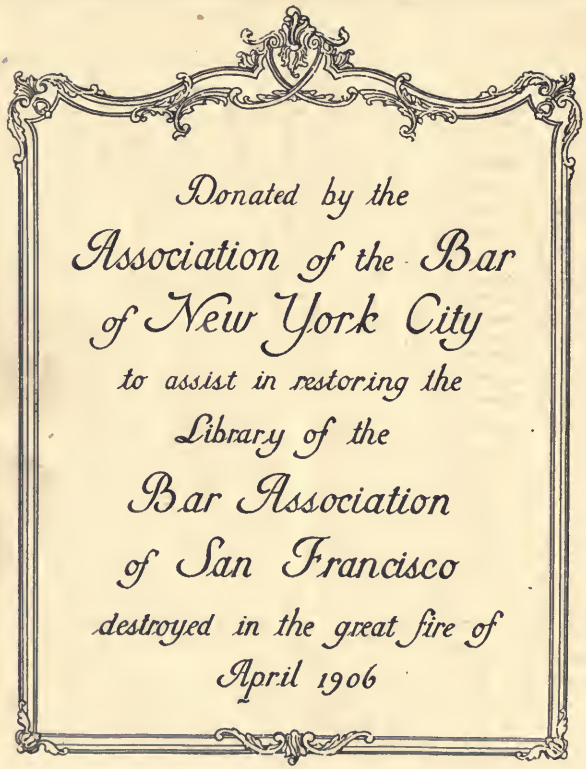
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April 1906

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF COMMON PLEAS

FOR THE

CITY AND COUNTY OF NEW YORK.

By CHARLES P. DALY, LL.D.,

CHIEF JUSTICE OF THE COURT.

VOL. X.

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1885.

JUDGES

OF THE

COURT OF COMMON PLEAS

SINCE ITS REORGANIZATION IN 1821,

WITH THEIR PERIODS OF SERVICE.

John T. Irving	1821—1838
Michael Ulshoeffer	1834—1850
Daniel P. Ingraham	1838—1858
William Inglis	1839—1844
Charles P. Daly	1844*
Lewis B. Woodruff	1850—1856
John R. Brady	1856—1869
Henry Hilton	1858—1863
Albert Cardozo	1863—1868
Hooper C. Van Vorst	1868—1869
George C. Barrett	1869—1869
Frederick W. Loew	1869—1876
Charles H. Van Brunt	1869*
Hamilton W. Robinson	1870—1879
Richard L. Larremore	1870*
Joseph F. Daly	1870*
George M. Van Hoesen	1876*
Miles Beach	1879*

JUDGES DURING THE PERIOD EMBRACED IN THIS VOLUME.

Charles P. Daly, Chief Justice.
Charles H. Van Brunt.
Richard L. Larremore.
Joseph F. Daly.
George M. Van Hoesen.
Miles Beach.

* Still on the Bench.

TABLE OF CASES

REPORTED IN THIS VOLUME.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

FOR THE

CITY AND COUNTY OF NEW YORK.

In the Matter of the Assignment of Bernard Rice *et al.* to Louis Sternbach for the Benefit of Creditors.

[Special Term.]

(Decided January, 1878.)

An assignee for the benefit of creditors continued the business of the assignors at retail for seven months after the assignment, selling goods during that period for $1,196.11, at an expense of $2,420, after which the remainder of the property was sold at auction for $2,815.41, at an expense of $267.25. In his account the assignee charged himself with the gross receipts, $7,011.51, and claimed to be allowed as expenses the above sums of $2,420 and $267.25, amounting to $2,687.25, besides $741.12 for legal services and other outlays; giving as reasons for not selling the property at auction as soon as possible, that the goods were of such a character, that, if so sold, they would have brought hardly more than one-fourth of the sum received for them at private sale, and that, the assignment having been made in the spring, the goods were not then salable, being suitable for winter trade. *Held*, that the assignee should have stored and insured the property and prepared it for sale at a seasonable and favorable time; and that he should therefore be charged with the estimated value of the goods if so sold, and be allowed the estimated

amount of expenses only of packing, cataloguing, storage, insurance, advertising, and auctioneer's fees, which would have been incurred had the property been so dealt with, besides his necessary expenditures for legal services.

Motion to confirm the report of a referee upon the final accounting of an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

J. F. Daly, J.—Bernard Rice and Ignatius Rice, dealers in fancy goods, consisting chiefly of millinery ornaments and fancy mock jewelry, and carrying on a retail business at No. 373 Broadway, became insolvent and made a general assignment to Louis Sternbach, which assignment was filed in the county clerk's office on April 17th, 1876. The schedules filed by the insolvents showed an indebtedness of $85,884.40 and assets nominally worth $62,246.43, but stated in the schedules to be actually worth only $8,259.85.

The assignee immediately entered upon the execution of his trust and performed it in the following manner: he carried on the retail business of the insolvents at their usual place of business for about seven months, paying the same rent as the assignors had previously paid, and employed both the assignors at a salary to sell the goods; at the end of the seven months he caused the balance of stock left, to be sold at public auction, which was effected in one day. The sales over the counter during the seven months he carried on the business amounted to $4,196.11. The expenses during that period amounted to nearly $2,420, leaving a balance in his hands of a little less than $1,800. The sales at auction amounted to $2,815.41, and the auctioneer's charges to $267.25, leaving a balance of $2,548.16. It is, however, stated that a portion of the expenses charged in the account for private sales were incurred in preparing the goods for the auction, but the specific proportion is not given. The assignee, it will thus be seen, charges himself with $7,011.52 proceeds of sales of the assigned property, and asks to be allowed the gross sum of $2,687.25

for expenses in realizing that amount, exclusive of $741.12 for legal services and other outlays.

The reason given for not proceeding to sell all the assigned property at auction as soon after he entered upon his trust as was possible, is that the goods were of such a character that if sold at public sale they would have been sacrificed; that they would have brought hardly more than one quarter of the sum they yielded at private sale over the counter, during the seven months he carried on the business; also, that they were not salable in the spring when the assignment was made, or in the summer, being a class of goods better adapted for winter trade. The testimony of the assignors and experts is given to this effect. He therefore assumed the responsibility of continuing for seven months the use of the store at a rent of $208 per month and of hiring the two assignors at a salary of $200 per month together, for the purpose of working off a stock of $7,011.52. The result is not creditable to his sagacity, if that were the only question in the case, for, expending $1,500 in salaries to the assignors and $1,128.28 for rent, with other outlays, he realized but $4,196.11 in the whole period. On the other hand the auction sale of the balance of goods yielded $2,815.41 at an expense of something over $267.25.

Taking the assignee's own explanation and proofs into account, it is manifest: 1st. That with the knowledge that the bulk of the assigned stock was not salable in the spring and summer seasons, but in the fall and winter, he assumed the heavy expenses of keeping open a store for the sale at retail of the goods during the very period when they were not in demand and would have been slaughtered if sold at auction. 2d. That he intentionally undertook at the outset of the execution of his trust to keep at retail for over six months a stock valued at no more than $8,259.85 in the schedules, at a certain monthly expense of nearly $450, with no prospect of realizing more for them owing to the season. And it is equally manifest that this whole arrangement was but an excuse for allowing the assignors to make a living out of the assigned property under the pretense of helping the creditors of the estate to a larger dividend; and that the assignee undertook to carry on at the

expense of the creditors through the assignors the very business which the latter had conducted until they became insolvent.

The duty of the assignee was unquestionably to take the stock into his possession and prepare it for sale at public auction at a favorable time. His expenses would then have been confined to packing, cataloguing, storage, insurance, advertising and auctioneer's fees; and it is difficult to understand why, if the surplus unsold stock brought $2,815.41 at auction, the rest of it, sold in a similar manner at a like favorable season, would not have netted more than the $1,800 which it produced under his management.

The accounts are referred back to take proof of the value of the assigned stock if sold at auction at a seasonable and favorable time, and to take proof in order to estimate the expenses indicated above; and with the balance, the assignee should, in my opinion, be charged, allowing him, however, necessary expenditures for legal services rendered the assignors in the preparation of the assignment and schedules, and rendered the assignee in his accounting.

Report referred back.

In the Matter of the Assignment of Foley & Co. to Edward True for the Benefit of Creditors.

[Special Term.]

(Decided January, 1878.)

Where, after an assignment for the benefit of creditors, a warrant of attachment against the property of the assignor is obtained by a creditor on the ground that the assignment is a fraudulent disposition of property, moneys in the hands of the attorney for the assignee, collected by him before the issue of the attachment, upon claims forming part of the assigned estate, are not subject to levy under such attachment.

Matter of Foley.

APPLICATION by an assignee under a general assignment for the benefit of creditors for payment to him of moneys of the assigned estate in the hands of his attorney.

Foley & Co. made an assignment for the benefit of their creditors to Edward True. Part of the assets assigned were claims against debtors of Foley & Co., which the assignee employed his attorney, David Leventritt, Esq., to collect. After some of these claims had been collected, but before the proceeds had been paid over to the assignee, Thomas Hanley, one of the creditors of Foley & Co., procured from the Marine Court an attachment against their property on the ground that the assignment was fraudulent, and the attachment was levied on the moneys collected and the uncollected claims remaining in the hands of Mr. Leventritt. The assignee applied to have the moneys paid over to himself.

M. M. Budlong, for Edward True, assignee.

David Leventritt, in person.

Peter Cook, for Thomas Hanley, attaching creditor.

J. F. DALY, J.—The attachment of Thomas Hanley, a creditor of the assignors, Foley & Co., which was issued by the Marine Court on the ground that Foley & Co. had fraudulently disposed of their property, can be levied only upon the property claimed to have been fraudulently assigned, and not upon its proceeds (*Lawrence* v. *Bank of the Republic*, 35 N. Y. 320; *Lanning* v. *Streeter*, 57 Barb. 33; *Campbell* v. *Erie R. Co.*, 46 Barb. 540; *Greenleaf* v. *Mumford*, 50 Barb. 543; *McElwain* v. *Willis*, 9 Wend. 548).

In this case the attachment was levied on two classes of property in the possession of David Leventritt, attorney of the assignee, viz: (1) moneys collected from debtors of the assignors upon claims placed in Mr. Leventritt's hands by the assignee for collection; and, (2) claims against other debtors of the assignors uncollected.

The proceeds of collected claims are to be regarded in the

same light as proceeds of sales of property. When the claim is uncollected the debt may be levied on under the attachment, but when the debt has been paid before the attachment is issued nothing remains which is the subject of levy, and the creditors of the assignors can only reach the proceeds by action in equity against his assignee after exhausting their legal remedies.

It follows, therefore, that whatever moneys had been collected by the attorney for the assignee before the attachment was issued are not the subject of attachment, and must be paid over by Mr. Leventritt to the assignee.

Application granted.

In the Matter of the Application of GEORGE H. WOOSTER, Assignee for the Benefit of Creditors.

[SPECIAL TERM.]

On an application by an assignee for the benefit of creditors for leave to compromise a claim due the assigned estate, where the amount of such claim is small, leave may be granted on the petition and proofs, without ordering a reference.

APPLICATION by an assignee under a general assignment for the benefit of creditors for leave to compromise a claim belonging to the estate.

The facts are stated in the opinion.

VAN HOESEN, J.—The amount of the claim which the assignee seeks to compound is small, and a reference to inquire into the circumstances would doubtless cost more than the sum which would be received on the composition. Whilst I shall, in view of the small amount involved, sign the order, I call attention to the fact that the petition is on information and

belief merely, and that the name of the informant and the reason why the affidavit is not made by him, are not stated, nor is any other evidence produced to support the petition.

Application granted.

In the Matter of the Assignment of ISRAEL YEAGER *et al.* to HENRY EISNER for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided June 25th, 1878.)

Until there has been an accounting by an assignee for the benefit of creditors, the assignee and the sureties on his bond will not be discharged, even after a composition by all the creditors.

APPLICATION by an assignee under a general assignment for the benefit of creditors for the discharge of himself and the sureties on his bond.

The application was made upon the petition of Henry Eisner, the assignee, showing that a composition agreement had been signed by all the creditors of the assignors, Israel Yeager and Seligman Bauer, that they had all received the amounts payable to them respectively upon the composition, and had consented in writing that the assignee reconvey to the assignors the assigned property; and the petitioner asked leave so to reconvey, and that he and his sureties should be discharged. No notice to creditors to present their claims to the assignee appeared to have been published.

VAN HOESEN, J.—On this application the release can only be from liability to the compounding creditors, who appear and who have been cited to appear on this application. If the bond is to be cancelled and the sureties discharged, there must be an accounting. It will be merely formal, perhaps, but it

must be had. The court will not discharge the bond, except after an accounting.

Application denied.

In the Matter of the Assignment of WILLIAM DRYER to JOHN D. WEINHOLZ for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided June 30th, 1878.)

Until there has been an accounting by an assignee for the benefit of creditors, the assignee and the sureties on his bond will not be discharged, even *pro tanto*, from liability as to creditors who have executed a general release upon a composition with the assignor.

To entitle the assignee to a discharge upon a final accounting before a referee, it must be shown before the referee that the assignee duly advertised for claims, and that citations to creditors and parties interested in the fund were duly issued and served; and it should appear, by evidence other than the original schedule, who are the creditors of the insolvent, and whether they all signed the composition. The original composition agreement and the original release should be returned with the report of the referee; and the testimony must be in writing, subscribed by the witnesses, and returned with the report.

APPLICATION by an assignee under a general assignment for the benefit of creditors for the discharge of himself and the sureties on his bond from liability to creditors who had executed a general release.

After the assignment, the creditors of the assignors, by a composition agreement duly executed, agreed to accept a sum equal to twenty-five per cent. of their claims in full satisfaction thereof, and subsequently, upon payment of the composition, a general release was also duly executed by the creditors. The assignee was the subscribing witness to both the composition agreement and the release, and both were proved by him before a notary public, whose certificate of such proof

was annexed. Thereafter, upon application of the assignee, a citation to the creditors to attend his final accounting was issued and served; and pending the accounting, this application was made by the assignee for the release of himself and his sureties from any further liability in respect of the claims of any creditors whose names appeared upon the general release.

Van Hoesen, J.—There can be no discharge without an accounting. Experience has shown the absolute necessity for the giving, by the assignee, of an account of his stewardship. I have now before me a case apparently like this, in which an assignor joined with the assignee in petitioning for the discharge of the assignee's sureties, and where after such discharge the assignee retained and refused to surrender to the assignor the surplus remaining in his hands.

I will not sign any order for a discharge *pro tanto*. Let the assignee make his account show that his duty has been done, and that nothing remains to be done, and then, upon turning over to the assignor the balance in his hands, a discharge will be granted.

Application denied.

A subsequent application for the discharge of the assignee upon his final accounting was made (at Special Term, July, 1878), upon which the following opinion was rendered.

Van Hoesen, J.—There are three classes of persons barred by the discharge of the assignee: First, creditors who have appeared; secondly, creditors who have been duly cited but have failed to appear; and thirdly, those who, after due advertisement, have not presented their claims (Assignment Act of 1877, § 20, subd. 5). It must appear on the accounting before the referee that the assignee duly advertised for claims (§ 4). It was not the intention of the legislature that the assignee should administer the estate without notice to the creditors. It must also appear that citations have been issued to creditors and parties interested in the fund (§§ 11, 12, 13);

there must be proof that the citation has been duly served; and it is of course essential that the referee should know who the creditors are, for without such knowledge he cannot tell whether they have all been cited. The original schedule is not satisfactory evidence of this. The books of the assignor, the assignor himself, and the witnesses, may be examined to ascertain the names and addresses of the creditors. The referee should have taken testimony to ascertain whether there are any creditors who have not signed the composition. Again, there must be some authority given by the court to warrant the withdrawal by the assignee of the original papers, and for the substitution of copies in their stead. In this case, the assignee is the sole witness to the signatures of the creditors to the composition agreement and to the release. He goes before a notary public by himself, proves as subscribing witness the signatures of the creditors and the genuineness of the signatures, and then, without any other evidence than the certificate of the notary that he (the assignee) has sworn to them, he asks that his bond be discharged. It will be seen that the whole matter and the interest of the creditors hang on the mere word of a single person, and that person the assignee, who asks that his bond be cancelled and that he be released. He then offers what purports to be, and what probably is, a copy of the notary public's certificate, and proposes to leave that, together with a copy of the other papers, instead of the original, on the files of the court. This is too unsafe a method of doing business. The matter must be referred back to the referee to ascertain, by the examination of witnesses, who are creditors of the insolvent, and whether they have all signed the composition, whether there was any advertisement for claims, and whether the creditors were duly cited. The original composition agreement and the original release must be returned with the report of the referee. The testimony must be in writing, subscribed by the witnesses, and returned with the report (Gen. Rules, r. 30).

Report referred back.

In the Matter of the Assignment of ADOLPH SCHEU *et al.* to ABRAHAM SELIGSBERG for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided July 23d, 1878.)

Rule 30 of the General Rules of Practice applies to the filing of reports of referees in proceedings upon assignments for benefit of creditors, and to notice thereof, and exceptions to and confirmation of such reports.

APPLICATION to confirm the report of a referee upon the final accounting of an assignee under a general assignment for the benefit of creditors.

VAN HOESEN, J.—The report of the referee will be filed, and notice thereof given to creditors who have appeared and proved their claims. If no exceptions be filed, the report will be confirmed conformably to Rule 30, General Rules.

In the Matter of the Assignment of WILLIAM WATT *et al* to WILLIAM W. SMITH for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided August 7th, 1878.)

An allowance may be made to an assignee for benefit of creditors, for services rendered him by counsel upon his accounting; but allowances will not be made to counsel who appear for creditors.

APPLICATION for allowances to counsel upon the final accounting of an assignee under a general assignment for the benefit of creditors.

VAN HOESEN, J.—The counsel fee to the counsel for the assignee should be allowed, and the amount asked for is reasonable.

Whilst it may be possible to justify the payments of reasonable counsel fees to the various counsel for the creditors on the ground that the proceedings before the referee are analagous to a suit for the general administration of assets, I do not feel safe in opening the gates to the flood of applications for allowances which I know will pour in, the moment it is known that a precedent has been established for paying the counsel for creditors out of the funds in the hands of the assignee. This proceeding is purely statutory, and there is no law prescribing any fee bill or any bill of costs or any rule for allowances in it. The inclination of the judges of this court is strongly adverse to the system which prevails in some jurisdictions of dividing up estates amongst lawyers.

I shall deny the application for allowances to the counsel for divers creditors, though the amounts applied for were extremely moderate. The assignee may prepare a decree in the usual form.

Order accordingly

In the Matter of the Assignment of Worthley for the Benefit of Creditors.

[Special Term.]

In the decree entered upon the final accounting of an assignee for the benefit of creditors, all amounts to be paid must be specified.

Allowances for legal services rendered to the assignee, are made to the assignee and not to counsel.

Application for a decree upon the final accounting of an assignee under a general assignment for the benefit of creditors.

Van Hoesen, J.—I will not sign the proposed decree. The amounts must be specified. No such looseness can be permitted as the proposed decree makes possible. It is not enough

that the amounts are small, and the counsel reputable. If this decree is signed, it becomes a precedent, and it may result in loss to some estate where the parties are different from those who propose this decree.

Again, I cannot allow anything to Lindsay & Flammer. The allowance is to the assignee, and is made as one of the expenses of his execution of the trust.

There will be no difficulty in having a proper decree signed.

In the Matter of the Assignment of Merwin & Co. to William S. See for the Benefit of Creditors.

[Special Term.]

(Decided September 20th, 1878.)

Upon an application for a discharge of an assignee and his sureties it must appear that creditors have been advertised for, as provided by section 4 of the Assignment Act, and that a citation to attend the accounting has been issued and served, as provided by sections 11 or 12, and that an accounting has been had, as provided by section 20.

Application for the discharge of an assignee under a general assignment for the benefit of creditors.

J. F. Daly, J.—I do not find any proof that creditors have been advertised for by the assignee under section 4 of the Act of 1877, nor that any citation has been issued under sections 11, 12, 13, &c.

The power possessed by the court or judge to grant a discharge to the assignee and his sureties, can only be exercised upon a regular proceeding for an accounting, and such proceeding must be commenced by service of a citation (§ 20, subd. 6).

If no such citation have been issued, I suggest that counsel apply under sections 11, &c. as amended by the Act of 1878, and if there be no appearance by creditors the report already made will be confirmed.

In the Matter of the Assignment of RAPHAEL LEWENTHAL *et al.* to ADOLPH M. PETSHAW for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided October 10th, 1878.)

An assignee for the benefit of creditors and the sureties on his bond will be discharged only upon a proceeding for an accounting instituted by citation, of which all persons interested in the estate, even though they have signed releases, must have notice.

The assignee must advertise for claims before he can be discharged by reason of a compromise between the assignor and the creditors.

APPLICATION by an assignee under a general assignment for the benefit of creditors for a reference of his accounts, and for the discharge thereupon of himself and the sureties on his bond.

The application was made upon the petition of the assignee, with affidavits by the assignors, showing the making of the assignment, the filing of schedules, inventory, and bond of the assignee, proof of claims by all the creditors, a compromise between the creditors and the assignors, and the execution of releases by all the creditors to the assignors.

J. F. DALY, J.—No discharge will be granted the assignee except upon a proceeding for an accounting to be instituted by citation. The statute is clear upon this point. The assignee must apply by petition for a citation to all persons interested in the estate, to attend the settlement of his accounts, and all parties, whether they have signed releases or not, must be notified.

Advertisement for claims must be made where the assignee seek relief by reason of a compromise between the assignor and the creditors.

Application denied.

In the Matter of the Accounting of FREDERICK VILMAR, Assignee for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided December 5th, 1878.)

Section 1016 of the Code of Civil Procedure applies to referees in proceedings under assignments for benefit of creditors, and a referee in such proceedings must be sworn unless the oath is waived.

APPLICATION to confirm the report of a referee upon the accounting of an assignee under a general assignment for the benefit of creditors.

LARREMORE, J.—Section 1016 of the Code of Civil Procedure provides that the referee must before proceeding to hear the testimony be sworn faithfully and fairly to try the issues, or to determine the question referred to him, as the case requires, and to make a just and true report according to the best of his understanding. "But where all the parties whose interests will be affected by the result are of age and appear in person or by attorney, they may expressly waive the referee's oath. The waiver may be made by written stipulation or orally. If it is orally it must be entered in the referee's minutes."

I cannot find any such entry in the minutes of the referee herein, nor can I find any allusion to such a waiver having been made in his report, and any further proceedings under the order would be therefore irregular (*Malcolm* v. *Foster*, 5 N. Y. W. Dig. 310; *Exchange Fire Ins. Co.* v. *Irving*, Id. 587).

Under these decisions I must send the report back.

Report referred back.

In the Matter of the Assignment of JOHN L. PARKER to HENRY A. MARRIOTTE for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided December 5th, 1878.)

Where, after an assignor for benefit of creditors has failed to file the required inventory of his estate, the assignee also neglects to file such inventory, and to give a bond, the assignee should not, on his own motion, be permitted to re-assign the assigned property to the assignor and be discharged. The proper course is to remove him and hold him to account for the assigned estate.

APPLICATION by an assignee under a general assignment for the benefit of creditors for his discharge.

The facts are stated in the opinion.

Miron Winslow, for the application.

VAN HOESEN, J.—On the first of November, 1878, Parker made an assignment to Marriotte, which was, on that day, duly filed in the office of the county clerk. It was the duty of Parker to make an inventory of his estate within twenty days thereafter, but if he failed to do so, the duty of making such inventory was then devolved by law upon Marriotte. Marriotte could have applied to this court for an order compelling Parker to appear, and to disclose under oath all he knew concerning the assigned estate. Instead of doing his duty, Marriotte says that he thought he would wait until Parker provided sureties for his (Marriotte's) bond as assignee, but as Parker fails to produce sureties for him, he asks to be discharged, and for leave of the court to re-assign the assigned estate to Parker. Marriotte evidently views the assignment as a matter in which only Parker and himself have an interest, and he does not see why Parker's creditors should be consulted or be paid. Instead of granting Marriotte's application for a discharge, and for leave to re-assign the property to Parker, the proper course is to remove him and to hold him to a strict

accountability for the assigned estate. Any creditor of Parker may now apply to the court for Marriotte's removal, for an accounting, and for the examination of Parker and his books. The application of Marriotte is denied.

Application denied.

In the Matter of the Assignment of GEORGE GROENCKE to RICHARD L. PLAHN for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided December 23d, 1878.)

An assignee for the benefit of creditors and the sureties on his bond will not be discharged until after the assignee has advertised for claims, and has accounted, although a composition with all the creditors has been made and the amount thereof paid to them.

APPLICATION by an assignor and assignee under a general assignment for the benefit of creditors for the discharge of the assignee and the sureties on his bond and the re-assignment by him to the assignor of any assets of the assigned estate remaining in his hands.

The applicants showed, by affidavits, the making of the assignment, a subsequent meeting of the creditors, upon notice to all of them, the execution of a composition deed by all the creditors, and payment to them of the amount of the composition. Personal notice to all the creditors of the application was also shown.

VAN HOESEN, J.—Motion for a discharge of the assignee denied. The assignee must advertise for claims. We never discharge without such an advertisement. Besides, there can be no discharge without an accounting. These *ex parte* proceedings for a composition may be right; no one can tell; but no discharge can be obtained upon them.

Application denied.

In the Matter of the Assignment of Bryce & Smith to Frederick W. Lewis for the Benefit of Creditors.

[Special Term.]

(Decided January, 1879.)

Under the General Assignment Act of 1877, § 21, an order for the examination of witnesses and the production of books and papers may be made at any time, and is not necessarily confined to cases where a proceeding under the act is pending.

The petition of a creditor for such an order alleged that the assignors, less than two months before their assignment, had represented to the petitioner that they were perfectly solvent; that their schedules filed after the assignment showed a total indebtedness approaching three times the actual valuation of their assets; and that an expert accountant was of the opinion that either the representations were untrue, or a balance-sheet prepared from the books of the assignors by an accountant employed by the assignee must be incorrect. *Held*, that these facts were sufficient to authorize an order for the examination of the assignee's accountant and the inspection of the books and papers of the assignors.

To obtain such an order for the production of books it is not necessary to allege or prove a previous demand and refusal of an inspection.

Application by a creditor of assignors under a general assignment for benefit of creditors to vacate an order vacating a previous order for the examination of a witness and the production of books and papers of the assignors.

Upon the petition of the National Park Bank, a creditor of Bryce & Smith, who had made an assignment to Lewis for benefit of creditors on July 23d, 1878, an order was made on December 13th, 1878, for the examination as a witness of Alfred D. Griswold, an accountant employed by the assignee, which directed the assignee to produce the books of account, papers, &c., of the assignors. On December 24th, 1878, the order of December 13th was vacated upon an application *ex parte* by the assignee; and on December 27th, 1878, upon application of the National Park Bank, an order was granted requiring the assignee to show cause why the order of December 24th should not be vacated and the examination proceed as origin-

ally ordered. The facts appearing on the return of this order to show cause are stated in the opinion.

J. F. Daly, J.—The order of December 13th, 1878, directing the examination of Alfred D. Griswold, and directing the assignee to produce all books of account, papers, and vouchers of the assignor, was authorized by the facts stated in the petition then presented to the court. The 21st section of the act (Laws of 1877, c. 466) authorizes the county judge at any time on the petition of any party interested, to order the examination of witnesses, and the production of any books and papers, by any party or witness before him, or before a referee appointed by him for such purpose. This may be done "at any time," and it is not necessarily confined to cases where a proceeding under the act is pending. The statute provides that the testimony and extracts from the books and papers shall be filed with the county clerk, to be used in any action or proceeding then pending, or which may be thereafter instituted. The provision is evidently designed for the obtaining of depositions, perpetuation of testimony, and the inspection of books and papers for use in any of the various proceedings that grow out of the administration of the assigned estate. Although the statute does not prescribe the proof necessary to authorize such order, it is clear that a necessity for the examination should be shown by the petition, otherwise the assignee might be perpetually obstructed in the administration of the trust, by applications in which the books of the assignors and the assignee's time might be wholly engrossed by examinations instituted by petitioning creditors.

The petition presented in this case alleged that the Park Bank is a creditor of the assignors to the amount of $18,314.60, upon nine notes indorsed by the assignors, and discounted by the Park Bank about June, 1878; that at that time the assignors represented to petitioners that they were perfectly solvent, and worth $273,600 over all their liabilities; that on July 23d, 1878, they made this assignment; that their schedules were filed September 27th, 1878, showing a total indebtedness of $352,979.59, and actual valuation of assets at $121,411.61;

that the assignee employed an accountant, Mr. Alfred D. Griswold, to prepare a balance-sheet of the estate from the books, and that such sheet was inspected by an expert employed by the bank, who was of the opinion, from casual inspection, that either the representations of the assignors in June, 1878, were untrue, or the balance-sheet was incorrect; that requests to inspect the books were made by petitioners, who were, however, put off by excuses; and the petitioners charge a fraudulent concealment by the assignors of assets of the firm. The charge was grave; a *prima facie* case was made out, and the ascertainment of the truth was not only of importance to all persons interested in the assigned estate, but would aid materially in carrying out the purposes of the Assignment Act. Judge VAN HOESEN, therefore, on December 13th, 1878, made an order requiring the accountant, Alfred D. Griswold, to appear and be examined before a referee, and requiring the assignee to produce on such examination the books and papers of the assignors. Mr. Griswold was evidently a "witness" within the meaning of section 21, and as the assignors were parties their books and papers were under the control of the court or judge. The examination under section 21 is itself "a proceeding," and every person interested in the estate who is required to submit to examination, or to produce books or papers, is "a party" to the proceedings. In a broader sense, however, the assignors, assignees, creditors, and sureties are "parties" to all the proceedings under the Assignment Act.

On December 24th, 1878, however, Judge VAN HOESEN granted, *ex parte*, an order vacating the order above mentioned. This was done on motion of the assignee, who presented to the court an affidavit denying that he ever refused to allow an inspection of the books; setting forth that there had been three meetings of the creditors, at which the bank was represented; that an advisory committee of creditors had been appointed, which fully examined all the books and papers of the assignors; that forty-five per cent. had been offered in settlement at a meeting on September 10th, 1878, and a composition agreement to that effect signed by the bank on the 29th of August, 1878; that a petition in bankruptcy against the as-

signors was filed by certain creditors, and that proceedings thereunder were still pending; and that a proceeding for composition was instituted, and a meeting called for January 10th, 1879, before Henry Wilder Allen, Register in bankruptcy; that there was a recommendation of composition in bankruptcy at thirty-five per cent. by a committee of the creditors; and finally stating, among other matters, that the petitioners' proceeding was intended merely to harass and annoy the assignee and debtors, and to coerce the debtors into giving better terms to the bank than to other creditors.

It is manifest that Judge VAN HOESEN was justified in setting aside his order for the examination of Griswold and production of the books, upon the fact coming to his knowledge that proceedings against the debtors were pending in the United States District Court in bankruptcy, a fact which had not been disclosed in the petition of the bank. He regarded it as proper to permit no step that required his order or approbation to be taken after the United States Court had taken cognizance of the matter in bankruptcy.

There seems to be no other reason than this discovery of the pending bankruptcy proceedings, which would require the judge to vacate peremptorily, and without notice to the petitioner, his previous order. The other matters stated in the affidavit of the assignee were such as would suggest the propriety of calling on the petitioner for answer, but not of vacating *ex parte* the order granted on the petition.

That this was the matter which operated to produce his decision would appear from the third order made by the judge, dated December 27th, 1878, requiring the assignee to show cause why the order of December 24th, 1878, should not be vacated and the examination originally directed be had. This last order to show cause was granted on a voluminous affidavit of Mr. Worth, president of the Park Bank, setting forth, among other things, that an injunction which had been issued by the United States District Court, staying all proceedings before the referee, had been modified by said court, after full hearing and argument, so as to allow the examination of the assignors'

books and papers to proceed. The other matters set out in Mr. Worth's affidavit were in support of his original petition.

I regard the facts before the court as sufficient to authorize the examination originally ordered under section 21. The United States District Court has expressly declined to interfere with that examination, and this court is bound in all proper cases to allow such remedies to the creditors as the act provides, and as do not conflict with the paramount authority of the bankruptcy court over the same assets.

Much proof has been offered on this motion upon an issue which seems to me of minor importance: viz., whether a demand for inspection was made upon the assignee, and whether he refused it. If it were necessary upon the question, I should say that he is by no means convicted of an attempt to obstruct creditors, and that he could not be so convicted upon the affidavits against him, some of which are open to severe criticism. But it is not necessary under section 21 to allege or prove a demand or refusal of inspection in the petition. It is of no importance, in considering the propriety of granting the prayer of the petition, that the assignee is and always has been willing to permit the inspection prayed for.

An inspection without an order made on petition gives no right to file with the county clerk extracts from the books, nor to use them in proceedings under the act. An order must be obtained for the purpose, and the application for it involves no reflection upon the assignee.

The main reason for the inspection of the books of these assignors yet remains, that, as set out in the petition on which the order of December 13th was made, the representations alleged to have been made by the assignors as to their solvency, less than two months before the assignment, were such as to excite surprise when their schedule of assets is examined, and the creditors are not unreasonable in their demand for an investigation. No denial by the assignors of the alleged representations is made, although Mr. Bryce makes an affidavit on this motion, and I am justified in believing that a well-founded distrust of the accuracy of the schedules is the ground of the petitioners' desire to examine the assignors' books, not a malic-

ious desire to embarrass the debtors, nor corrupt design to extort a payment to the bank over and above the composition proposed by the creditors generally. I shall therefore direct that the order of December 24th, 1878, be vacated, and the examination under the order of December 13th, 1878, be proceeded with.

No costs.

Order accordingly.

JOSHUA M. WHITCOMB *et al.*, Plaintiffs, *against* JOSIAH F. FOWLE, *et al.*, Defendants.

[SPECIAL TERM.]

(Decided February, 1879.)

Where, after an insolvent limited partnership has made an assignment for benefit of creditors, general creditors of the partnership have brought an action to set aside the assignment, and for a receiver of the co-partnership property and an injunction restraining any disposition of such property, without first proceeding to judgment and execution against the debtors, a receiver may, nevertheless, be appointed and an injunction granted, in order to prevent a dissipation of the copartnership assets.

Although, as between the parties to it, an assignment for benefit of creditors is revocable at their pleasure, such a revocation cannot in any way prejudice or impair the rights of creditors.

MOTION to remove a receiver and vacate an injunction.

The action was brought to set aside a general assignment for the benefit of creditors made by the defendants Josiah F. Fowle and William A. Brown, Jr., to the defendant John H. Folk.

Prior to January 2d, 1879, a limited co-partnership existed under the firm name of "J. F. Fowle," of which the defendant Josiah F. Fowle was the general, and the defendant William A. Brown, Jr., was the special partner. On the day last mentioned, the said firm made an assignment for the benefit

of its creditors to the defendant John H. Folk, in which the amount due the special partner was made a preferred claim. This action was then commenced in behalf of the plaintiff and other creditors who might come in and contribute to the expense thereof to have the assignment declared null and void, that a receiver of the copartnership property be appointed, and that an injunction issue restraining any disposition of such property. An order to show cause as to the appointment of a receiver and the granting of an injunction was made January 7th, 1879, returnable January 8th, 1879, the hearing of which was on that day adjourned to January 13th, 1879, with the direction that no disposition of the property by sale was to be made by Folk, the assignee.

On January 7th, 1879, Fowle (as appeared by his affidavit) was served with the summons and complaint and the order to show cause in this action. On January 9th, 1879, with the consent of Brown, Folk re-assigned the copartnership property, and on the same day the said firm, with Brown's consent, made a new assignment to Folk for the benefit of its creditors generally, and without preference. Folk, as such assignee, subsequently filed the schedule required by law and executed a bond, which was duly approved. A receiver having been appointed and an injunction granted meanwhile, Folk moved to remove the receiver and vacate the injunction.

John Henry Hull and *William A. Cook*, for the defendants.

P. & D. Mitchell, for the plaintiffs.

Larremore, J.—[After stating the facts as above.]—If this were an action in the nature of a creditor's bill, the plaintiffs would have no status in court without alleging the recovery of a final judgment and execution issued and returned thereon (*Geery* v. *Geery*, 63 N. Y. 252, and cases there cited).

But I do not understand that the doctrine laid down in *Innes* v. *Lansing* (7 Paige, 583), has been disturbed or disputed. That case holds that when a limited partnership be-

comes insolvent, its assets are a special fund for the payment of its debts ratably (except those due to the special partner), and any creditor, although he have not proceeded to judgment and execution at law, may file a bill in equity to restrain the insolvent partners from disposing of the property contrary to law, and for the appointment of a receiver. This practice was reviewed and approved in *Van Alstyne* v. *Cook* (25 N. Y. 489).

If the plaintiffs have asked for more or greater relief than the court can afford them on a final judgment, that is no reason why the court on a mere motion should try issues upon the determination of which they may be entitled to some relief. If as general creditors they cannot (as contended) contest the validity of the assignment, yet as general creditors they may have the right to prevent a dissipation of the co-partnership assets.

The authorities cited by the counsel for the defendants (*Hone* v. *Woolsey*, 2 Edw. Ch. 289; *Mills* v. *Argall*, 6 Paige, 577; *Metcalf* v. *Van Brunt*, 37 Barb. 621) establish the theory that as between the parties to it the assignment is binding and revocable at their pleasure. But no case goes to the extent of holding that such a revocation could in any way prejudice or impair the rights of creditors. In the case under consideration the creditors had commenced proceedings to protect their rights upon a statement of facts which should not be decided on affidavits.

Considering the hopeless insolvency of the firm, that its indebtedness to its special partner would almost, if not entirely, exhaust its assets, the peculiar relations of the assignee and the special partner, and also the entire merits of the application to remove the receiver and vacate the injunction, I think it should be denied.

Motion denied.

In the Matter of the Assignment of Robert S. Orsor to Theodore Smith for the Benefit of Creditors.

[Special Term.]

(Decided June 4th, 1879.)

An assignee for the benefit of creditors who continues the business of the assignors at a loss, is chargeable with the full value of the assets originally received, and is to be allowed the expenses of getting them in, but nothing for his losses.

Where, after an assignment for benefit of creditors, a composition is entered into, creditors who refuse to join in the composition are entitled, on the final accounting of the assignee, only to the proportion they, in common with all the creditors, would have received of the assets had no composition been made.

Application to confirm the report of a referee upon the final accounting of an assignee under a general assignment for the benefit of creditors.

The accounting was ordered upon petition of Whitlock & Anderson, creditors of the assignor. The facts are stated in the opinion.

J. F. Daly, J.—A majority of the assignor's creditors (if not all excepting these petitioners), agreed to a composition of thirty cents on the dollar payable in notes of the assignor indorsed by the assignee, and consented to the assignee continuing the insolvent's business for the purpose of providing for the notes. Petitioners did not agree to this arrangement, and called the assignee to account for his dealings with the trust. The value of the goods and fixtures that came to his possession, and the debts collected by him amounted altogether to $910.44. He took this stock, added new purchases of his own and carried on the business for a short period, paying a part of the notes and ultimately winding up with a loss of $1,247.60 to himself. I do not gather from the papers, that of this loss more than $500 at the ontside, was for payments on the notes; that is to say, he did not pay much, if anything, over a fourth

of the thirty per cent. It would seem, therefore, that at least $700 of the loss was upon the business. The referee charges him with the value of the estate he received from the assignee in the first instance, allowing him nothing for his losses in carrying on the business. This is correct. Had he made a profit in that business he would have been chargeable with that profit in addition to the value of the assigned estate, but he is not to be allowed his losses on the experiment. On the other hand he is not chargeable with the gross receipts of the business without regard to the cost of carrying it on. If he speculated and lost, he is chargeable only with the full value of the assets originally received, and allowed only the expenses of getting them in. This the referee has found, and his report should be confirmed.

The petitioners are entitled to be paid only the proportion they, in common with all the creditors, would have received of those assets, had no composition been made. This is found by the referee to be a less sum than the petitioners have already received, and nothing is therefore due them.

Report confirmed, with $10 costs of motion to assignee against petitioners.

Order accordingly.

In the Matter of the Assignment of FREDERICK W. COFFIN *et al.* to JOSIAH P. MARQUAND, JR., for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided June, 1879.)

An assignee for the benefit of creditors who uses the funds of the assigned estate in the purchase of claims against the assignors, for less than the estate would have yielded to creditors on an honest administration, is not entitled to the profits derived from such purchase; creditors influenced by him so to transfer their claims should be allowed to present claims for the balance due upon their ratable proportions of the estate;

and no commissions or expenses should be allowed to the assignee from the time that he began so to misuse his position.

Accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

Albert Roberts, for the assignee.

R. C. Elliott and *Gleason & Cator*, for the creditors.

Van Hoesen, J.—No fault is found with the proceedings of the assignee until he attempted to make money for himself by his management of the assigned estate. He conceived the idea of inducing the creditors of Coffin & Lyon to release their claims against the assigned estate for less than the estate would have yielded to them on an honest administration; and to accomplish his purpose he addressed a circular letter to them, in which he stated that the law gave him seven months more time to settle the estate, and that it was for their interest to accept a final dividend of fifteen per cent. immediately, which dividend he was then able to pay, but he doubted if so much would be paid if he exercised his right of withholding payment till the lapse of one year from the date of the assignment. Most of the creditors, upon receiving that letter, thought it prudent to accept Marquand's offer, and he then paid every creditor, except two who refused to listen to his proposal, fifteen per cent. on the amount of his claim. He exacted, however, from every one he paid, an assignment of all demands against Coffin & Lyon, against himself as assignee, and against the assigned estate; the assignments were, as a rule, drawn in blank, and the name of a Mr. Roulon was afterward written in. Roulon was acting as representative of Marquand, who was the actual assignee of the claims of the creditors who accepted the fifteen per cent. No money was paid except what came from the assets of the estate in his hands, save in a few instances where a refractory creditor refused to accept fifteen per cent., and where such a difficulty was encountered enough extra was paid by the assignee or his friends

to obtain the assignment. The assignee now contends that he is entitled to whatever profits are to be derived from the purchase by him of these claims, in the manner which I have described. He admits that his proceedings were unlawful, and utterly indefensible if called in question by any creditor whose claim was bought; but insists that neither the court nor any other person than one who made an assignment can challenge the validity of his illegal transactions or prevent him from enjoying the fruits of his breach of trust. He plants himself upon the proposition that no one can assail the act of a trustee who defrauds his *cestui que trust* except the *cestui que trust* himself, and cites a case decided in the State of Mississippi to that effect. I have looked into that case, and I think that it has no bearing upon the point involved in this. If it had appeared in theMississippi case that the executor had used moneys belonging to the estate in the purchase of legacies, it is not to be believed that the court would have decided that the executor was entitled to retain to his own use the profits of the purchase. It may well be that where a legacy is paid in full, the legatee so paid is not the proper party to call in question the acts of an executor who misconducts himself, but if legacies are subjected to an abatement any legatee whose legacy is reduced in amount, has a right to call upon the executor to account for and to pay over any profit he has made by the use of the moneys of the estate in speculation. It matters not whether that speculation was in buying claims against the estate.

In buying claims of legatees, or in operations entirely disconnected from the business of the administrator, so in the case under consideration; the creditors who have not been paid have the right to exact from the assignee every dollar he has made by the use of the trust funds for his own purposes. Every purchase of the claim of a creditor for less than its ratable share of the assets is for the advantage of the other creditors and not for the advantage of the assignee.

It is not now necessary to say what rule would be adopted if the assignee had used his own moneys in the purchase of claims; as for myself, my impression is that whether he uses his own money or the funds of the estate, he should not be

permitted to deal in any way likely to lead him into the temptation of making money out of his *cestuis que trust*.

Under the circumstances in this case I think that those creditors who were influenced to make the assignments by the letter of the assignee, should have an opportunity to present their claims for the balance due upon their ratable proportion of the assets. The statement of that letter was likely to frighten creditors into the acceptance of almost any offer which the assignee chose to make. A day should be fixed before which creditors who made assignments to Marquand, or to his representative Roulon, may present their claims for the balance remaining unpaid, and certify to their wish to undo their assignments. If they wish to undo their transfers they may share in the fund, but if they prefer to ratify their assignments the share they would otherwise receive will be distributed among the creditors. In any event the assignee must not profit by his misuse of the trust estate. Upon the application of any creditor, Marquand will be removed and a new assignee appointed to close the estate. For the time that Marquand was executing the duties of his office in good faith, he should receive compensation. It is true that the Assignment Act provides that the assignee shall receive as his commission five per cent. upon the moneys coming into his hands, but the statute is not to be so construed as to give the commissions, no matter how unfaithful or dishonest the assignee may be. (3 Wait's Actions and Defenses, 248.)

From the time he began to use his position for his own gain, he should not be allowed either his commissions or expenses. He should not be allowed any fees paid to his counsel, for obtaining the assignments, or for any services connected with the assignments, and no commissions should be paid to the assignee upon moneys which came into his hands after he issued his circular letter and entered upon the business of betraying his trust.

Order accordingly.

In the Matter of the Assignment of JEHOAKIM DAVIS to HUGH PORTER for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided October 17th, 1879.)

Under the General Assignment Act of 1877, § 11, authorizing the issue of a citation to parties interested in an estate assigned for benefit of creditors, "requiring them to appear in court" on the settlement of the account of the assignee, a citation requiring parties to appear "before one of the judges of this court at chambers," confers no jurisdiction, and can not be amended.

Where such a citation has been set aside for the defect above mentioned, the petition upon which it was issued may properly be used in obtaining a second citation.

The omission of the name of the Chief Justice of the court from the teste of such a citation is not a material defect, where the citation bears the signatures of the clerk and of the attorney for the petitioner, and is under the seal of the court.

Where the petition for an accounting by an assignee is made by a creditor, the fact that the assignee disputes the claim of the petitioner is not a ground for denying the application.

APPLICATION to compel an accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinions.

BEACH, J.—Under the Act (L. 1877, c. 466, § 11), the citation must require all parties to "appear in court." That process, in the case at bar, requires them to appear before "*one of the judges of this court at chambers.*" This would not be an appearance "in court" or before the court. The citation is therefore irregular and confers no jurisdiction. For that reason it cannot be amended, or an order to that end would be granted. The preliminary objection is well taken, and this proceeding must be dismissed without costs.

Order accordingly.

Upon a second citation having been issued upon the same petition, the following opinion was rendered, November 3d, 1879.

VAN HOESEN, J.—I. The petition was used in obtaining the citation which was set aside by Judge BEACH, and it is objected by the assignee that it cannot be used a second time and made the foundation of a second citation.

Before the adoption of Rule 23, it had always been the practice to require a new affidavit of merits to be made every time a defendant was required to swear to merits, and an affidavit of merits used for one purpose could not afterwards be used for a different purpose. I do not understand, however, that the same practice prevailed with respect to other affidavits. It is said in Tidd, p. 502, that "though affidavits have been used and a motion made thereon, they may be again referred to in support of a fresh motion." In England there are many cases holding that affidavits may be used a second time provided they are material to the points at issue on both motions. An indictment for perjury will not lie unless the affiant has sworn falsely respecting some material facts, and it is necessary therefore when an affidavit is offered upon a motion different from that for which it was prepared that it should appear that the affidavit when sworn to touched material facts, and that the affiant when he made it could have incurred the pains and penalties of perjury, if he had sworn falsely (see *Ryan* v. *Smith*, 9 Mees. & W. 223; *Reg* v. *Mizen*, 1 D. N. S. 865; *Quelly* v. *Boucher*, 1 Scott, 283). It was not improper therefore for the petitioner to use the petition a second time in obtaining a second citation.

Had the first citation been sustained, and had any subsequent proceedings thereupon been taken. I should have been inclined to hold, under the authority of *McCoy* v. *Hyde* (8 Cow. 68), that it could not have been made the foundation of a second citation.

II. I do not regard as material the omission of the name of the Chief Justice from the teste of the citation. The citation bears the signature of the clerk and the signature of the

attorney for the petitioner, and is under the seal of the court. The words of the rule are not well chosen but the meaning is obvious. The fair construction is that the citation shall be issued by the clerk.

III. The assignee's denial of the petitioner's debt will not save the assignee from accounting. The Case of *Farmen* is directly in point.

IV. If the assignee desire it, I will order the petitioner's claim submitted to a jury, but with notice, if the claim be established, the assignee personally must pay the costs of the litigation. There seems to me circumstances that make such a disposition of the matter peculiarly proper.

In the Matter of the Assignment of Joseph Stockbridge *et al.* to Isaac Bristow for the Benefit of Creditors.

[Special Term.]

(Decided November, 1879.)

A final decree upon an accounting by an assignee for the benefit of creditors, requiring the payment of money by the assignee, cannot be enforced by attachment, and fine and imprisonment as for a contempt.

Under section 1915 of the Code of Civil Proeedure, which applies to actions upon bonds of assignees for benefit of creditors, the court may authorize any number of actions on such a bond, and leave to sue will be granted to any creditor who shows himself entitled thereto.

Motion for an attachment against an assignee under a general assignment for the benefit of creditors, for his failure to pay over to the creditors moneys directed, by the final decree upon his accounting, to be paid by him to them.

The decree upon the final accounting of the assignee charged him with a specified sum, the total amount of the proceeds of the assigned estate and interest, and, after allowing him certain sums for expenses, &c., directed the remainder thereof, the sum of $7,131.08, to be distributed among the creditors named

in the decree, and payment thereof to those creditors or to their attorneys was ordered to be made forthwith.

Upon service on the assignee of a copy of the decree and a demand in writing of the sums due certain of the creditors, made by their attorney, the assignee answered, "that he had no money of the assigned estate referred to in said decree, and could not pay the money required to be paid by said decree, or comply with its terms;" whereupon the creditors made this motion for an attachment against him.

The affidavit of the assignee, in opposition to the motion, alleged that the funds of the estate were collected and retained by the firm of George W. Kidd & Co., of which he was a member, and that George W. Kidd, also a member of said firm, was one of the sureties on his bond as assignee, and was amply responsible; that the firm had been dissolved, and that he had commenced an action against his former copartners to recover the trust funds, which was still pending. Parts of these allegations were controverted by affidavits on behalf of the creditors.

Samuel G. Adams, for the creditors.

Frank K. Pendleton, for the assignee.

J. F. Daly, J.—A final decree in accounting cannot be enforced by attachment. Provision for enforcing such a decree is expressly made by section 22 of the General Assignment Act (L. 1878, c. 318, § 6, amending L. 1877, c. 466, § 22). It is there enacted that all decrees in proceedings under this act shall have the same force and effect, and may be entered, docketed, and enforced and appealed from the same as if made in an original action brought in the county court. Judgments and decrees of the county court are enforced by execution where the judgment is for a sum of money, or "directs the payment of a sum of money" (Code, § 1240). The judgment being enforceable by execution, the court has no power to punish the party for not paying, by fine or imprisonment (Code, § 14, subd. 3). Such was the state of the law prior to the Code (*Hosack* v. *Rogers*, 11 Paige, 603).

The General Assignment Act above cited provides further (§ 20) that the county judge may exercise such powers in respect to the proceedings and the accounting as a surrogate may by law exercise in reference to an accounting by an executor or administrator. It also provides (§ 25) that the court may exercise the powers of a court of equity in reference to the trust and any matter involved therein. Giving these provisions the effect of controlling the mode of enforcing final decrees in accounting, they do not confer the power of punishing, by fine and imprisonment, disobedience to a final decree for the payment of money, since neither the surrogate nor the court of chancery could commit as for a contempt in such a case (*Matter of Watson*, 69 N. Y. 536). Such decrees could be enforced only by execution against the property and against the body.

It is plain, however, that these provisions of sections 20 and 25 give this court full power to punish, by attachment for contempt, disobedience to interlocutory orders for the deposit, payment, or transfer of funds and property in the hands of the assignee, or under his control, and for disobedience to final decrees other than for the payment of money (Code, § 14, subd. 3; *Matter of Watson; Hosack* v. *Rogers*, *supra*).

Motion denied, but, as the question is new in these proceedings, without costs.

Afterwards leave to prosecute the bond of the assignee was granted to Oscar Hoyt, one of the moving creditors; and on motion by other creditors to vacate the order granting him leave to sue, the following opinion was rendered, January 18th, 1881.

Van Hoesen, J.—The method of bringing action on the bond of an assignee is now regulated by section 1915 of Code of Civil Procedure, which is a substitute for Article second, Chapter 6, Title 6, Part 3, Revised Statutes. That article of the Revised Statutes was frequently before the courts for consideration, and a serious question existed as to whether it was possible to carry out its provisions after the abrogation by the

old code of the remedy known as the *scire facias*. It was the opinion of the Superior Court that a new action should be brought for every new breach of the condition of the bond, and that under the practice prescribed by the Code of Procedure judgment should not be taken for the penalty of the bond, in the first action that might be brought. The cases I refer to are, *Baygot* v. *Boulger* (2 Duer, 170); *O'Connor* v. *Such* (9 Bosw. 318); *Ireland* v. *Litchfield* (8 Bosw. 634). It is true that some of the actions, to which I have referred, were actions brought upon the bonds of administrators, after the surrogate had assigned them; and it has been held that a distinction exists between suing on a bond to the people which had been assigned, and suing on a bond to the people which had not been set over to a particular individual. Where the bond has been assigned pursuant to some statute the assignee may bring suit upon it in his own name though it may run to the people, but where it has not been assigned it has been held that the action should be in the name of the people. Perhaps after the intimation of the court in *Dayton* v. *Johnson*, (69 N. Y. 428), even under the law which was in force before the last nine chapters of the Code of Civil Procedure took effect, an action on a bond made to the people might have been brought by a party in interest in his own name. As to that I express no opinion. Section 1915 was evidently designed to do away with those provisions of the Revised Statutes which regulated the method of proceeding to enforce bonds for the performance of covenants. That section is not so clear as it ought to be, but it does provide that there may be two or more successive actions upon a bond, and that the bond shall be construed as if it contained a covenant to perform the act specified in the condition thereof. It also provides that damages may be recovered for successive breaches, and then limits the aggregate amount of damages to the penalty mentioned in the bond, except in a certain case not now to be considered. My own conclusion is that the effect of this is to make it proper for the court to authorize any number of actions upon an assignee's bond. There is now no statutory provision which contemplates a judgment for the amount of

the penalty, in the first action on the bond, and a series of proceedings in the nature of a writ of *scire facias* for the benefit of persons other than the relator by whom the first suit is brought.

The system of enforcing sheriff's bonds under the Revised Statutes seems to me to afford a very good guide to those who now seek to enforce an assignee's bond. It appears to me to cover the case exactly, though I do not say that there is any statute which makes it applicable. I shall grant to any creditor who shows himself entitled thereto, permission to sue upon the bond of the assignee.

I have very little doubt that there is collusion between Kidd and Hoyt's attorney, and I suspect that Hoyt is only a tool in Kidd's hands, but the evidence before me is not sufficient to authorize me to set aside the order which allows Hoyt to prosecute the bond. I can only say, I suspect; I cannot say, I adjudge. If any *bona fide* creditor who really intends to prosecute the bond wishes to make a case which will warrant the setting aside of the order which empowers Hoyt to sue, I will appoint a referee to take proof of the facts, if the applicant will stipulate to pay the fees of the referee. My own belief is that such a proceeding is unnecessary, for Hoyt is in nobody's way.

I shall not remove Bristow on the application of Hoyt; if any creditor acting for himself, and not for Kidd, should make the application, a different question would be presented.

The proposed orders should each contain a provision for the distribution by the Court of Common Pleas of the moneys that may be recovered. Sections 17, 18, vol. 3, p. 781, 5th Ed. Revised Statutes may be consulted, as to the form of the provision.

Motion denied.

In the Matter of the Assignment of JULIUS GOLDSCHMIDT to JACOB WOLF for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided November, 1879.)

Where an action is pending, brought by an assignee for the benefit of creditors against the sheriff for taking property of the assigned estate under warrants of attachment obtained by creditors of the assignor, and an offer of compromise is made by such creditors to the assignee, leave to accept it will not be given him if the compromise is opposed by other creditors who are preferred in the assignment, and whose testimony will be available to the assignee on the trial of the pending action.

APPLICATION by an assignee under a general assignment for the benefit of creditors for leave to accept an offer of compromise by creditors of the assignor.

The facts are stated in the opinion.

J. F. DALY, J.—The assignee has done his duty in bringing the proposed offer of compromise on the part of attaching creditors to the attention of the court and inviting the persons interested in the estate to consider it. The opposition to the proposed compromise is general on the part of the preferred creditors, however. And as they are most interested in the result of the pending action against the sheriff, and their testimony is available for the assignee on the trial, he should proceed with the suit.

Motion denied, without costs.

In the Matter of the Assignment of THOMAS MANAHAN to ALEXANDER C. ROBERTSON for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided December 19th, 1879.)

Upon an accounting by an assignee for the benefit of creditors, the necessity for and the reasonableness of charges for expenses must be shown.

An attorney for petitioning creditors who has been successful in obtaining the removal of an assignee is not therefore entitled to an allowance out of the assigned estate, although such removal may be for the advantage of all the creditors.

APPLICATION to confirm the report of a referee upon an accounting by an assignee under a general assignment for the benefit of creditors, after his removal.

The facts are stated in the opinion.

VAN HOESEN, J.—The referee reports in favor of disallowing two items in the account rendered by Robertson, the assignee, who was removed, and in favor of allowing every other item in the account.

The two rejected items are charges for lunches and other personal expenses of the assignee. It was proper to disallow these items, but it seems to me the referee did not go far enough.

The testimony shows that the assignor kept a paper warehouse in Duane Street, that Robertson was in possession of the place about a month, and that in the period of four weeks, he paid out in wages a large amount of money. Manahan, the assignor, received for his wages at least $105, and other persons received as wages $261.35, and in addition to all this Robertson says he expended $112 in removing the stock to the adjoining house.

It is difficult to understand why such a large expenditure for wages was necessary or excusable. Robertson gave no explanation of the matter, and in the absence of all evidence of the necessity for the outlay his charge for wages must be re-

jected. It is possible that a portion of the charge may be sustained if Robertson be given a further opportunity to show that the outlay was advantageous to the estate. I will send the matter back to the same referee, that he may take such further evidence as may be offered as to the propriety of the expenditure for wages.

Robertson is not entitled to any allowance for counsel fees.

I think that the referee decided properly in rejecting Mr. Lockwood's claim for an allowance. Lockwood must look to the creditors who employed him. It is probable that the proceeding he instituted inured to the advantage of all the credi tors. That alone is not sufficient to entitle him to an allowance out of the estate. He was acting throughout not for the estate but for his employers. And the benefit which the others received was merely incidental to the relief he obtained for his clients. We have never applied to proceedings under the Assignment Act, the rule which prevails in equity as to the payment of costs out of the fund in suits brought for the administration of assets (*Hamilton* v. *Hamilton*, 1 Malloy, 535).

Under section 25 of the Assignment Act the only costs that could be allowed to Lockwood would be costs against Robertson. It gives no authority for charging the fund with allowances to the counsel for some of the creditors for proceedings taken by them against an assignee.

The report as to Lockwood's allowance is confirmed.

Order accordingly.

In the Matter of the Assignment of JOSEPH CROMIEN to JAMES M. LIDDY (JOSEPH F. BECKER substituted as Assignee) for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided December 22d, 1879.)

Where proceedings have been taken in the Supreme Court to compel an assignee for the benefit of creditors to execute his trust and distribute the funds in his hands, this court will make no order for that purpose.

APPLICATION by an assignee under a general assignment for the benefit of creditors for the settlement of his account and the discharge of himself and the sureties on his bond.

The facts are stated in the opinion.

VAN HOESEN, J.—The order applied for is denied.

The Supreme Court has jurisdiction no less than the Common Pleas. Where it assumes the control of the assignee and exercises its unquestioned power to compel him to execute his trust, and distribute the funds in his hands, the Court of Common Pleas will make no further order in the matter. All the relief to which any party, trustee or *cestui que trust* is entitled, the Supreme Court is competent to grant.

The rule is that the court which first takes jurisdiction of the settlement and winding up of the assigned estate, retains exclusive control to the end, and where an accounting is begun in the Supreme Court, the Common Pleas will, as I have said, leave to that court the settlement of the estate and the discharge of the assignee and his sureties.

In one case where an application was made to Justice DAVIS for the appointment of a referee to take and state the accounts of the assignee, in an action brought in the Supreme Court, that learned justice said that he would appoint no referee until an application had been made to the Common Pleas for the appointment of a referee under the Assignment Act, and that he would then appoint the referee named by the

Common Pleas, so that the accounting in the Supreme Court suit and the accounting under the Assignment Act might go on simultaneously before the same referee. This virtually ended the Supreme Court suit.

Application denied.

In the Matter of the Assignment of PHILIP F. KOBBE *et al.* to ALGERNON S. SULLIVAN for the Benefit of Creditors. Application of NEUBERGER *et al.*

[SPECIAL TERM.]

(Decided January 5th, 1880.)

A principal may lose his right to follow the proceeds of his goods when his factor's assignee for benefit of creditors, in ignorance of his rights, has paid them out in the ordinary course of administration of the assigned estate.

A principal will estop himself from claiming the proceeds of his goods by presenting to the assignee a demand in the ordinary form of a creditor's claim, and accepting a dividend in common with unpreferred creditors. If the whole proceeds have been consumed in paying dividends, the principal has no greater rights than an ordinary unpreferred creditor; but if he can distinguish and trace in the hands of the assignee any portion of the proceeds of his goods as yet undisposed of, he may recover it. An examination *pro interesse suo* is the method of ascertaining his rights.

APPLICATION by creditors of the assignors in a general assignment for the benefit of creditors, for the payment to them of the proceeds of goods consigned by them to the assignors.

The facts are stated in the opinion.

VAN HOESEN, J.—In order to determine correctly the rights of the petitioners, it must first be ascertained whether or not they consigned goods to Kobbe & Ball with the understanding that the latter firm might mingle, and sell, commingled, the goods of divers consignors, take in payment one secur-

ity or one sum for the goods of several principals, deposit the money, or use the security, as their own, and pay the consignors as general creditors merely, and not as principals having a right, each to the proceeds of his own goods. If there were such an understanding, the Neubergers cannot now claim from the assignee the identical proceeds of the goods consigned by them, nor can they claim any superiority to ordinary creditors. The determination of this matter in favor of the assignee, would be a complete answer to the petition. If no such understanding existed, then another question presents itself: Did not the Neubergers, by filing their claim as ordinary creditors, and taking a dividend calculated upon the theory that there was no consignor entitled to the proceeds of his goods which Kobbe & Ball had held as factors, so mislead the assignee that it would be most unjust to permit them now to alter their claim, and assert the right which a consignor has to the avails of his goods in the keeping of the assignee of his factor? That they are so estopped, seems to me to admit of no question. The assignee, not aware that they had any claim superior to that of any other creditor, but assuming, as he had a right to do from the character of the claim which they presented, that they were upon an equality with the other creditors, declared and paid a dividend estimated upon the assets as a fund for the payment of all creditors equally. If they are now allowed to assert a claim to the proceeds of the goods which they consigned to Kobbe & Ball, the result would be to make the assignee liable for such part of those proceeds as he has paid out in dividends, and to put him in the position of one who has misapplied trust funds. Nothing more unfair than this can be conceived. It is said that by examining the books, he might have known that the Neubergers were consignors, that Kobbe & Ball were factors, and that the usual rule which entitles the consignors to recover unsold goods, or to follow the proceeds of goods which have been sold, was applicable to the relations between the parties. But, if there were such an understanding as the assignee alleges, the books would not be the guide for the ascertainment of the petitioners' rights. Moreover, it was for the petitioners to assert their claim, and

if they chose to enroll themselves in the ranks of ordinary creditors, they cannot complain if the assignee left them in the station which they voluntarily assumed.

If, however, they are entitled to reclaim the proceeds of the goods which Kobbe & Ball sold as their factors, it is not too late for them to assert their right to such part of the assets still in the hands of the assignee as can be distinguished and traced as the avails of their property. As to those assets there is no estoppel.

I will direct a reference to Jeremiah Loder, Esq., to inquire whether such an understanding as I have spoken of existed, and whether there are now any assets distinguishable and traceable as the proceeds of goods consigned by the petitioners to Kobbe & Ball. I leave open the question, whether those assets can be paid over to the petitioners if the expenses of executing the assignment require the application of them to the payment of those expenses.

Order accordingly.

In the Matter of the Assignment of Risley & Burris to Clifford E. Smith for the Benefit of Creditors.

[Special Term.]

(Decided January 29th, 1880.)

Under an assignment for the benefit of creditors which does not provide for the payment or indemnification of persons who subsequently incur liabilities or make advances for the assignor, a claim by a surety for the assignor upon a lease, for money paid by him, subsequent to the assignment, for rent due upon the lease and as a bonus for its cancellation, can not be allowed.

Where there is a trial before a referee of a claim disputed by the assignee, the prevailing party will be allowed as costs the usual costs of proceedings before notice of trial, costs of proceedings after notice and before trial, and the trial fee. Where an allowance is proper, it is to be com-

puted upon the amount of the claim in controversy at the trial, and must not exceed five per cent. of that amount.

Application to confirm the report of a referee upon a trial of a disputed claim under a general assignment for the benefit of creditors.

The claim was made by Lawrence G. Risley, as the surety of Risley & Burris, the assignors, upon a lease, for the payment by him, subsequent to the assignment, of rent becoming due on the lease for two quarters, and of a bonus for the surrender and cancellation of the lease. The claim was disputed by the assignee, and was referred. The report of the referee disallowed the claim, and the assignee made this motion to confirm the report.

Samuel Brown, for the assignee.

John E. Risley, for the claimant.

Van Hoesen, J.—It is not contended that the assignment provides for the payment or indemnification of persons who subsequently to the date of the assignment incur liabilities or make advances for the assignor. There is, therefore, no authority for the payment by the assignee of those claims which Risley presents for advances or payments made by him after the assignment was executed (Burrill on Assignments, marg. p. 76 and notes).

For this reason alone, the report of the referee should be confirmed. But, after reading the testimony, I am of opinion that the bonus paid for the cancellation of the lease and the payment made for the rent for the quarter ending August 1st, 1879, could not be allowed even if the assignment had expressly provided for the indemnification of those who, after the execution of the assignment, should discharge liabilities arising out of suretyships undertaken for the benefit of the assignor prior to the assignment. The bonus could not become a claim against the assignor without his consent, and, of course, was not a valid claim against the estate in the hands of the assignee. It was in every respect an unnecessary expenditure, and is

proved in this case to be a most foolish one. So also with respect to the payment of the August rent. The lease was surrendered and canceled in July. Rent paid for the quarter ending in August following, constituted no legal claim, and it was paid, doubtless, for the benefit of the new firm which was then in the occupation of the demised premises. It cannot be allowed against the firm of Risley & Burris, or against their creditors. Were it not that the claim for rent paid for the quarter ending May 1st is a claim for a payment made after the execution of the assignment, I should be inclined to allow it.

The report of the referee is confirmed, and the exceptions are overruled. The claimant must pay as costs the referee's fees and the necessary disbursements of the assignee at the trial.

I do not feel at liberty to award more than the usual five per cent. on the amount of the claimant's demand as counsel fee to the prevailing party. It is true that section 26 of the Assignment Act does not by its terms limit the amount of counsel fees to be awarded where a trial is had of a disputed claim, but I see no reason why allowances for a trial under that act should exceed allowances for trials under the Code of Procedure. The assignee is entitled to charge reasonable fees paid to his attorneys and his counsel as part of the expenses of administering the estate. An allowance to be paid by the losing party ought not to exceed the statutory rate for analogous proceedings. In addition to the five per cent., I think it not improper to allow costs of proceedings before and after notice of trial, and the usual trial fee of an issue of fact. The latter are taxable as costs (5 Abb. N. C. 144).

Order accordingly.

In the Matter of the Assignment of RACHEL PHILLIPS to BERNHARD E. STEINHARDT for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided February 13th, 1880.)

Upon an accounting by an assignee for the benefit of creditors, the report of the referee should show proof of the service upon creditors of notice to present claims, and of the citation upon the accounting, and who of them appeared on the return of the citation.

APPLICATION to confirm the report of a referee upon an accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

VAN HOESEN, J.—The report is sent back for the following reasons:

1st. There is no proof of the mailing of the notices as required by rule 31. This is indispensable.

2nd. No proof of service of the citation is attached to the papers. Nor does it appear that such proof was presented to the referee. It is not enough to say that proof is on file in the clerk's office. That will not answer. It must be examined either by the referee or by the court. The regular way is to present the proof to the referee.

3d. There must also be proof as to who among the creditors cited appeared on the return of the citation, for those so appearing are entitled to notice of the hearing before the referee.

The report of the referee for want of these essentials cannot be confirmed. If the defects can be remedied the papers will be remitted to the referee for further proof.

Report referred back.

In the Matter of the Assignment of CASSIUS B. ELMORE *et al.* to DAVID CROSSMAN for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided March 8th, 1880.)

The expense of the accounting of an assignee for the benefit of creditors is a proper charge against the estate; and where a retiring assignee has done his duty, and has paid over to his successor the whole estate, the fees of the referee upon his accounting may be paid by the new assignee out of the funds in his hands.

APPLICATION to confirm the report of a referee upon an accounting by a retiring assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

VAN HOESEN, J.—The usual course is to charge the assigned estate with the expenses of the accounting. This is so, because to render an account is a necessary part of the duty of a trustee, and the law does not require that the expenses of executing the trust shall be borne by him. Our law requires an accounting before an assignee can be discharged, and the accounting is for the benefit of those having an interest in the assigned estate. This is so, though incidentally the sureties of an assignee are benefited by an accounting, inasmuch as it is indispensable to their release from liability on their bond. The accounting of a retiring assignee is to be considered as part of the expenses of appointing a new assignee; and the rule is, that "the expenses of appointing new trustees, when necessary and proper, must unquestionably be borne out of the *corpus* of the trust estate." (Hill on Trustees, marg. p. 189.)

In the first instance the new assignee who has the funds in his hands will pay the fees of the referee who audits the accounts of the retiring assignee, and if it should appear on the hearing of the motion to confirm the report that the retiring assignee ought to be compelled to pay the expenses of the ac-

counting, the proper order may be made to charge him. Where the retiring assignee retains any of the funds of the estate the rule might be different.

The report is required by the court, and the referee cannot be required to file it till his fees have been paid. When the retiring assignee has done his duty, and has paid over to his successor the whole assigned estate, there is no sense in compelling him to pay the referee and thereby make himself a creditor of the assigned estate.

The motion is granted.

Application granted.

In the Matter of the Assignment of Nathan L. Burdick *et al.* to Edward H. Bailey for the Benefit of Creditors.

(Decided April, 1880.)

A person who is named as a creditor in the schedules filed under an assignment for the benefit of creditors, but who does not present any proof of his claim to the assignee, is not entitled to a distributive share in the assigned estate.

Appeal from an order of this court denying an application to confirm the report of a referee upon the final accounting of an assignee under a general assignment for the benefit of creditors.

Upon the application at Special Term it appeared that no proof of claim had been presented to the assignee by certain persons named as creditors in the schedules of the assignors, and that the claim had not been paid by the assignee. For this reason the application was denied, and the assignee was directed to pay all creditors whose names appeared on the schedules, whether they had presented claims or not. From the order entered on this decision this appeal was taken.

G. N. Campbell, for the assignee.

William Lindsay, for the creditors.

LARREMORE, J.—This is an appeal from an order on a final accounting directing the distribution of the trust fund among all the creditors named in the schedules of the insolvents, irrespective of any proof of the claims mentioned in such schedules.

The learned judge from whose order this appeal is taken has intimated an acquiescence in the view contended for by the appellants (*Matter of Weinholz*, *ante*, p. 9). But, while reiterating the same opinion in his decision of this application, he felt constrained to follow the ruling in the *Matter of the Accounting of Oakley* (1 Am. Insolv. Rep. 56), and granted the order which is the subject of this appeal. The question thereby presented is whether a creditor, named as such in the schedules, is entitled to a distributive share of the trust funds without making presentation or proof of his claim.

Prior to the act of April 13th, 1860 (L. 1860, c. 348), the only mode of passing the account of an assignee of a trust fund was by a suit in equity in behalf of the party plaintiff and all interested in the assignment who should, after due notice, come in and claim the benefit thereof, by proving their claims (*Kerr* v. *Blodgett*, 48 N. Y. 62).

The act above mentioned was intended as a summary remedy to accomplish the same object, and the various amendments made thereto have all had for their purpose the abridging of the practice without impairing the spirit and intention of the law relating to special trusts.

A cardinal principle thereof is the good faith of each transaction subjected to review; and to this end all the safeguards of inspection, examination, and legal adjudication have been made applicable to test the validity and honesty of the proceedings.

Collusion on the part of the assignor, or his creditors, or of any party interested has always been open to legal investigation. The legislature, on June 16th, 1877, passed an "Act in

relation to Assignments of the Estates of Debtors for the Benefit of Creditors" (L. 1877, c. 466), which repeals all former acts on the subject. Section 4 of this act authorizes the assignee to advertise for creditors to present to him their claims, with vouchers therefor duly verified. Section 13 provides that a citation for an accounting to all parties who are interested in the fund must be served; except that if the time limited by the advertisement for presentation of claims has expired before the issue of the citation, creditors who have not duly presented their claims need not be served.

The referee found in favor of the creditors who had presented their claims, and who appeared upon the accounting. This ruling was in conformity with the statute, which does not authorize indiscriminate distribution to all persons named as creditors in the schedules. To hold otherwise would be to allow the assignor to pass upon the validity of all claims not presented or proved. The naming of a creditor in the schedule is not a presentation or proof of his claim within the meaning and intent of the statute. An assignor might name in his schedule a creditor for a fictitious debt. The creditor makes no presentation or proof of his claim, thus escaping the scrutiny and examination of the other creditors, and also the necessity of substantiating his demand by his oath. It is obvious that if no distinction were made between such a claim and claims duly presented and proved, a wide door would be opened to fraud and collusion, and an act that was passed for the benefit of creditors perverted.

The assignee is liable on his bond for twenty years unless legally discharged. It is a grave question whether an order for his discharge would protect him in the payment of a claim which was fraudulent, and which the creditors had no opportunity to object to or dispute. If any person has a claim against the trust fund he should present and prove the same and invite an investigation as to its validity. Creditors who have fulfilled these requirements are the only ones entitled to share in the distribution of the fund.

The order appealed from should be reversed, with costs.

CHARLES P. DALY, Ch. J., concurred.

J. F. DALY, J., dissented.

Order reversed, with costs.

In the Matter of the Assignment of RAUTH & SON to CHARLES SCHLANG for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided April 15th, 1880.)

Although the Court of Common Pleas is not bound to allow commissions to an assignee for the benefit of creditors, as the surrogate is bound to allow commissions to an executor or administrator, yet, unless a clear case of fraud or misconduct on the part of the assignee is shown, his commissions will not be denied him.

An assignee for the benefit of creditors will not be allowed the expenses of carrying on a retail business as such, but he should be allowed the reasonable expenses of preparing goods for sale at auction.

An allowance may properly be made to an assignee for the benefit of creditors for services rendered by counsel in the preservation of the estate; and where difficult questions of law arise, the assignee may lawfully employ counsel to advise him as to his duty and charge the estate therefor.

Upon the removal of an assignee for benefit of creditors without any proof of fraud or misconduct on his part, the estate should bear the expenses of his accounting.

In the provision of section 26 of the General Assignment Act, authorizing the court in its discretion to "award reasonable counsel fees and costs," the words "reasonable counsel fees" do not mean an extra allowance such as is provided for by the Code. The court, in determining what costs should be allowed on an accounting, will, in the absence of any statutory provision on the subject, adopt the scale of costs allowed by the Code, and allow such costs as would be awarded on the trial of an issue of fact in a civil action.

What particular items of costs may be allowed on an accounting by an assignee.

On an application to confirm the report of a referee upon an assignee's account, the court cannot pass upon matters as to which no exceptions to the report have been filed.

Matter of Rauth.

Application to confirm the report of a referee upon an accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

Van Hoesen, J.—I. In the case of *Halsey* v. *Van Amringe* (6 Paige, 12), the Chancellor did not deem it necessary to pass upon the question as to whether the Court of Chancery could disallow commissions where an executor or administrator had fraudulently mismanaged the estate, but he did decide that commissions could not be disallowed by a surrogate, who is an officer of limited powers, and who, to use the language of the Chancellor, "takes no power by implication." The duty of the surrogate is to obey the statute, which requires him to allow to executors and administrators specified commissions for their services. The allowance to an executor of his commissions is held not to be a matter of grace, but of right, even though, by his misconduct, he should have subjected himself to liability for compound interest (*Rapelje* v. *Hall*, 1 Sandf. Ch. 406), or though he should have been guilty of gross negligence (*Meacham* v. *Sternes*, 9 Paige, 405).

The powers of the Court of Common Pleas are not limited as are those of the surrogate, for, by section 25 of the Assignment Act, it possesses, in all proceedings arising under that act, "the powers of a court of equity in reference to the trust and any matters involved therein." These powers, in many cases, may be exercised, though a formal action, corresponding to a suit in equity, be not pending; but it is not necessary now to determine whether or not the court will or can withhold the commissions of an assignee who has violated his trust. In the case of Marquand (*ante*, p. 27), the assignee had, in fact, got in the whole of the assigned estate, and then had used the moneys in his hands for the purchase for his own benefit, of claims against the estate. Of course, I refused to allow him commissions upon moneys laid out by him in buying claims. A surrogate could properly have withheld commissions upon moneys expended under similar circumstances. The moneys were not paid out within the meaning of the law,

they were misappropriated, and used by the assignee for his private speculations. In this case, however, Schlang, the assignee, has violated no duty. He was removed, as appears by the decision of Chief Justice DALY, because his domestic relations were such as to make it probable that his feelings might conflict with his duty. The Chief Justice said that the removal should be made under the principle established by the Burtnett case, which was a case in which the assignee had been the attorney and confidential adviser of the assignor's wife, and employed by her to collect a claim, which, if paid, would have absorbed a large part of the assigned estate. The validity of the claim was disputed by creditors, and though nothing inconsistent with honor and duty had been done by the assignee, it was held to be better that the assignee should not be a person whose bias, at least, was in favor of the wife, and against the other creditors (*In re Cohn*, 20 Alb. L. J. 352).

It is insisted, however, by Mr. Severance, who represents some creditors, that as he made a number of charges against Schlang, and as a removal followed, we must assume that all the charges have been established as res adjudicatæ, notwithstanding the decision of the Chief Justice, which declared that the case presented was within the principle of the Burtnett case. No such inference can be drawn. The truth of Mr. Severance's charges has never been passed upon, and it would be the grossest injustice to assume that Schlang had been found guilty of fraud or misconduct, and to subject him to the punishment that might, perhaps, follow such an adjudication. The referee was right in allowing Schlang his commissions.

II. The referee properly disallowed the assignee's claim for rent, clerk hire and gas bills paid whilst the stock was selling at retail. It was proper, however, to allow such expenses as were incurred in preparing the goods for sale at auction. Rule 20 of the Court of Common Pleas, requires that the sale shall be advertised for at least ten days, in one or more newspapers, and that the goods shall be sold in parcels, according to a printed catalogue. The arranging of the goods in parcels and the preparation of the catalogue required time; and it

would not be improper for the assignee to retain possession of the store, and to employ assistants, if the assorting and the cataloguing of the goods could be done better there than in an auction room.

III. It was proper to allow the assignee the amount payable to his counsel for services in the replevin suits. It was the duty of the assignee to defend the trust, and to preserve the assigned estate from attack (*Noyes* v. *Blakeman*, 6 N. Y. 579, 584).

IV. Where difficult questions arise, an assignee may lawfully employ counsel to advise him in relation to the administration of the estate, and charge the expenses to the trust fund (*Jewett* v. *Woodward*, 1 Edw. Ch. 200; *Levy's Accounting*, 1 Abb. N. C. 177; Bishop on Insolvent Debtors, § 378).

The exceptioner has not pointed out that in the $458.36 allowed to the assignee as payments to his counsel any sums were included that were not properly chargeable against the estate.

V. It is said that Schlang should not be allowed the fees paid to the referee on this accounting. If Schlang had been removed for misconduct, or if he had capriciously refused longer to serve, the objection would be a good one. The rule is that if a trustee has good ground for retiring, the costs of the suit by which he seeks and obtains a discharge from his trusteeship, will be paid out of the trust fund (Adams on Equity, marg. p. 39, citing *Coventry* v. *Coventry*, 1 Keen, 758; *Greenwood* v. *Wakeford*, 1 Beav. 581; *Forshaw* v. *Higginson*, 20 Beav. 486; *Gardner* v. *Doones*, 22 Beav. 395; *Carter* v. *Seabright*, 26 Beav. 376; Hill on Trustees, marg. p. 189).

In this case, Schlang, without any fault on his part, was called on to vacate his office, and he stands, therefore, in the position of one who voluntarily, and for good cause, seeks to be relieved from his trusteeship. There was no impropriety in his accepting the assigneeship, nor has he since done anything that can be called misconduct. The delicacy of his position occasioned his removal. As was said by the Court of Appeals in the Burtnett case, the words "misconduct" and "incompetency," as used in the Assignment Act, have no

technical meaning, and were intended to embrace every conceivable cause which a court of equity might deem adequate for the removal of a trustee. I repeat that I think Mr. Schlang is, with respect to the expenses of his accounting, to be treated like a trustee, who, for good reason, and of his own accord, asks leave to lay down his office.

VI. It is next objected that Mr. Schlang should not be allowed the payment made of a gas bill for $20.50 for the period beginning December 23rd, 1878, and ending January 23rd, 1879. This bill was, it appears, contracted by the assignor, and was a claim against the assigned estate. Not being a preferred claim, only a pro rata portion should have been paid. The gas company must share with the other creditors of the non-preferred class; and Mr. Schlang must account for and pay over to his successor, the amount paid to the company. He will, on the final accounting of the substituted assignee, be entitled to reclaim the amount which, on a pro rata payment to creditors of the non-preferred class, would be coming to the Gas Company.

VII. The exception to the allowance of $150 to the assignee as the fee of his attorney for drawing off the account, and attending at the accounting, should be sustained. The case of *Burtis* v. *Dodge* (1 Barb. Ch. 91), suggests the true rule. We have not construed section 26 of the Assignment Act as giving us the right arbitrarily to allow costs and counsel fees, limited only by the courts' discretion (see *Matter of Risley*, *ante*, *p.* 44).

Though the accounting is not a special proceeding, and is not governed by Laws of 1854, c. 270, and though we are not controlled by any statute fixing the amount of costs and counsel fees, there is so much force in the suggestions of the Chancellor in *Halsey* v. *Van Amringe* (6 Paige, 17, 18, 19), that I am in favor of adopting his reasoning, and of holding that the costs to be allowed on an accounting are such costs as would be awarded on the trial of an issue of fact in a civil action; that is to say, for proceedings after notice and before trial, and the usual trial fee. There must be either an unlimited discretion in awarding costs and counsel fees, or else a

settled rate conformable to some fixed standard. The only standard known to me is the bill of costs established by the Code, and to that I think we must conform (see 55 N. Y. 146).

The allowance of $150 should be reduced to $15 for proceedings after notice and before trial; for each party served with notice to appear before the referee, not exceeding ten, $2, and for each party so served in excess of ten in number, $1; for trial of an issue of fact, $30; if more than two days occupied, in addition $10.

If the words "reasonable counsel fees" can be construed to mean an extra allowance, I know of no basis upon which such an allowance could, in this case, be computed.

The foregoing observations dispose of all the exceptions filed to the referee's report. The argument of the counsel for the exceptioners is, in some respects, broader than the exceptions, but the court cannot pass upon matters as to which no exceptions have been filed, and which one counsel chooses to argue without notice to his adversary.

With the modifications suggested in this opinion, the report of the referee will be confirmed.

Application granted.

In the Matter of the Assignment of Otto Schaller to Edgar Pool for the Benefit of Creditors.

[Special Term.]

(Decided June 28th, 1880.)

After the execution of an assignment for the benefit of creditors, the assignor obtained, by fraudulent representations, certain notes, which he transferred to some preferred creditors, taking from them releases of their preferred debts. The maker of some of the notes, who was compelled to pay them, applied to be subrogated to the rights of the preferred creditors whose claims had thus been paid. *Held*, that he was not entitled to subrogation.

To obtain such a release from a creditor who was preferred in part, the assignor represented that, to promote a compromise with the creditors, the assignee would surrender to him the assigned property, if the creditors would release the assignee from liability; whereupon, and in consideration of certain notes, an instrument was executed and delivered by such creditor to the assignor, which was supposed by the creditor to be merely such a release to the assignee, but was in form a general release to the assignor. No compromise was made; the notes were not paid, and judgments were recovered on them, but remained unsatisfied. The original claim was presented to the assignee, but was rejected by him, by reason of the release; and pending a reference thereon, the release was cancelled in an action brought for that purpose. *Held*, that on proof of these facts before the referee, the claim was properly allowed.

An assignee for the benefit of creditors is not acting in hostility to the assignment when he refuses to pay a preferred claim on the ground that it has been released or extinguished since the assignment was executed.

The report of a referee upon an accounting by an assignee for the benefit of creditors cannot be confirmed without proof of service, upon the creditors, of notice to present claims, and of the citation to appear on the accounting; and where the citation has not been served, the referee has not power to cure the irregularity. Service of the citation by mail is not sufficient unless authorized by the court.

A referee acting under the Assignment Act will be allowed the same compensation as a referee in an action; his fees will be taxed by the clerk; and the clerk's taxation may be reviewed by the court.

A referee who is compelled to audit the accounts as well as to take testimony, will be allowed for the time necessarily spent in auditing.

An attorney who is employed to act as the general adviser of an assignee for the benefit of creditors is not entitled to charge a retaining fee in suits that he is called on to conduct in the course of his regular duties. A retaining fee is intended to remunerate counsel for being deprived, by being retained by one party, of the opportunity of rendering services to the other, and receiving pay from him.

Application to confirm the report of a referee upon a disputed claim under a general assignment for the benefit of creditors.

The claim was made by John S. Hulin, as the maker of certain promissory notes alleged to have been obtained from him by the assignor by false representations, and transferred to preferred creditors in consideration of their release of their

claims. Hulin having been compelled to pay the notes, and his claim therefor being disputed by the assignee, a reference was ordered, upon which the referee reported in favor of allowing the claim, and application was made to confirm the report.

George B. Ashley, for John S. Hulin, the creditor.

Thomas F. Wentworth, for the assignee.

Van Hoesen, J.—I have not changed the views I expressed upon the argument, though I understand the great hardship of the case. Hulin got no more than Schaller had to convey, and that was nothing at all. Schaller's transaction amounted simply to a payment of the preferred creditors, and he obtained from them a release. He merely paid them. He bought nothing, and acquired nothing by purchase from them. By the terms of the assignment, what is left after paying the preferred creditors, goes to the non-preferred creditors. The payment of the preferred creditors with the notes which Schaller obtained by fraud and false pretenses from Hulin, discharged the assigned estate from the claims of the creditors so paid, and left it to be distributed among the non-preferred creditors. There is no way in which Hulin can be put in the shoes of the preferred creditors. He was a stranger to the transaction by which they were paid, though Schaller, in making the payments, wrongfully and fraudulently used the notes which he had lent him. Hulin's claim is against Schaller personally, not against the assigned estate.

The report of the referee is overruled.

Application denied.

Another claim was made under the same assignment by Milo W. Pember, one of the creditors of the assignor, a portion of whose claim had been preferred in the assignment. Soon after the making of the assignment, the assignor, Schaller, being then engaged in negotiations with the creditors for a composition, represented to Pember that, in order to enable

him to carry out such composition, the assignee would surrender to Schaller all the property in the possession of the assignee under the assignment, provided the creditors would release the assignee from all liability in the matter; whereupon Pember, supposing that he was giving such a release, executed and delivered to Schaller a general release of the latter, the consideration of which was stated therein as being several notes which represented or appeared to be intended to represent Schaller's indebtedness to Pember. The notes not having been paid when due, an action was brought by Pember against Schaller upon the original indebtedness, in which the complaint was afterwards amended so as to set forth the notes, and judgment was recovered upon them, but was not satisfied. Pember's claim being disputed by the referee, on the ground of the release, was referred; and, pending the reference, a judgment cancelling the release was obtained in an action brought by Pember for that purpose. Upon proof of the foregoing facts the referee reported in favor of allowing the claim, and application was made to confirm the report.

At the same time an application was heard to confirm the report of the same referee upon the accounting by the assignee. Objections were made to the account on the ground that the charges by the assignee for professional services of his counsel, especially in contesting the claim of Pember, and charges for the services of a book-keeper, were excessive; and on other grounds which are stated in the following opinion, rendered August 31st, 1881.

Chauncey B. Ripley and *Samuel Jones*, for Milo W. Pember, the creditor.

George B. Ashley, for John S. Hulin, and *George W. Galinger*, for Reynolds, other creditors.

Thomas F. Wentworth, for the assignee.

Van Brunt, J.—The irregularity in the proceedings of

the assignee in reference to the accounting makes it impossible to confirm the referee's report.

There is no affidavit of service of the notice to creditors to produce their claims before the assignee, as prescribed by the rules of this court.

It appears affirmatively that the citation was not served upon certain creditors who had filed claims with the assignee. It is true that the referee upon the reference has endeavored to cure this irregularity, but I find no authority in the statute authorizing the referee to usurp the powers of the court. These creditors had the right to be heard upon the application for a reference, and neither the assignee or any other person or court can deprive them of that right. It would seem, therefore, that the order of reference to take and state the accounts was entirely irregular and conferred no authority upon the referee.

It further appears from the papers which have been submitted that the citation was served upon the creditors whom the assignee claims to have served by mail, and it does not appear that there was any authorization by the court that the service should be made in that way. The referee's report as to the claim of Milo W. Pember seems to me entirely correct, and should be confirmed.

For these reasons the referee's report cannot be confirmed, and for these, if for no other.

Upon a subsequent referee's report on the accounts of the assignee, the following opinion was rendered January 9th, 1882.

Van Hoesen, J.—The fees of the referee are to be taxed by the clerk. If there be dissatisfaction with the taxation made by him, an appeal lies to the court. Though the statute does not prescribe the fees payable to a referee in an assignment proceeding, there has been a general understanding that the same rate of fees shall be allowed as in an ordinary action. In these assignment matters, one thing must be borne in mind—that the duties of a referee do not consist merely in presiding at the examination of witnesses. The most arduous

and vexatious of his duties is the auditing and examination of the accounts and vouchers in those cases in which there is a serious contest over the allowance of disputed claims. For these services, though they are not performed under the eye of the attorneys, the referee is to be paid; and in taxing his fees, the clerk is bound to ascertain, by the affidavit of the referee and such other testimony as may be offered, how much time and how much labor the referee has devoted to the particular case. Time necessarily spent in auditing and examining accounts is "time spent in the business of the reference" (§ 3296). If an extortionate bill is presented, the court can always protect the estate.

From my examination of the testimony, it appears to me that Mr. Todd and Mr. Galinger do not state correctly the part taken by the assignee in resisting the payment of certain claims. The assignee did not dispute the right of the preferred creditors to be paid in the manner prescribed by the assignment. He did not attempt to defeat the execution of the assignment under which he acted, but he did contend that events had taken place since the execution of the assignment which entirely altered the position of those who held the preferred demands. He said in effect: "Mr. Pember, you have released your claim, and that claim is, therefore, no longer a claim against the estate." With respect to the claim of John Schaller, the assignee likewise contended that it had ceased to be entitled to the preference which it had by virtue of the assignment. This was not to dispute the validity of the assignment. It was analogous to the action of a tenant, who, though he could not dispute his landlord's title, could say that his landlord had been paid. The fees of counsel employed to conduct the litigation arising out of those claims should be allowed to the assignee. He was protecting his trust in contesting those claims, though it turned out that the court did not sustain the views of his counsel as to the law applicable to those cases.

The retainer in the Pember matter ought not, in my opinion, to be allowed. The attorney was regularly employed by the assignee, in the business of the assignment, and, there-

fore, was not in a position to claim a retainer. The theory of a retainer is thus stated by the Supreme Court of Maine, in *McLellan* v. *Hayford* (24 Alb. L. J. 536): "The proper scope and application of the right to charge retainers is to remunerate counsel for being deprived, by being retained by one party, of the opportunity of rendering services to the other, and receiving pay from him." I do not mean to say that the law of Maine with respect to the right to charge retainers is the law of New York, but I do say that the Supreme Court of Maine correctly stated the principle upon which retainers are allowed. An attorney who is employed by the assignee as his general adviser in all matters relating to the assignment, puts himself in such a position by becoming such general adviser that he cannot ask a retainer in such suits as he is called on to try in the course of his regular duties. He is to be paid, of course, but he is not to be allowed anything as a retainer.

In a single case, a fee of twenty-five dollars for bringing a suit in the Marine Court might not be too large, but where a large number of suits are to be brought, for the purpose of winding up an insolvent estate, and where all those suits are placed in the hands of one man, or of one firm, I think a smaller rate of compensation sufficient, especially where all the actions are settled without a trial. I think ten dollars in every case, instead of twenty-five dollars, a sufficient compensation; and the bill of the attorneys should be reduced accordingly.

The compensation to Hopkins, the book-keeper, does not seem to me extravagant, though it was large enough. Perhaps, if the data had been given me, I might know better than I know now what the charge of Hopkins ought really to have been. With the light that I have, I can do no more than allow the charge to stand.

The report of the referee, as it will be modified by the foregoing suggestions, will be confirmed.

Application granted.

ROBERT MCMURRAY, Plaintiff, *against* ROBERT HUTCHESON *et al.*, Defendants.

[SPECIAL TERM.]

(Decided July, 1880.)

After an assignment for the benefit of creditors by a building contractor, one of his subcontractors filed a mechanic's lien upon the buildings. The assignee discharged the lien by depositing the amount of it with the county clerk, completed the performance of the work under the contract of the assignor, and received the money payable thereupon. *Held*, in an action to foreclose the lien, that the lienor was entitled to the money deposited to discharge the lien, with costs of the action to be paid out of the assigned estate.

TRIAL by the court of an action for foreclosure of a mechanic's lien.

The lien was filed by the plaintiff, Robert McMurray, for work done by him upon buildings owned by the defendant, Robert Hutcheson, under a subcontract with John Jennings, the principal contractor, who had previously made a general assignment for the benefit of his creditors to William E. Price, without completing the work under his contract. Other facts are stated in the opinion.

The action was brought by McMurray against Hutcheson, Jennings, and Price, the assignee, and was defended only by the assignee, who claimed that as the lien was filed after the assignment by Jennings, the plaintiff was only entitled to share in the assigned estate as an ordinary creditor.

George F. Langbein, for plaintiff.

R. S. Johnson, for defendant.

VAN HOESEN, J.—The contractor Jennings made, on the 13th day of January, 1880, an assignment for the benefit of his creditors. On the following day, the 14th, the plaintiff, who was subcontractor under Jennings, having completed his

contract, filed his lien under the mechanic's lien act. The lien was afterwards discharged by the payment of the amount thereof to the county clerk. This payment was made by Mr. Price, Jennings' assignee. Price made the payment because he had made an arrangement with Hutcheson, the owner of the buildings, to go on and finish Jennings' contract. He fully performed Jennings' contract and obtained the money which was payable thereunder to Jennings. McMurray has brought his action to foreclose his lien, and the question is, who is entitled to the money which Price deposited with the county clerk, McMurray, the lienor, or Price, the assignee? The equities are all in favor of McMurray, and the decisions of this court seem to me to entitle him to recover. Price, not for himself but for the benefit of the assigned estate, did the work which his assignor had left undone and obtained from Hutcheson payment, not only for what he did but also payment for the work which had been done by McMurray. Is it fair that he should retain what was honestly coming to McMurray?

Again, he assumed the contract of Jennings with Hutcheson, and by doing so placed himself in Jennings' shoes, so that whatever Jennings would be bound to do he is equally bound to do. The case is the same as if Jennings himself had performed the contract, and the rights of McMurray are the same as they would then be.

The cases in this court which I have referred to are *Henderson* v. *Sturgis* (1 Daly, 336), and *Oates* v. *Haley* (Id. 338).

The plaintiff is entitled to judgment, with costs payable out of the Jennings estate, but not by the assignee personally. My intention is that the costs shall be paid before any claims owing by Jennings have been satisfied, but I cannot direct the assignee to pay them forthwith.

Judgment for plaintiff.

In the Matter of the Assignment of EDWARD G. WARD *et al.* to GEORGE S. DIOSSY for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided August 4th, 1880.)

The duty of an assignee for the benefit of creditors is to uphold his trust, not to impeach it; he cannot object to the payment of a creditor preferred in the assignment, on the ground that the preference is fraudulent.

Upon an application by a creditor for a partial accounting by an assignee, and for the payment of the whole or part of such creditor's claim, it is discretionary with the court to order such payment or not.

APPLICATION by a creditor preferred in a general assignment for the benefit of creditors for an accounting by the assignee and the payment of the preferred claim.

The assignors, Edward G. Ward and Seymour S. Peloubet, composing the firm of Ward & Peloubet, by their assignment for the benefit of creditors preferred the claim of Israel C. Ward, by whom this application was made. The facts are stated in the opinion.

VAN HOESEN, J.—It is the duty of a trustee to uphold his trust and not to impeach it, and for that reason, if there were no other, Diossy would not be permitted to show that the assignment which he accepted and which he has been executing was in fact fraudulent and void as against creditors of his assignors. For him to ask the court to adjudge the preference to Israel C. Ward to be fraudulent and the assignment void would be to attack the very title under which he claims. If the assignment be void he is not the assignee of Ward & Peloubet and he has no right as a mere volunteer to make any objection to any disposition of the estate which any creditor of that firm may apply for.

It is said that this, though formerly the law, is so no longer, and that chapter 314 of the Laws of 1858 does by its

very terms authorize an assignee, no less than an executor, administrator, receiver or trustee of the estate of an insolvent debtor or an insolvent corporation, partnership or individual, to disaffirm and treat as void any act, transfer or agreement done or made in fraud of the rights of any creditors (themselves included) interested in any property of right belonging to the insolvent estate.

The statute provides that a fraudulent transfer made by an insolvent decedent or by an insolvent corporation, partnership or individual is to be impeached by an action brought against the fraudulent transferee. Where the fraudulent transfer is an assignment under the General Assignment Act of 1877, is the assignee to sue himself and to recover from himself as assignee, property which when recovered he must proceed to distribute under the fraudulent and void assignment? It is evident from this mere statement of the proposition that it was not the intention of the legislature, that an assignee for the benefit of creditors should attack the very charter by which he holds. Though the meaning of the act of 1858 is not difficult of ascertainment, it is not now necessary to construe it further than to say that it does not empower an assignee for the benefit of creditors to impeach the assignment under which he acts. I decline, therefore, to permit the assignee to show that the claim of Israel C. Ward was fraudulently preferred, and that it ought not to be paid, but that the other provisions of the assignment are valid and should be carried out. The assignment must all stand or be set aside entirely.

Where an application is made for a partial accounting, as in this case, and for payment of the whole or part of a creditor's claim, it is discretionary with the court to order or not the payment to be made. This is obvious from the language of subdivision 4 of section 20 of the General Assignment Act, which authorizes the court to direct that such a payment be made "as circumstances render just and proper."

In the case before me it is evident that the claim, payment of which I am asked to compel, is in reality the private debt of one of the assignors, and not a firm debt at all. It ought

not to be paid out of the firm assets, if any creditor of the firm who is in a position to assail the assignment is making an effort to bring the question of the legality of the assignment before the court; and the affidavits show that two creditors, one with an execution, and the other with an attachment, have caused the sheriff to levy upon a part of the assigned estate. Though the assignee would incur no risk if he should pay the claim of Israel C. Ward in obedience to an order of the court, it may be that these creditors who have seized the property would lose their debts if so large a sum as three thousand dollars were now paid to Mr. Ward. It is true that these creditors are not before the court on this application, and that they have not applied for the court's protection, but nevertheless, all the facts appearing, I think it better not at this time to order the assignee to pay Mr. Ward.

This must not be considered as a decision adverse to Mr. Ward's right to recover the money from the assignee. Unless the assignment be successfully impeached by some creditor in a position to attack it, the claim of Mr. Ward must eventually be paid by the assignee.

No costs to the assignee.

Application denied.

In the Matter of the Assignment of Richard F. Edwards to John Creighton, (Joseph Annin substituted as Assignee) for the Benefit of Creditors.

[Special Term.]

(Decided August 4th, 1880.)

Upon an accounting by an assignee for the benefit of creditors who asks to be relieved from the trust, evidence of the value of the assigned estate when turned over by him to his successor is admissible.

The costs of such an accounting are ordinarily to be borne by the trust fund; but if the assignee, to serve his own ends or to suit his own convenience, refuses to go on with the trust, he must pay the costs which his conduct occasions.

When an assignee for the benefit of creditors has incurred liability for rent by retaining premises occupied by the assignor, in determining whether such rent shall be charged to the estate or to the assignee personally, the question is, did the assignee in so doing act as a cautious and prudent man would have acted in his own affairs.

Application to confirm the report of a referee upon an accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

Van Hoesen, J.—Why the referee should have refused to permit the contestants to show the value of the assigned estate at the time Creighton turned it over to Annin, the substituted assignee, I am at a loss to discover. It certainly was proper for the contestants to prove if they could that the assigned estate had diminished in value whilst in Creighton's hands, and that Creighton was responsible for such diminution. The evidence which was offered, and which the referee rejected, was directed to that very point. It may very well be that the estate consisted of articles not of a fluctuating value, and that the probabilities are that the property did not deteriorate during the short time of Creighton's assigneeship, but nevertheless the evidence was competent. The matter must be remitted to the referee that the evidence offered and rejected may be received.

With respect to the point that the costs of this accounting should be borne by Creighton, and not by the trust fund, I will make this suggestion. The contestants did not show why Creighton asked to be relieved from his trust. The papers showing this may be on file, but they were not before me on this motion. I cannot say that such a state of facts exists as requires the court to order the expenses incident to the appointing of a new trustee to be paid by the retiring trustee. The rule is that a trustee shall not capriciously refuse to carry out the trust which he assumed. But if

complicated questions arise out of the administration of the trust—questions not merely personal to himself, but appertaining to the execution of the trust, and such questions raise difficulties not foreseen when the trust was accepted, the trustee may properly ask the court to relieve him; and the costs incident to the accounting and to the appointment of his successor will be borne by the estate. But if the trustee, to serve his own ends or suit his own convenience, refuses to go on with his trust, he and not the estate, must pay the costs which his conduct occasions (*Forshaw* v. *Higginson*, 20 Beav. 485; *Howard* v. *Rhodes*, 1 Keen, 581; *Greenwood* v. *Wakeford*, 1 Beav. 576).

As to the liability of the estate for the rent of the premises hired by the assignee from Oxley and Giddings, I will say that I do not see why upon the evidence taken before the referee either Creighton or the estate should be answerable for it. The rule laid down by this court in *Journeay* v. *Brackley* (1 Hilt. 447), would probably exempt the assignee from liability, provided the whole truth appeared on the hearing before the referee, and if he be not liable of course the estate is not. But if, as may be the case, the assignee has made himself responsible, the question still remains, ought the estate to be charged with the rent? I shall ask the referee to pass directly upon this question: did Creighton, in keeping the store and premises which Edwards had occupied, and in incurring a liability for rent to the amount of about $1,300, act as a cautious and prudent man would have acted in his own affairs? (See *Litchfield* v. *White*, 7 N. Y. 438.)

An order may be entered sending the case back for further proof, and for an answer to the foregoing inquiry.

Report referred back.

In the Matter of the Assignment of GEORGE THORN to DAVID K. SCHUSTER for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided January 22d, 1881.)

Proceedings taken by creditors and other interested parties under the assignment acts are special proceedings. The provisions of section 779 of the Code apply to them. An application by a creditor for a citation to an assignee is a motion, and motion costs may be granted thereon, and a subsequent application by the same party will be stayed until the costs of the former application are paid.

APPLICATION for a citation to an assignee under a general assignment for the benefit of creditors to account.

The application was made by Joseph Reiss, a creditor of the assignor. A previous application by him had been denied, with costs, which remained unpaid.

J. F. DALY, J.—The proceedings of this petitioner, Joseph Reiss, creditor, are stayed until the costs of his former petition are paid. The provisions of section 779 of the Code apply to applications under the Insolvent Assignment Act. Proceedings taken by creditors and other interested parties for the enforcement or protection of their rights under insolvent assignments are special proceedings (Code, §§ 3333, 3334, 3343, subd. 20). An application by a creditor for an order directing a citation to issue and compelling the assignee to account is a motion (Code §§ 767, 768). Motion costs may be allowed on granting or refusing the application (§ 3240). When motion costs are not paid, the proceedings of the party are stayed (§ 779). This application is therefore dismissed, with ten dollars costs.

Application dismissed, with costs.

In the Matter of the Assignment of NEIL MCCALLUM *et al.* to GEORGE SILVER for the Benefit of Creditors. Application of CHARLES HAUSELT.

[SPECIAL TERM.]

(Decided February 3d, 1881.)

If an assignment for the benefit of creditors gives a preference to a debt which the assignor did not owe, it will be adjudged fraudulent in an action brought by a creditor, but in the absence of objections from creditors, the assignee is bound to pay the debt.

The assignee may show that the debt has been extinguished since the assignment was executed.

An assignment made a preferred debt of two notes made by the wife of one of the assignors. After the assignment went into effect, the holder of those notes surrendered them to the wife, and took in their stead the note of the insolvent assignors. No creditor had objected to the preference or to the assignment, and the holder of the note applied for an order to compel the assignee to pay the note as a preferred debt. *Held*, that unless the notes given by the wife were in force, the holder of the note given in their stead had no claim upon the estate; and that until he had established by judgment his claim against the wife, he could get no aid from this court against the assignee.

APPLICATION by a creditor preferred in a general assignment for the benefit of creditors for payment of the preferred claim.

The application was made by Charles Hauselt upon a preference in the assignment made by Neil McCallum & Co., copartners, for the benefit of their creditors. The facts are stated in the opinion.

VAN HOESEN, J.—Neil McCallum & Co. owed Hauselt nothing, but Mary McCallum, Neil's wife, owed him the amount of two notes. Neil McCallum & Co. made an assignment for the benefit of creditors, in which they made Hauselt a preferred creditor for the amount of the notes which Mary

owed him. After this, an arrangement was made between Hauselt and Neil McCallum by which the notes of Mary were given up to Neil, who then gave Hauselt in lieu thereof a note made by the insolvent firm of Neil McCallum & Co. The giving of a preference to one whom the assignor does not owe —and that is the case presented to me—is a fraud on creditors; but it is for the creditors, and not for the assignee, to complain of the fraud. That the preference is fraudulent would be no reason for a refusal by the assignee to pay, if the creditors did not complain. A conscientious assignee might refuse to act, and call on the court for advice as to his duty; and the court might order payment to be suspended till the creditors had had an opportunity to acquaint themselves with the facts. The assignee in this matter thinks that Hauselt has been paid; and I am of the same opinion, notwithstanding Mr. Hauselt's legal conclusions to the contrary. If he has not been, let him establish his right to enforce the payment of the notes from Mary Mc Callum.

The matter may be summed up thus: What claim was preferred? A claim against Mary McCallum upon her two notes. Has Hauselt any claim now upon Mary McCallum? If he has, then, unless the creditors of Neil McCallum & Co. object, he has a claim upon the funds in the hands of the assignee; if he has not, it is because the notes of Mary McCallum have been extinguished by the transaction which took place between Neil McCallum and himself; and the assignee cannot be compelled to pay a debt which has been discharged since the execution of the assignment. But the burden of establishing the liability of Mary McCallum ought not to be thrown upon the assignee. Hauselt created the difficulty by his dealing with Neil McCallum after the assignment had been executed, and it is evident that he dealt with his eyes open, for he admits that he knew of the assignment, and upon him, therefore, should rest the responsibility of proving that the claim against Mary McCallum is still alive. The preference in his favor is only collateral security for the notes, if they be still outstanding as a claim against Mary McCallum, and there is no reason why he should not resort to the principal debtor

before he attempts to enforce his doubtful claim against the surety. As I said before, if he has no claim against Mary McCallum, he has no claim upon the assignee.

I shall deny the application, with $10 costs, with leave to renew it, after he has established his right to recover upon the two notes which he surrendered to Neil McCallum.

Application denied, with costs, and with leave to renew.

In the Matter of the Assignment of CHARLES S. FAIRCHILD *et al.* to WILLIAM E. MASTERTON for the Benefit of Creditors. Claim of ALEXANDER MASTERTON.

[SPECIAL TERM.]

(Decided February 8th, 1881.)

Where a reference of a disputed claim or matter under section 26 of the Assignment Act (L. 1877, c. 446; L. 1878, c. 318) is ordered by the court, the proceeding before the referee is a trial of the issues involved in the dispute, and an order of reference "to hear and determine" is proper. The decision of the referee can only be reviewed by the general term of this court.

Costs in such a case are allowed to the successful party as in an action, and must be taxed. An extra allowance, as in an action, may also be awarded. Referee's fees may be allowed at the rate of six dollars per day.

APPLICATION to confirm the report of a referee upon a disputed matter under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

J. F. DALY, J.—On petition of Mills & Gibb, Muser Brothers, Oscar Delisle & Co., Strange & Brother, Meyerheim & Kempner, Passavant & Co., Lawson Brothers, E. R. Dill-

ingham, Meyer & Dickinson and Gardiner Hall, Jr. & Co., creditors of the assignors, an order of reference was made by this court to George B. Pentz to hear and determine the matters set forth and referred to in said petition pursuant to the statute in such case made and provided (Assignment Act, § 26, L. 1877, c. 446; L. 1878, c. 318). The statute provides that "The Court, in its discretion, may order a trial by jury or before a referee of any disputed claim or matter arising under the provisions of this act or the acts hereby amended." The proceeding before the referee is therefore a trial—a trial of all the issues involved in the disputed claim or matter. The order of reference requiring the referee to "hear and determine" was proper in this case, because that is the duty of a referee who tries the issues. No review of a determination by a referee in such a case can be had at Special Term. I shall therefore not consider the exceptions, but leave the parties who consider themselves aggrieved to their appeal. This view of the practice under the 26th section of the act is, I find, taken by all the judges of this court whom I have consulted.

Under the same section of the act the court is authorized to award reasonable counsel fees and costs and determine which party to the dispute shall pay the same.

In this case Alexander Masterton, one of the schedule creditors to the amount of $10,000, was charged by the petitioning creditors with liability for all the debts of the firm making this assignment, on the ground that he was a secret or dormant partner in the concern, and that his claim of $10,000 was not a debt due him from the assignors but was in effect the amount contributed by him to the capital of the concern; and the petitioners also charged that if the said Masterton were a creditor his debt was invalid for usury.

All the issues raised by the petition and tried by the referee between Alexander Masterton and the petitioning creditors, were determined by the referee in favor of the former. I can find no equitable considerations which should move the court to refuse costs to the prevailing party in such a case. It is true that it is not likely that the petitioning creditors would have instituted this prosecution without strong suspicion that

the position they took would be borne out by the facts; but that alone affords no ground for relieving them from costs. Alexander Masterton did not mislead them, nor involve them in the litigation by any act of his. They took the proceeding to benefit themselves, believing that the legal effect of the dealings between the assignors and A. Masterton was to make him a copartner, or at least to affect the validity of his debt.

Costs and an extra allowance will be awarded the prevailing party, to be paid by the petitioning creditors. Costs to be taxed at the same rate allowed for similar services in an action. Allowance of five per cent. on $10,000.

The assignee will not be allowed costs, but will be allowed any necessary disbursements. There was no reason for his retaining counsel in the matter.

The report will be confirmed and judgment entered against the petitioners for the sums hereby allowed.

Referee's fees will be taxed at $6.00 per day under the Code.

Order accordingly.

In the Matter of the Assignment of Frank Leslie to Isaac W. England for the Benefit of Creditors.

[Special Term.]

(Decided February 14th, 1881.)

After the filing of an assignment for the benefit of creditors, nearly all the assignor's creditors executed an instrument empowering a committee of themselves to control and manage, compound and release their claims, and consenting that the business of the assignor might be continued by the committee themselves, or through the assignee or others. The business was carried on for a time by the assignee, and a dividend was paid by him to the creditors out of the proceeds. Subsequently an agreement was entered into between the committee, on behalf of the creditors represented by them, and the assignor, for a composition, upon the payment by the assignor to those creditors of a specified percentage of the portion

of their claims remaining unpaid. The agreement also contained provisions for the transfer by the assignee of the assigned estate, upon certain conditions, to the assignor, and for the continuance by the latter, under certain restrictions, of his former business, for the purpose of obtaining thereby the means of paying the amount of the composition. The estate was not, however, so transferred to the assignor, and the business was continued by the assignee, with the assistance of the assignor, and dividends were paid to the creditors out of the proceeds; but before the dividends so paid had reached the amount of the composition, and before the expiration of its terms, the assignor died. *Held*, that his personal representatives, upon paying to the creditors the amount required, in addition to the dividends already paid, to complete the payment of the composition, were entitled to be subrogated to the rights of the creditors It was no objection to this, under the circumstances, that such dividends had been paid by the assignee, instead of by the assignor, they having been in fact paid out of the fund contemplated by the agreement.

Application by the executrix of a deceased assignor for the benefit of creditors to be subrogated to the rights of his creditors upon payment to them of the amount remaining unpaid upon a composition agreement made between them and the testator.

On the 8th of September, 1877, Frank Leslie made an assignment of all his property to Mr. Isaac W. England for the benefit of his creditors. On the 22nd of October, 1877, an instrument was executed by nearly all the creditors in the words and figures as follows:—

"*Whereas*, at a meeting of the creditors of Mr. Frank Leslie, held at the city of New York, on the 13th day of September, 1877, a committee was appointed with instructions to investigate fully the affairs of Mr. Leslie, and to report, at a subsequent meeting to be called by their chairman, such recommendations as in their judgment would best promote the interests of the creditors;

"*And* the said committee having, at a meeting called by their chairman, and held on the 5th day of October, 1877, at the office of the American News Company, made their report and recommended in substance that, for the purpose of securing unity of interest and of action, the creditors should appoint a board of trustees, to consist of five (5) of the creditors,

with authority to act for the whole body of the creditors, in the matter of the management and settlement of the estate, in so far and in such manner as they shall be advised by counsel can legally be done :—

"*Now therefore*, we, the undersigned creditors of Mr. Frank Leslie, do hereby and for the purpose aforesaid make, constitute and appoint Alexander H. Rice, John H. Hall, Edward Goodwin, Jr., William D. Wilson, and William H. Parsons our true and lawful attorneys, for us and in our names to take control and management of our several claims and to exercise every right and power in relation to our several claims and towards the estate of Frank Leslie that we or either of us, by virtue of our said claims, are entitled to exercise towards the same, to meet together in committee, and to advise and act in our interests by vote of the majority, and to compound, release and compromise the said claims, and to exercise every power in relation to the same and to the control and management of the said estate that we have or can delegate or assign ; and we severally consent that such a contract or agreement may be made with Mr. Frank Leslie for his employment in and about the business of the estate as to our attorneys may seem proper, not to exceed, however, twenty per cent. of the net profits thereof, and we further consent that, if deemed advisable, the business as heretofore conducted by Mr. Leslie may be maintained and continued by our said attorneys by themselves or through the assignee, or such person or persons as they may delegate in our interests, until the 31st day of December, 1880, inclusive ; giving our said attorneys full power to retain or employ the services of such and so many persons in the business aforesaid as to them shall seem best, and to do everything whatsoever in the premises as fully as we could do if personally present, with authority to fill any vacancy in the said board by vote, hereby ratifying and confirming what our said attorneys, or such substitute so elected, shall lawfully do or cause to be done.

"And we severally covenant and agree each with the other that during the period aforesaid allowed for the settlement of the estate, to wit: to the thirty-first of December, 1880, in-

clusive, we will take no proceedings at law or otherwise for the collection or enforcement of our respective claims; and that in case the business so to be carried on in our interest (if that course is resolved on) by our said attorneys, or by the assignee, or any person delegated by them, acting according to their best judgment in the premises, shall result in loss rather than gain, or by reason of fire, the elements or some unforeseen accident, be impaired or destroyed, that we will not make any personal claim therefor against our said attorneys, agents, or either of them, or their said agents, or against the assignee or any person by them intrusted on our behalf to act herein; but that such loss, if any, may be charged against the trust fund in their hands, or in the hands of the assignee, we relying upon those acting in our behalf not to continue the said business further when it shall become clearly apparent to them that the same cannot be carried on without loss. And we hereby consent that our attorneys or said assignee may suspend any publications or initiate any new ones as their judgment may dictate.

"And it is further understood and agreed by us that nothing herein contained is to be deemed to bind our said attorneys or their agent or agents to any particular course of action, it being our intention not to hamper our said attorneys in their action, but to empower them to act in our interests as changing circumstances may require, without restriction as to their course and with full authority to consent and act for us severally in the matter as fully as we might individually do.

"As the legal title of the estate is now vested in the assignee, it is understood and agreed that the above provisions authorizing the continuance of said business under the advice and with the co-operation of our said attorneys and the said immunity from personal liability for loss occasioned thereby, shall extend to such assignee.

"In the event of said business being carried on we are to receive eighty per cent. of the net profits thereof pro rata. If continued till December 31st, 1880, and the said eighty per cent. paid and the property not disposed of by sale or otherwise, then we consent to a reconveyance to said Leslie, of all

such machinery and other property connected with the publication business, as passed by the assignment of September 8th, 1877, to the assignee, to wit, what is commonly known as the 'business plant.' The net profits accruing up to January 1st, 1878, are to be divided pro rata among the creditors. If, in the exercise of their discretion by our attorneys, the business is closed out prior to the 31st of December, 1880, then we are to be paid our pro rata shares of the net proceeds.

"And we severally agree upon the closing up of the estate to give to our said attorneys or said assignees such other and further release as may be required to discharge them from liability in the premises."

On the 20th day of March, 1879, a certain other instrument was executed on behalf of said creditors with Frank Leslie in the words and figures as follows:

"An Agreement, made this twentieth day of March, 1879, between such of the creditors of Frank Leslie as became parties to the power of attorney dated the twenty-second of October, 1877, constituting Alexander H. Rice, John H. Hall, Edward Goodwin, Jr., William D. Wilson, and William H. Parsons, attorneys of the said creditors for the purposes and with the powers therein contained, as will more fully appear by reference thereto, by their said attorneys, parties of the first part, and the said Frank Leslie, party of the second part.

"*Whereas*, Said power of attorney authorized said attorneys to meet together in committee, and to advise and act in the interest of the said creditors by vote of the majority, and to compound, release and compromise the claims of the said creditors against the said Frank Leslie, and to exercise every power in relation to the same, and to the control and management of the assigned estate hereinafter mentioned, that the said creditors had, or could delegate or assign.

"*And whereas*, The said attorneys or committee did meet as aforesaid in committee, and acted therein by vote of the majority of the said attorneys or committee, and authorized the execution of this agreement on behalf of the said creditors.

"*And whereas*, The said Frank Leslie, at the City of New York, on the eighth day of September, 1877, duly made,

acknowledged, and delivered an assignment to Isaac W. England, of Ridgewood, in the State of New Jersey, doing business in the State of New York, of all and singular the lands, tenements, hereditaments, appurtenances, goods, chattels, stocks, promissory notes, debts, claims, demands, property, choses in action and effects of every description belonging to the said Frank Leslie, wherever the same then were, except such part as was exempt by law from levy and sale under execution, for the equal benefit of his creditors, ratably, without preference, as will more fully appear by reference to said assignment, recorded on the day and year last mentioned, in the County Clerk's office of the county of New York, where the said Leslie then resided and carried on his business.

"*And whereas*, The parties hereto have hereby come to a final compromise and settlement of all disputes and agreements existing or claimed to be existing between them.

"*And whereas*, The said assignee has been carrying on the business of the assigned estate for the account of the creditors, namely, the same business of publication as the said Leslie was engaged in up to the time of the said assignment, and has, out of the proceeds of the assigned estate, heretofore paid a dividend of ten per cent. of the face of the claims of the creditors under the said assignment, leaving due the creditors a balance of about three hundred and two thousand dollars, upon which balance the said Leslie proposes to pay fifty per cent., or about the sum of one hundred and fifty-one thousand dollars, on or before the 31st day of December, 1881, as is hereinafter more fully provided for, in satisfaction and discharge of the said claims. And the parties of the first part, in consideration of the promises and agreements of the said Leslie hereinafter contained, and of the sum of one dollar by them paid him, the receipt whereof is hereby acknowledged, hereby agree with him that the said fifty per cent. of the balance of their said claims, when paid, shall be in full compromise and discharge of their said claims respectively; and in consideration aforesaid hereby consent that the said assignee, Isaac W. England, now release, and do hereby authorize the said assignee now to release to the said Frank Leslie, the assignor, all and singular

the unadministered estate and assets embraced in the said assignment from the said Frank Leslie to the said Isaac W. England, bearing date the eighth day of September, 1877, or since acquired by the said assignee in the course of the said business, the said assignee being first paid therefrom the balance that may be due to him for his services in the premises, and a proper provision being made to protect and indemnify the said assignee against any indebtedness or liability that he has incurred in the conduct of the said business, and against all liability for rent or otherwise under the lease hereinafter mentioned; and further agree that they will hereafter, from time to time, upon request, sign, acknowledge and deliver, such further consent or authority which they can rightfully sign and acknowledge, to aid in and facilitate such release as aforesaid by the said assignee to the said Frank Leslie.

"*And* the party of the second part, in consideration of the premises and of the sum of one dollar to him paid by the parties of the first part, the receipt whereof is hereby acknowledged, agrees with the parties of the first part to pay to the said creditors respectively, fifty per cent. of the said balance of the face of their respective claims, on or before the 31st day of December, 1881, and at such earlier time and times, in installments, as hereinafter provided for; and also simultaneously with the execution hereof, to deliver to the said attorneys, namely, Alexander H. Rice, John H. Hall, Edward Goodwin, jr., William D. Wilson and William H. Parsons, his bond, of even date herewith, in the penal sum of two hundred thousand dollars, conditioned for the payment of the said sum of one hundred and fifty-one thousand dollars, on or before the 31st day of December, 1881, and also conditioned for the performance by him of all and singular the promises and agreements on his part herein contained, and which said bond is to be held by the said attorneys, for the benefit of the said creditors, for the payment of the said fifty per cent. of the said respective claims, and to be enforced only in case of default on the part of the said Frank Leslie in the performance by him of any of the conditions of the said bond; and he also further agrees with the parties of the first part to duly execute, ack-

nowledge, and deliver to the said Alexander H. Rice, John H. Hall, Edward Goodwin, jr., William D. Wilson and William H. Parsons, or to the survivors or survivor of them, simultaneously with the release to him, the said Leslie, of the unadministered part of said assigned estate, a chattel mortgage in due and usual form, approved by the counsel of the said mortgagees, upon all and singular the said unadministered assigned estate, original as well as since acquired by the said assignee in the course of business, and then existing, including all copyrights, trademarks, use of names of publications, rights of publication, and all things pertaining thereto, owned or used by the said Frank Leslie prior to the time of making the said assignment, to secure the payment and performance of the conditions of the said bond; and that the said mortgage shall contain the usual insurance clause in regard to loss or damage by fire, the insurance to be to the extent of seventy thousand dollars. And that he will, simultaneously with the giving of the said mortgage, procure insurance on the mortgaged premises to the extent of seventy thousand dollars, in companies approved by the said mortgagees, and deliver the policies thereof to the said mortgagees; and that the policies shall contain the usual clause of loss payable to the said mortgagees; and in case of loss by fire, the insurance money shall be forthwith expended under the direction of both parties in replacing the property destroyed, so that the business may be carried on as if no fire had occurred, as nearly as possible. And he hereby gives and grants to the said Alexander H. Rice, John H. Hall, Edward Goodwin, jr., William D. Wilson and William H. Parsons, and the survivors and survivor of them, an equitable mortgage and lien on the said unadministered estate, original and acquired, and proceeds, when the same shall be released to him by the said assignee as aforesaid, until he, the said Leslie, shall have duly executed, acknowledged, and delivered the said mortgage as aforesaid, and until he shall have delivered said policies of insurance as aforesaid.

"*And* he, the said Frank Leslie, further agrees with the parties of the first part, that a sub-committee of three of the said attorneys, to be appointed by said attorneys and the sur-

vivors and survivor of them, as a committee of the creditors, shall advise and consult with the party of the second part in respect to the discontinuance of any publications which are now being issued, or which may hereafter be issued; and that if it shall be found that any such publications are actually losing money over their cost of production, then such publications so losing money may be discontinued. And if, upon such consultation, all three of said committee shall be of opinion that such publication should be discontinued, then it shall be discontinued; and if it shall be proposed to start a new publication in addition to or in place of any that are now published, then the joint consent of said committee and the party of the second part shall be necessary in order to authorize such new publication.

"*And* he further agrees with the parties of the first part, that the said sub-committee, or a majority of them, or the survivor of them, until the said indebtedness shall have been paid, shall have the right to nominate, and also to remove from time to time and as often as a vacancy shall arise, and the party of the second part will appoint the person so nominated as the book-keeper and cashier, who shall respectively keep the books of the business and collect and disburse the funds, and that the cashier shall also act as a general assistant in the business.

"*That* the said sub-committee, or any of them, shall have the right at all times to examine and inspect the books, papers, and accounts of the business, which shall be kept in such manner as they shall prescribe, and have free access to all the operations of the business; and that all the moneys, checks, drafts, and notes which shall be collected shall be deposited by the cashier, forthwith, in the Nassau Bank, to be drawn only by checks signed by the party of the second part and countersigned by the cashier at the time when the payment is to be made; and in case of the absence or sickness of the party of the second part, the checks shall be signed by one of the said committee. That whenever there shall be any accumulation of money over and above the amounts due from the current liabilities, a dividend shall be declared in the discretion and

by the direction of the said committee, by a check drawn as aforesaid, and the amount paid shall be credited upon the bond as aforesaid.

"*And* the party of the second part further agrees that in the conduct of the business the party of the second part shall not purchase any machinery or permanent property beyond the value of one hundred dollars without the consent of the said committee.

"*And* inasmuch as a large portion of the property and material covered by the said mortgage in the regular course of the said business will be used and disposed of, and new property and material purchased with the proceeds in the regular course of the business (it being intended that such purchases shall be made for cash from such proceeds), the said Leslie agrees that the said committee shall have, and there is hereby granted to them, an equitable lien as security for the payment of the said bond, and the performance by said Leslie of the conditions thereof, on all such property and material acquired from time to time, until the amount of the said compromise shall be fully paid; and the said Leslie agrees that there shall also be paid from the said estate or business, the expense of the said committee of creditors heretofore incurred by them to their counsel for professional services, as well as any proper expense that the said committee may hereafter incur to counsel for professional services in respect of the matters or any of them mentioned or provided for in this agreement or in respect to their duties or other matters in the course of the performance of their duties; and he the said Leslie hereby consents to and approves of the amounts heretofore paid by the assignee for the professional services of the counsel of the said attorneys.

"*And* it is mutually agreed that the said Leslie, during the continuance of this agreement, may draw from the business two hundred dollars per week and no more for his personal expenses, and also at the rate of two thousand dollars per year in addition thereto in trade advertising.

"*It is mutually understood, and agreed*, in the event that the said fifty per cent. of the balance of the said claims shall

not amount to the sum of one hundred and fifty-one thousand dollars, or in case the same shall exceed the sum of one hundred and fifty-one thousand dollars, that the said Leslie shall pay fifty per cent. of such actual balance of the said claims, whether such fifty per cent. shall amount to more or less than the said sum of $151,000.

"*And* the said Leslie, in consideration aforesaid, hereby assumes and agrees to discharge out of the estate and funds now in the hands of the assignee, or hereafter arising out of the business, all indebtedness and liability incurred by the said assignee or by the creditors and every of them to the said assignee in the conduct of the business by the assignee up to the time that the same shall be released to the said Leslie as aforesaid, including all liability and rent passed and future, under any lease or hiring to the said assignee of all and singular the premises occupied by the said assignee in the conduct of the said business, and to fully indemnify and hold the said assignee and the said creditors and each and every of them harmless and protected in the premises.

"*And* the parties of the first part agree that they will not enforce payment of the said bond or mortgage, or enforce the said equitable lien, until the said Leslie shall make default in the performance of any of the conditions thereof; and thereupon the said Leslie agrees that the said mortgage may be foreclosed, and the said lien enforced, and that the said creditors or the said committee or a majority of them, and the survivors and survivor of them, in their own or his name or otherwise, and on behalf of the said creditors, may pursue any remedy at law or in equity by action, injunction, or otherwise, to protect and preserve the rights and interests of the creditors or of the committee, and to realize the amount agreed to be paid in composition as aforesaid or so much thereof as may then remain unpaid.

"*Inasmuch* as Mrs. Alfred Leslie, one of the said creditors, has notified the said attorneys of the revocation by her of the said power of attorney so far as she is concerned, and inasmuch as it is claimed that said power of attorney is irrevocable as to her, and that her attempt at revocation is inoperative, now it is

agreed between the parties hereto that said attorneys do not undertake to bind her by this agreement, unless they have a lawful right to do so.

"It is mutually agreed that any prepayment as hereinbefore contemplated on the said bond or compromise shall not entitle the said Leslie to any rebate of interest on such payment."

The assigned estate was never transferred by the said assignee to said Frank Leslie as contemplated by the said last mentioned agreement, and the said assignee in connection with the said Frank Leslie carried on the said business, and prior to the death of the said Frank Leslie, which occurred on the 10th of January, 1880, 35 of the 50 per cent. mentioned in the compromise agreement had been paid out of the proceeds of said business to the creditors. It being claimed upon the part of the creditors of said Leslie, that his death put an end to said compromise agreement, the executrix of the will of Mr. Leslie offered to said creditors to pay the remaining 15 per cent. upon being subrogated to the rights of said creditors.

This application was made to have the court determine whether or not the decease of Mr. Frank Leslie terminated and put an end to the compromise agreement of March 20th, 1879.

F. N. Bangs, and *Francis C. Bowman*, for I. W. England, assignee.

W. Fullerton, and *T. Darlington*, for Mrs. Leslie, executrix of the assignor.

R. O'Gorman, and *Mr. Whitehead*, for the members of the committee, and for D. A. Bullard & Sons, Campbell Hall & Co., William H. Parsons & Co., Alexander H. Rice, and Kendall & Co., creditors.

R. O'Gorman, also for Perkins & Goodwin, creditors.

Malcolm Campbell, for Robert Boyd, executor.

Sheldon & Brown, and D. T. Waldron, creditors, do not appear on this proceeding.

Van Brunt, J.—[After stating the facts as above.]—It seems to me reasonably certain that we cannot go astray in the construction of the compromise agreement of March 20th, 1877, if we bear in mind the provisions of that agreement, the purposes which were to be attained by its execution, and the relation of the various provisions to each other. It was undoubtedly the intention of both of the parties to that agreement to effect a compromise of the claims of the various creditors of Mr. Leslie, upon the payment of a smaller sum than the total amount due the said creditors, within a future period, and to provide Mr. Leslie with the means, within the period named, and produced by the management of the assigned estate under the supervision of a committee of the creditors and under certain restrictions contained in the said agreement, wherewith to pay the amount which he agreed to pay by the terms of the compromise agreement in full discharge of the claims of these creditors upon him. The instrument is entirely complete in both its branches.

It is a sufficient agreement of compromise if we strike from it all the provisions looking to the management of the property by Mr. Leslie during the time which was given to him to pay the amount for which the debts were compromised. This being the case, there is not necessarily any relation between the compromise agreement and those provisions in this agreement which relate to the management of the business, the profits of which business were to afford Mr. Leslie the means of paying the amount which he agreed to pay. If this is true, and an inspection of the agreement makes it apparent, then Mr. Leslie, the day after the execution of this agreement, had a right to pay the 50 per cent. therein provided to be paid, and to claim from the creditors a complete release and discharge from the debts owing by him to them. He was not necessarily bound to wait to pay the amount of the compromise until he should realize the amount necessary to make such payment from the profits of the business mentioned in the agreement. That privilege of conducting the business and realizing from the business such moneys was a concession to him, and not to the creditors. Therefore, there is nothing in

those parts of the agreement looking to a continuation of the business, which in any way affected Mr. Leslie's right to be released upon the payment of the 50 per cent. therein mentioned. If this is true, then it is difficult to see, Mr. Leslie having died, why the rights of Mr. Leslie have not descended to his successors in interest, and why they have not the right to comply with the terms of the compromise and pay the balance remaining unpaid, as the time to make such payment has not yet expired.

It was strenuously urged by the counsel for the creditors and the committee, who opposed this construction of the agreement, that it was a personal agreement between Mr. Leslie and his creditors, that as Mr. Leslie has died, and he cannot give that personal supervision to the business which the agreement contemplated, the agreement must necessarily fail. As far as the agreement for compromise is concerned being personal to Mr. Leslie, it is not more personal than every agreement of compromise between a debtor and his creditors. The inducement which moves a creditor to agree with a debtor to receive a less amount than the full sum of the debt in full discharge thereof, is usually the recollection of past profits made out of the trade between the creditor and the debtor, or the expectation that the debtor will continue business, and that future profits may be made sufficient to compensate for the loss then sustained; but it is not claimed that if a debtor has compromised with his creditors, payments to be made at a future day, and the debtor dies before all the payments are made, that his personal representatives have not the power to complete the payments contemplated by the compromise and release his estate from the payment of the debts in full, in conformity with the terms of the compromise.

The argument which I have suggested would undoubtedly be fatal to this compromise agreement if it was necessary that this business should be continued as is contemplated by the terms of the agreement, in order to produce the balance of the fifty per cent. remaining unpaid, because I think it clearly appears that in case of the continuance of the business to realize the funds sufficient to pay the balance of the fifty per cent. remaining unpaid, the creditors would have the right to claim

the personal attention, supervision and experience of Mr. Leslie in the management of the business.

But, as I have already suggested, this was a concession to Mr. Leslie. He had the right to waive the means of raising the money to pay the amount of the compromise, and his personal representatives, coming forward to pay the whole amount due under the compromise without seeking to raise the money from the profits of the business, would seem to be entitled to the benefits thereof.

I am unable to see why the personal representatives of Mr. Leslie are not his successors in interest in reference to the whole of this matter.

It was claimed that there was no right of property to descend to such personal representatives arising out of this transaction. There certainly were equities in Mr. Leslie's favor which could descend, and any surplus which might belong to his estate after the payment of his debts undoubtedly descended to his personal representatives. If that surplus was to be increased by reason of an unfulfilled compromise agreement, and the terms for fulfilling that compromise agreement had not expired, his personal representatives had the right to comply with those terms, make the balance of the payments required to be made thereunder, and reap the benefits thereof, precisely the same as though the terms of the agreement had not had appended to it the peculiar provisions allowing Mr. Leslie to raise the money out of the proceeds of the business to be thereafter conducted by him to make the payments provided for by the agreement.

It is urged by the counsel for the creditors that the thirty-five per cent. paid to the creditors since the making of the agreement of March, was paid by the assignee and not by Mr. Leslie, and that, therefore, Mr. Leslie could not have the benefit of that payment. The difficulty with that proposition is that, although the money was paid by the assignee to the creditors, it was paid out of the very fund out of which the creditors had said that Mr. Leslie should be permitted to pay the amount of the compromise, namely, out of the profits of the business. The agreement of the creditors with Mr. Leslie was that the fifty per cent. should be paid out of

the results of the assigned property ; the thirty-five per cent. paid by the assignee formed the very fund which the creditors had consented should be used by Mr. Leslie in the payment of the amount of the compromise.

The papers submitted upon this motion show that the creditors have failed to carry out the agreement upon their part by which Mr. Leslie was to be put in full possession of this property for the purpose of raising the money wherewith to pay the compromise. It therefore comes with very ill grace from them to say that Mr. Leslie personally has not paid the thirty-five per cent. which has been paid by the assignee on account of these claims. If the creditors had carried out the provisions of the agreement upon their part, Mr. Leslie would have made the payment out of that very fund; but as they have not done so, so as to enable the assignee to transfer the property to Mr. Leslie, the assignee has made the payments out of the identical fund which was to be transferred to Mr. Leslie.

It seems, therefore, to be difficult to come to any conclusion adverse to the present claims of the representatives, because some other person applied the very fund which Mr. Leslie, under the compromise agreement, had the right to apply to the payment of the amount of the compromise.

I have, therefore, come to the conclusion that the estate of Mr. Leslie, upon payment of the balance due upon the compromise, has the right to be subrogated to the claims of the various creditors.

Application granted.

LEWIS SCHIELE *et al.*, Respondents, *against* RICHARD HEALY *et al.*, Appellants.

(Decided May 6th, 1881.)

An assignment, by members of an insolvent copartnership, of the firm property, for the benefit of creditors, is rendered fraudulent and void by the preference of an individual indebtedness of one copartner.

APPEAL from a judgment of this court setting aside a general assignment for the benefit of creditors as fraudulent.

The defendants Healy and Conway were partners in trade. In December, 1878, they made an assignment for the benefit of creditors, to the defendant Cunningham, who was a preferred creditor for $1,604.50 made up of two promissory notes, and owing to him by the said assignors. It appeared upon the trial, that both these notes were dated the same day, to the same payee, but the smaller was signed by the defendant Richard Healy, individually. The plaintiffs were judgment creditors of the partnership, and brought this action to set aside the assignment as fraudulent, and a decree to that effect was given by the court below. The defendants appealed.

Alvin Burt, for appellants.

John J. Adams, for respondents.

BEACH, J.—[After stating the facts as above.]—It is fair to conclude from the evidence given upon the trial, that the note for $200 was given by the defendant Healy for an individual debt. Thomas J. Conway, the payee, and who transferred it to the defendant Cunningham, states directly and without qualification that the defendant Healy owed him a debt of $400 before the formation of the firm, the half of which was represented by this note, while the balance was included in the one for $1,200, signed with the firm name. Upon his cross-examination he states that

Healy told him the $400 was used in his business, which in no way tends to change the obligation to a firm indebtedness, because Healy had been doing business for some time, before the co-partnership of Healy and Conway was formed. Nor is the force of this evidence weakened by the testimony of defendant Conway, that he was to assume one-half of the indebtedness for $400, because that portion was included in the firm note for $1200, while the balance was represented by the individual obligation of Healy. This tends to establish a direct contradiction of that statement. In any event, were it true, the sum would have been a portion of the capital of the partnership, and in providing it each partner seems to have intended to contract a separate personal obligation.

The assignment was of the firm property, and the question arises whether or not it was rendered fraudulent and void, by the preference of an individual indebtedness of one copartner.

In *Kirby* v. *Schoonmaker* (3 Barb. Ch. 46), the case differed from the one at bar. The assignment covered both individual and partnership property, and gave preference to the creditors of the firm, except in two instances of individual indebtedness, upon which the contention of its invalidity was founded. "These debts (says the learned chancellor), were not directed *to be paid out of the effects of the partnership generally*, but the separate debt of each copartner was directed to be paid out of his portion of the proceeds of the joint property, and of his separate property . . . The case would have been entirely different if copartners who were insolvent and unable to pay the debts of the firm, either out of their copartnership effects or of their individual property, had made an assignment of the property of both, to pay the individual debt of one of the copartners only. For an insolvent copartner who was unable to pay the debts which the firm owed, would be guilty of a fraud upon the joint creditors, if he authorized his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property was liable at law or in equity."

The creditors of a copartnership are legally and equitably

entitled to payment from the firm assets. If, as appears by the proofs, the note for two hundred dollars was an individual debt of the defendant Healy, the provision for its payment from the firm assets, in preference to demands against the partnership, was a fraud upon those creditors, and should invalidate the assignment. Neither the firm, nor the other partner Conway, was in any way liable upon the note, and its indorsement with the firm name, by the maker Healy, after or at the time of the assignment, was a fraudulent act showing a like intent. If the conclusion of fact is well founded, the decision of the court of appeals in *Wilson* v. *Robertson* (21 N. Y. 587), in addition to the adjudication *supra*, seems to dispose of the case. The court say, that the insertion of a provision to pay individual debts out of partnership property, in an assignment of the partnership effects of an insolvent firm, "is a violation of the statute in respect to fraudulent conveyances, and furnishes conclusive evidence of a fraudulent intent on the part of the assignors . . . The prior right of the creditors of the firm to its effects cannot be impaired by any consideration having reference to the interests of the individual partners; and anything which defeats this right or hinders or delays such creditor in enforcing payment of his demand against the firm, from the firm property, is a violation of the statute, and a fraud upon such creditor."

The case of *Turner* v. *Jaycox* (40 N. Y. 470), does not bear upon the point. The decision was based upon the fact, that although the debt preferred was not originally contracted by the firm, they had subsequently for a good consideration agreed, and became liable, to pay it.

The judgment must be affirmed with costs.

Charles P. Daly, Ch. J., and J. F. Daly, J., concurred.

Judgment affirmed, with costs.

In the Matter of the Assignment of WILLIAM BUTLER DUNCAN *et al.* to WILLIAM D. SHIPMAN for the Benefit of Creditors.

(Decided June 6th, 1881.)

Under an assignment, by members of an insolvent copartnership, of their copartnership and individual estate, for the benefit of creditors, if the individual estate of one of the assignors is more than sufficient to pay his individual indebtedness, the claims of his individual creditors are to be paid in full, with interest to the date of distribution.

APPEAL from a final order of this court upon an accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

Francis L. Stetson, for appellant.

James H. Fay, for respondent.

VAN BRUNT, J.—Mr. James H. Fay and Mr. Sidney P. Slater, as executors of the last will and testament of Edward E. Dunbar, deceased, held a bond made by William B. Duncan, a member of the firm of Duncan, Sherman & Co., which in December, 1877, was past due and unpaid.

This bond bore date on the 14th day of June, 1871, and was payable on the 14th day of June, 1872, and the amount secured to be paid was $7,300 and the interest thereon; such interest was paid up to the 14th day of June, 1878, and a part of the principal, leaving the sum of $2,473.34 of principal due.

In 1875 the firm of Duncan, Sherman & Co. made an assignment for the benefit of its creditors of their individual and copartnership estate to William D. Shipman.

The individual estate of William B. Duncan was more than sufficient to pay his individual indebtedness, and the assignment provided that the assignee should convert the assigned estate into cash, and after the payment of expenses "pay and distribute the residue of the proceeds to and among the

creditors of the firm, and to and among the creditors of the respective individuals constituting the firm, according to law in such case made and provided, so that each of said classes of creditors, to wit, the creditors of the said firm and the creditors of the individual members thereof, shall receive, as such classes and respectively, from that part of such proceeds of all and singular the assigned premises in which, by law, they are respectively, as classes and individuals, entitled to share, their due and ratable proportion, according to law."

On the 18th of December, 1878, the said executors presented their claim to the assignee, who refused to pay anything more than the principal due upon said bond.

Upon the coming in of the assignee's accounts after the return of the citation, the court made a decree that the assignee should pay the principal and interest to the time of distribution, upon said bond, and from this portion of the decree or judgment this appeal is taken.

I am entirely unable to see upon what principle individual creditors of William B. Duncan can be deprived of their right to recover the whole amount of damage which they have sustained by reason of his breach of contract to pay his individual debts when due.

It is conceded that his individual estate is and was amply sufficient to meet the whole of his individual liabilities, and it is also conceded that he has placed that estate by virtue of the assignment out of the reach of his individual creditors, and they were prevented from collecting the same by the ordinary process of law; and it is claimed that the delay which has been caused by the act of Mr. William B. Duncan in making the assignment which he has done, shall operate to the benefit of the copartnership creditors, and to the detriment of the individual creditors.

The cases which have been cited from England and also those in the State of Massachusetts, and also in the federal courts of this State, seem to rest upon the peculiar provisions of the Bankruptcy Laws in force and under consideration by the courts respectively which decided the cases cited. There is no provision of the law of the State of New York regulating

this question, and by the terms of the assignment itself it would seem that the rights of individual creditors were recognized, and that the provision of the assignment seems to be that those individual creditors shall be satisfied in full before any portion of the individual estate shall be devoted to the payment of copartnership debts. All that the assignors have the right to transfer to their copartnership creditors of their individual property is the surplus that would be returned to them by the assignee after the payment of their individual debts in case each of the partners had simply made a separate assignment of their individual estate for the benefit of their individual creditors.

Now I do not think it could be claimed for a moment, that where an individual had made an assignment of his individual property for the payment of his individual debts, believing himself to be insolvent, and it subsequently turned out that his estate was entirely solvent, but what his creditors would have the right to collect interest up to the time of distribution, and that he could not claim that they should only be paid up to the time of the assignment, and that the excess should be returned to him. The right of the individual to apply by means of an assignment only such part of his individual estate to the payment of co-partnership debts as may remain over after the payment of his individual debts, being a transfer of that which would be returned to him in case he had made an individual assignment only, seems to show that the individual creditor has the right to claim his debt and the damages, by way of interest, which he has sustained by reason of non-payment at maturity up to the time of distribution. The injustice of any other rule it seems to me is clearly manifest. The rights of the individual creditor would be delayed, and he would necessarily have to contribute to the increase of the fund which was to go to pay the copartnership creditors. There does not seem to be any equity in any such rule, and it cannot prevail unless we are compelled so to hold by some definite and controlling authority upon the subject.

It is urged by the counsel for the appellant that the case of *Ex Parte Murray* (6 Paige, 204), is not an authority in point.

An examination of that case shows that the principle involved in the illustration which I have heretofore made use of received the entire sanction of the court in that case. It is claimed that the decision of that case is not an authority, because there was no voluntary assignment, no contract between assignor and assignee, and no express trust: that there was no question between one class of creditors and another, but it was a question only between one trustee and another, for if the surplus had been returned to the corporation it would have held it in trust for the creditors; and that is precisely the condition of affairs in case of a solvent individual estate and an insolvent copartnership estate. The assignee of the individual estate holds it in trust for the individual creditors, and the only interest which he has in the individual estate is in the surplus after the complete satisfaction of the individual debts. In other words, as I have above said, all that the assignee gets is that which would be returned to the individual assignor, if there were no copartnership creditors.

I am of the opinion, therefore, that the order appealed from, directing the payment of the individual creditors in full with interest to the time of distribution, was entirely correct, and the order must be affirmed with costs.

Charles P. Daly, Ch. J., and J. F. Daly, J., concurred.

Order affirmed, with costs.

In the Matter of the Assignment of EUGENE EVERIT *et al.* to WILLIAM D. EVERIT for the Benefit of Creditors. Application of WILLIAM H. ADDOMS.

[SPECIAL TERM.]

(Decided June 18th, 1881.)

Under section 21 of the General Assignment Act an examination of the books of an assignor can only be ordered in aid of the assignment.

APPLICATION for an order for the examination of the books of an assignor in a general assignment for the benefit of creditors.

The facts are stated in the opinion.

VAN HOESEN, J.—Section 21 was intended to afford to creditors a ready means of tracing property which ought to be applied to the payment of the assignor's debts, and as was said by Chief Justice DALY in the *Matter of Burtnett* (8 Daly, 363), "to aid in the administration of the assignment." It is altogether foreign to the purposes of the legislature to compel the assignee to produce the assignor's books, in order to enable a creditor to extract evidence therefrom that will aid him in a litigation, existing or contemplated, not relating to the assigned estate. An insolvent is under no greater obligation than a solvent person to disclose to his adversary the evidence on which he relies. It cannot add to the quantum or the value of the assigned estate to show from the assignor's books that he intentionally misrepresented the weight of the hides on which he procured a loan from the petitioner, nor ought the assignee to be compelled to exhibit the evidence which he has to show that the petitioner took usury from the assignor.

This application must therefore be denied, but without prejudice to the right of the petitioner to examine the assignor and any other witnesses, as to what property should be followed

and applied to the payment of the assignor's debts. The books of the assignor may be examined in connection with such an examination, but those parts and those entries which relate to the transactions between the petitioner and the assignor will be sealed.

When an action has been brought, the petitioner may obtain any examination or inspection which the Code provides for (*Matter of Burtnett*, 8 Daly, 363).

In the Matter of the Assignment of WILLIAM H. FINCK *et al.* to ALBERT PIESCH for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided August 8th, 1881.)

That a claim preferred in an assignment for the benefit of creditors has been paid by the assignee without having been proved pursuant to the General Assignment Act, is not ground for disallowing such payment upon the accounting of the assignee.

APPLICATION to overrule exceptions to the report of a referee upon an accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

VAN BRUNT, J.—This is an application to overrule the exceptions filed to the referee's report upon an accounting of the assignee in the above matter. The exceptions are numerous, but it will be necessary to examine in detail but one, and that is the exception relating to the disallowance by the referee of the moneys paid to B. Fisher & Co. as a preferred creditor of the assignors by the assignee.

None of the other exceptions seem to be well taken.

The referee, it would appear, has fallen into an error in supposing that the case of *The Matter of Bailey* (58 How.

446; *ante*, p. 49), decides, that where an assignee has made a payment upon any bona fide claim, due by the assignors at the time of the assignment, if such claim is not proved according to the Assignment Act that the assignee cannot be allowed a credit for such payment.

In the Matter of Bailey the decision simply was, that in a decree of distribution payments should not be provided for in a decree for all the creditors named in the schedules filed by the assignors, but that the decree should provide for the payment only of such general claims as have been proved under the Assignment Act. It nowhere refers or relates to a preferred claim. The assignee by the terms of the assignment being called upon to pay a preferred claim, he is bound to follow out the provisions of the assignment, and pay that claim, whether it has been proved under the Assignment Act or not.

The provision of the Assignment Act relates only to those claims which are not specifically mentioned in the assignment itself, and is simply a substitute giving to the assignee a short method of passing his accounts instead of compelling him to file a bill in equity, as was the practice before the passage of the act in question.

The assignee in this case by the terms of the assignment was required to pay the claim of B. Fisher & Co., and he paid that claim, and at the time of the advertisement for creditors to present claims B. Fisher & Co. were no longer creditors of the assignors, because they had been paid by the assignee as directed by the assignment.

Under these circumstances it is difficult to see how B. Fisher & Co. could swear at the time of the advertisement that they held any claim against the assignors, they having already been paid; and it is exceedingly doubtful whether upon an accounting of this description, where the assignment directs a specific sum of money to be paid to a specific creditor, any other creditor can be allowed to attack the validity of that claim.

If the claim is a fraudulent one, and they desire to prevent or avoid its payment, they cannot come in under the assign-

ment and avoid it, but they must file their bill to set aside the assignment.

The referee in this case therefore erred in disallowing the amount paid to B. Fisher & Co. by the assignee, because B. Fisher & Co. had not proved their claim pursuant to the terms of the Assignment Act.

In the final decree the assignee should be allowed the amount paid to B. Fisher & Co., and the account made up should be credited with this amount. In all other respects the referee's report is confirmed, and the exceptions are overruled.

Order accordingly.

In the Matter of the Assignment of CLEMENT T. PETCHELL *et al.* to JOHN W. NUTT for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided January 16th, 1882.)

If an assignee for the benefit of creditors carries on the business conducted by the assignor before the assignment, he is personally liable for any loss caused thereby, and the expenses incurred by him in so doing will not be allowed in his account.

APPLICATION to confirm the report of a referee upon an accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

VAN HOESEN, J.—The assignee was not acting in the line of his duty when he borrowed money, hired clerks, hired shops, and bought goods for the purpose of carrying on the business which the assignor had formerly conducted. All the

purchases and the profits or the losses which resulted from them are to be thrown out of consideration in making up the account. The assignee cannot engage in business at the risk of the estate. If he uses the money of the estate in his business he is liable to the same penalties that are inflicted upon other trustees who use trust funds for their private benefit. If they embark in speculation with the trust funds, the risk is theirs exclusively.

In this case I cannot determine upon the evidence before me whether the estate has suffered or not by the assignee's proceedings. If no loss has occurred, the creditors have sustained no pecuniary damage, and in settling the accounts of the assignee there will be no question as to the manner of protecting their interests. There may, however, have been a loss to the estate from the business which the assignee carried on, and if such should be the case the assignor must make it good. The keeping open of the old store, the hiring of the new store, the employment of three clerks, and the other expenses of carrying on the business, were all uncalled for, unnecessary, and entered into for the benefit of the assignors, whom the assignee sought to provide for at the expense of the estate.

I think that the true way of adjusting these accounts is to throw out of consideration the purchases made by the assignee, but to charge him interest on the money which he used belonging to the estate; to throw out of consideration the outlays for shop hire, clerk hire, and the other expenses of keeping the shops; to charge him with the property assigned to him except such as he could not with reasonable diligence get in and collect; and to credit him only with those expenditures that were made with a view to the winding up of the business and the execution of the trust.

He must show why he has not collected the book accounts now unpaid. If those accounts were created whilst he was assignee he must make them good, for he had no right to sell on credit.

The assignee had no right to pay for the execution of the assignment. That is no part of the duty of executing the trust. The only lawyers' charges that he can lawfully pay

are for assistance rendered him by an attorney or by counsel in defending the trust or in executing its provisions.

I shall send this account back to the referee that he may re-settle it in conformity with these suggestions. In short, let him see to it that the assigned estate is accounted for, not the business which the assignee conducted after he became assignee.

The expenses of the accounting first had must be borne by the assignee personally, and in the order sending the account back let a provision be inserted to the effect that the assignee be not allowed for the expenses of counsel or of referee at the hearings already had before the referee.

Report referred back.

In the Matter of the Assignment of PHILIP JESELSON to AMAND PLAUT, for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided January 25th, 1882.)

Upon a reference of claims presented under an assignment for the benefit of creditors, which are not mentioned in the schedules and are disputed by the assignor, the affirmative of the issue is upon the claimants.

Where such an order of reference directs that the referee shall take proof and report as to the validity of contested claims, none of the parties who have appeared can object to proceeding under the order.

APPLICATION to confirm the report of a referee upon an accounting by an assignee, and upon disputed claims under a general assignment for the benefit of creditors.

J. F. DALY, J.—The assignor objects to the referee's report in favor of a distribution of the estate among certain creditors who presented claims. It appears that on referring the assignee's account on September 13th, 1881, the court ordered

the referee to take proofs, and report what persons are entitled to share in the distribution of the assigned estate, and ordered that any party to that proceeding might object to any claim presented before the referee, and that the referee should take proof and report as to the validity of such contested claim. This order was made on a hearing in which the assignor and other parties appeared by attorneys and counsel, and was entered without objection. The claims now contested by the assignor were presented to the referee by the assignee who had received them pursuant to advertisement, and by creditors on the accounting. The assignor objected to them. No proof was taken by the referee, and he reports that the claimants are entitled to distribution.

It was the duty of the claimants to offer evidence of their demands. The burden was on them to show a claim against the assignor, as they were not mentioned in the schedule. This objection raised an issue which the referee was to try, and the claimants had the affirmative. As no proof was offered, the claims should not have been allowed. As the referee, however, seems to have been of opinion that the burden was on the party attacking the claim, the report should be referred back to permit evidence to be given in the regular way.

The referee, under the order of reference (made without objection), has power to try the disputed claim under section 26 of the Assignment Act. This is the way pointed out by statute to ascertain who are entitled to share in the assigned estate. The assignor cannot object to proceeding under it.

Report referred back to take proof accordingly.

In the Matter of the Assignment of CLINTON H. SMITH to JOHN G. SMITH for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided May 27th, 1882.)

That an assignee for the benefit of creditors has disposed of the assigned estate in bulk is not ground for his removal, where it is a fair question whether the price received is not a good one. All questions arising as to the propriety of the sale may be inquired into upon the accounting of the assignee.

APPLICATION for the removal of an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

J. F. DALY, J.—The chief ground for the removal of the assignee, and the only one that need be considered on the proofs before me, is his action in selling the assigned stock in bulk to B. O. Huntington; and that sale is attacked for inadequacy of price and on the ground that it was not an actual sale, but a mere device to save the property from execution creditors.

On the question of adequacy of price there is much uncertainty, and the affidavits make it a fair question whether for a sale in bulk of the whole stock it was not a good sale, and whether the result will not be better for the estate than a sale at auction after paying auctioneer's fees and the expenses, or a sale over the counter with the large expenses attendant thereon.

On the question of bona fides it is sufficient to say that if the price be a good one the estate will lose nothing, because the assignee is bound to account for such price in cash, and it is only a question of his solvency and that of his sureties. Circumstances going to show that he made this sale hurriedly in order to save the stock from executions issued by creditors who sought to seize it in disregard of the assignment, will not

be considered if the sale were a good one, *i. e.*, for a good price, as that disposition of the property results in benefit to the assigned estate although the execution creditors may be baulked. In administering the estate under the assignment we are not to regard the complaints of execution creditors who are seeking to wrest the estate from the general creditors under the assignment and appropriate it under their own executions.

The questions arising on this application as to the propriety of the assignee's acts are such as may be fully inquired into upon his accounting. He is now and will be then chargeable at least with the price at which he sold to Huntington. If he sold the stock in bad faith below its real value he will be liable for its real value and will be charged accordingly.

The assignee has given his own undertaking to save the stock from attaching creditors and thus manifested a desire to protect the property for the purposes of the assignment.

Under the state of proofs presented on this application I think it should be denied, but without costs.

Application denied.

In the Matter of the Assignment of John A. Swezey *et al.* to John A. Bagley for the Benefit of Creditors.

(Decided June 5th, 1882.)

Under section 21 of the General Assignment Act, an order may properly be made for the examination of one of the members of a copartnership which has made an assignment for the benefit of creditors, to ascertain whether a particular trade-mark belongs to the assigned estate, where the facts upon which the ownership of such trade-mark depends are within the knowledge of the partner for whose examination the order is made.

Motion to vacate an order for the examination of one of the assignors in a general assignment for the benefit of creditors.

The copartnership of Swezey & Dart, composed of John

Matter of Swezey.

A. Swezey and Joseph Dart, being insolvent, a general assignment for the benefit of creditors, executed by Joseph Dart alone, assigning the copartnership property and his individual property not exempt from attachment, was filed, in which the claim of Buckingham & Paulson, copartners, and creditors of Swezey & Dart, was preferred. Upon their petition, an order was granted requiring Dart to appear and be examined in order to determine the interest of Swezey & Dart, and of their assignee, in a certain trade-mark, which, the petition alleged, Dart claimed and was about to use. Dart applied to vacate the order for his examination, and, should his application be denied, for a stay of proceedings pending an appeal from the order denying his motion.

Robert S. Green, for Joseph Dart, assignor.

Chauncey B. Ripley, for Buckingham & Paulson, creditors.

Van Hoesen, J.—The *Burtnett Case* (8 Daly, 363) was not like this. There the avowed object of the examination was not to aid the assignee in the administration of his trust save in the way of obtaining testimony to be used in such actions as he might afterwards bring. Chief Justice Daly said that such testimony ought to be taken after those actions had been begun, and that the Code of Civil Procedure made ample provision for the examination of parties in pending actions. Here it is not shown that the testimony is sought for use in any action hereafter to be brought. The examination is, as I understand it, to ascertain whether or not certain property, called a trade-mark, belongs to the assigned estate. That can only be determined by learning the facts which give the trade-mark its value. If, as Chief Justice Daly said in the *Hegeman Case* (8 Daly, 1), this trade-mark is made valuable simply because the public believe that Dart's personal skill, experience, and peculiar knowledge impart to the fabric a perfection which it would not possess if made by any other person, it does not belong to the assigned estate. If, on the other hand, the trade-

mark indicates a certain fineness or quality in the goods, and does not owe its value to the public belief in the peculiar skill of the manufacturer individually, it will be part of the assigned estate, and will go to those who buy the factory which has heretofore produced the fabric.

The sub-rule of rule 73, Moak's Underhill's Principles of Torts (p. 632), thus states the law: "Although a trader may have a property in a trade-mark sufficient to give him a right to exclude all others from using it, if his goods derive their increased value from the personal skill of the adopter of the trade-mark, he will not be allowed to assign it, for that would be a fraud upon the public. But if the increased value of the goods is not dependent upon such personal merits, the trade-mark is assignable."

In *Kidd* v. *Johnson* (9 Reporter, 729), the United States Supreme Court held, as has Chief Justice DALY in several cases, that trade-marks affixed to certain articles manufactured at a particular factory, will pass with the factory when it is transferred by contract or by operation of law.

A trade-mark may be, and often is, transferred *in invitum* by proceedings in bankruptcy.

Now the question here is whether or not the trade-mark in question owes its value to the personal skill of Mr. Dart as a manufacturer. If it does it does not pass by assignment, for the public must not be deceived into buying goods which, though bearing his trade-mark, are not the product of his peculiar skill. If, however, it is the machinery, the factory, which has produced superior goods, the trade-mark goes with the machinery. In other words, the trade-mark is inseparable from the particular thing which gives it its value.

It is said that the trade-mark did not pass because it is not subject to levy under an attachment. That is not the test, conceding, for the sake of the argument, that it is not leviable. The statute of exemptions does not expressly exempt a trade-mark, and therefore the clause in the assignment on which Mr. Dart's counsel relies does not apply. The assignment does not except property which is not subject to levy, but property which the exemption act declares to be exempt.

I think the examination should proceed. I have indicated the scope of the examination. In settling the order I will explicitly state what shall be the subject and the extent of the examination. I shall not grant, nor give leave for an application to any judge for, a stay of proceedings. Both parties may submit forms of an order drawn in conformity with the views above expressed.

An order in accordance with the foregoing decision, dated December 14th, 1881, was duly entered; and on December 17th, 1881, another order was entered directing the examination of Dart by the creditors Buckingham and Paulson to proceed before a referee, and providing as follows:

"That said creditors be allowed, in such examination, to ascertain whether or not certain property, called a trade-mark, belongs to the assigned estate; to elicit any facts which give the trade-mark its value; to ascertain any facts showing how and wherein it has since the assignment had a value, or how it has a present value; by whom the goods have been and are manufactured on which this trade-mark has been or is at present used; to show what qualities, if any, are indicated by its use; and how, if at all, the trade-mark is made valuable; *i. e.*, whether by a belief on the part of the public that Dart's personal skill, experience or peculiar knowledge impart that which the warps would not possess if made by any other person than himself; or, on the other hand, whether the said trade-mark indicates a certain fineness or quality in the goods, and does not owe its value to the public belief in the peculiar skill of the manufacturer individually. The examination may also show whether or not the increased value of the goods is dependent upon the personal merits, that is to say, the skill of the adopter of the trade-mark; or whether it is dependent upon the machinery, the factory which has produced superior goods. It may be shown how the trade-mark was used by the assignors, on what goods, and how, if at all, made profitable by them or either of them; what goods were, have been, and are sold under that ticket; to whom the profits were, have been,

and are paid over; and by whom used or appropriated; if there be any present use of the trade-mark, or if there has been since the assignment, it may be shown what such use has been and is, and for whose benefit; and what the benefits and profits are. Books and papers, containing evidence of any facts allowed under this order, can be required during the progress of the examination."

The assignor, Dart, appealed to the general term, both from the order denying his motion to vacate the order for his examination, and from the order of December 17th, 1881, directing the examination to proceed before a referee. Upon the appeal the following opinion was rendered, June 5th, 1882.

Beach, J.—The objections appearing in the first order appealed from, relate to its being returnable only before the learned justice who granted it, and for want of jurisdiction. The answer to the first objection is that it would appear from the record, that the witness appeared on November 18th, and presumably before the same judge. But were it not so, any act or proceeding commenced or returnable before or instituted or ordered by one judge, may be heard, continued, or completed before any other. (General Assignment Act, § 24.) I can imagine no reason for the objection to jurisdiction.

The examination of witnesses under this statute rests entirely within the discretion of the court, and applications therefor should be granted only in those cases where benefit will probably result to the assigned estate or those interested therein.

Whether or not this so called trade-mark passed by the assignment is a question not here involved. The facts which may control such a proposition are within the knowledge of the assignor, whose examination was directed. Information upon that subject it is proper for the creditors to have, because the inquiry is in aid of the assignment, and may be useful to them, in promoting action by the assignee, or as a basis for a proceeding against him for a violation of his duty, in not preventing illegal use of the name. The examination of witnesses denied *In matter of Burtnett* (8 Daly, 363), was

one destined to involve matters within the issues of an action to be brought, and not for pertinent information preliminary to the suit. The application was made by the assignee, who appeared to have all the knowledge necessary for the assertion of his rights.

The order of December 17th, directing the examination to proceed before a referee therein named, is in my opinion too broad in its terms. The portion thereof between the sentence "to ascertain whether or not certain property called a trade-mark belongs to the assigned estate," and the last clause relative to books and papers, should be stricken out.

The order denying the motion to vacate the original order should be affirmed, and also the succeeding order as hereby modified, without costs of this appeal to either party.

Van Brunt and J. F. Daly, JJ., concurred.

Order accordingly.

In the Matter of the Assignment of Jacob Goldsmith *et al.* to Leopold Wertheimer for the Benefit of Creditors.

(Decided June 5th, 1882.)

An order for the examination, as witnesses, of the assignors and assignee in an assignment for the benefit of creditors, cannot be sustained by allegations of facts tending to show fraud by the assignors in conducting their business and in making the assignment; as such a proceeding is in hostility to, not in aid of the assignment.

Appeal from an order of this court vacating an order for the examination of the assignors and assignee, and for the production of the books of the assignors, under a general assignment for the benefit of creditors.

The assignment was made by Jacob Goldsmith and Lewis Goldsmith, comprising the firm of J. Goldsmith & Co., to

Leopold Wertheimer, on November 1st, 1881. An order for the examination of the assignors and assignee and the production of the books of the assignors was obtained by E. R. Mudge, Sawyer & Co., creditors, upon a petition and affidavits showing that at various times from August 31st, 1881, to September 19th, 1881, both Jacob Goldsmith and Lewis Goldsmith had made representations to creditors that their firm was worth from $28,000 to $35,000 over all their liabilities, that they did not owe over $4,000, and did not owe any borrowed money to any person; but that their assignment and schedules showed preferences to creditors amounting to $40,806.58, of which about $33,000 was stated to be for money borrowed and notes discounted; that in addition to the preferred claims, the assignors owed $46,268.43 for merchandise, making the total amount of their liabilities $87,075.01; that the total actual value of their assets was stated in their schedules at $40,427.65; that there had been no extraordinary loss in their business, and that their sales for the year 1881 should show a large profit.

The order thus granted was subsequently vacated on the ground that the affidavits of the petitioners showed that the sole object of the examination was to discover evidence upon which to found an action to set aside the assignment as fraudulent. From the order vacating the order for the examination, the petitioners appealed.

Jno. J. Adams, for appellants.

M. H. Regensburger, for respondent.

Beach, J.—This is an appeal from an order vacating an order for the production of books and the examination of the assignors and assignee before a referee. The examination was originally directed upon papers showing no reason therefor, except what might arise from facts tending to show fraud in conducting the business and making the assignment. It is plain, a proceeding founded upon such statements must be in hostility to the assignment. If upheld, a marked inconsistency would be apparent. The act is entitled "An Act in relation to assignments of the estates of debtors for the bene-

fit of creditors." (L. 1877, c. 466) and its purpose is to provide the manner of making assignments, and the method of accomplishing the distribution of the estate. Nothing could be more foreign to such an intention, than the authorization of proceedings, plainly hostile to the assignment, and intended to overturn the structure the legislature erected.

Every section of the act tends to aid the eventual distribution of the estate among the creditors, according to the provisions of the deed of trust. Section 21 has no different aim, and no construction should be given it, save consistent with the general object of the law. Except for its general wording, it might be held solely applicable to the proceedings on accounting and removal of assignees, set forth in the prior sections. It is impossible to discover from the text, what reasons should call upon the court to order the examination of witnesses and production of books, and those suggested by the purpose of the act, viz., in aid of the assignment, must be held the only ones warranting the proceeding. The creditors under proper restrictions should have opportunity to examine the assignors' books of account, as they are sources of information relative to the estate which is to be distributed.

The order should be affirmed so far as it vacates the order for an examination of the assignors and assignee, and reversed in that portion denying the examination of the books, without costs on this appeal.

Charles P. Daly, Ch. J., concurred.

J. F. Daly, J., dissented.

Order accordingly.

In the Matter of the Assignment of WILLIAM P. BROWN to JOSEPH W. DURYEE for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided November 22d, 1882.)

A petition by a corporation for the examination of witnesses, under section 21 of the General Assignment Act, should be signed and verified by an officer of the corporation.

Such an examination will be allowed only where its object is to promote the administration of the assigned estate.

Sections 20 and 21 of the act considered.

A preferred debt must be paid by an assignee for the benefit of creditors though it be usurious.

Semble, that the assignee may plead usury in answer to a demand for the payment of a debt not preferred.

Query, whether a creditor can compel an assignee to plead usury.

APPLICATION for an order for the examination of the assignor under a general assignment for the benefit of creditors, and others, as witnesses.

The facts are stated in the opinion.

BEACH, J.—The objection to the lack of attorney's address upon the indorsement of petition, although required by rule 7 of this court, might be overcome by amendment, without injury to any interest of the opposing parties, and should therefore be overruled.

The objections to the petition itself are much less technical, because it is the foundation of the proceeding. By section 21, the petition must be of a party interested, and being for the purposes of a motion should be verified by the petitioner. It purports to be that of "The Weidmann Dyeing Company, a corporation organized and existing under the laws of the State of New Jersey." It is signed "Clarence W. Francis, attorney for the Weidmann Dyeing Company," and verified by the book-keeper of the corporation and the director of a

National Bank stated in the verification to be a creditor of the assignor. By what authority the attorney assumes the right to sign the petition is nowhere shown, and by the ordinary rules of procedure no such power exists. No retainer to appear as attorney for a corporation confers it, and no practice warrants an inference by the court, of the petition being that of the corporation. It should be signed by an officer of the corporation, authorized to take action in its behalf.

The verification is equally defective. A book-keeper has no authority to verify the petition, but the verification should be made by the officer signing it. The appended affidavit of the director of another corporation, alleged therein to be a creditor, is as ineffective as would be one of a third party, an entire stranger.

These preliminary objections are sustained, and the proceeding dismissed, with leave to renew the application.

Upon a renewal of the application, the following opinion was rendered, December 11th, 1882.

Van Hoesen, J.—The assignment is not before me, nor are the schedules, so that I do not know what debts are and what are not preferred. It is settled that a preferred debt must be paid by the assignee even though it be usurious (89 N. Y. 270). It seems also that an assignee may, if he chooses, refuse to pay a debt that is not preferred, and set up the defense of usury thereto. Whether a creditor having no lien can prevent the assignee from paying the unpreferred claim of another creditor on the ground that it is usurious, is not, to my knowledge, yet determined. Before I pass upon the right of an unsecured creditor to prevent an assignee for the benefit of creditors from paying the unpreferred debt of another creditor because it is usurious, I think I ought to hear the creditor whose claim is disputed. None of those creditors are now before me, (at least, I have no reason to suppose that they are) and I do not now express any opinion as to whether their right to share in the assigned estate can be contested by a competing creditor who has acquired no lien upon the estate. If the assignee

should pay them after he has received notice not to do so, he acts at his peril, but they are entitled to their day in court before their rights are passed upon.

One way of testing the question would be to ask the assignee to contest the claims alleged to be usurious, and if he refuses, then to apply for his removal on the ground that having defenses to unlawful claims he would not protect the estate by availing himself of them.

Until it has been decided that one creditor may dispute the validity of another creditor's claim on the ground that it is usurious, I do not feel at liberty to order an examination of the assignor, or other persons, for the purpose of proving that usury exists. It may be entirely irrelevant, and an examination as to irrelevant matters would be a great abuse. I feel bound, therefore, to deny, for the present, but without prejudice, the application for the examination of Brown, Dix and Phyfe as to whether certain notes are usurious.

The examination as to whether Brown made false representations prior to the assignment I must also deny on the authority of the *Burtnett Case*, (8 Daly, 363). Of the correctness of that decision, I have no question. Broad as the language of section 21 is, there can be no doubt that the object of the statute is to facilitate the execution of assignments, and not to furnish a new method of obtaining testimony for the prosecution of actions that do not affect the assigned estate. The assignor may have swindled thousands, but his testimony as to his offenses ought not to be taken under the Assignment Act unless the assigned estate is to be affected thereby. It can not be supposed that the legislature intended that under the Assignment Act any party could be examined on any subject, and that his testimony could be used thereafter in any action against any body, even though the person against whom it was offered never had notice of the examination, or an opportunity to cross-examine; yet, construed according to its letter, just such proceedings might be had.

Section 20 provides for an examination on an accounting. Section 21 provides for an examination when proceedings on an accounting are not pending; but the object of the exami-

nation, whenever had, must be to secure a proper administration of the assigned estate, not to promote a litigation the result of which can not affect the assignment, or its execution. Section 21, like the rest of the act, must receive a reasonable construction, and loose though its language be, we are not justified in ascribing to the legislature an intention to violate the fundamental principles of jurisprudence by giving to the words of this section a construction that would authorize a person to examine a witness on any subject whatever, to place the testimony on file in the clerk's office, and then use it "in any action or proceeding then pending or thereafter to be instituted." Common sense tells us that testimony so taken ought not to be used against a person who had no part in conducting the examination, but yet the section imposes no limitation upon the right of an assignee or of a creditor to use it against any one. The legislature, though it has not said so, meant, doubtless, to confine the use of the testimony to cases in which it could be introduced without violating any provision of the constitution, or the rules of law; and in the same way, it doubtless meant to authorize an examination only in those cases where the assignment and its administration were involved.

I shall vacate the order for the examination, but without prejudice to the right to renew the application when it has been decided that the creditors who have no lien may contest the right of an unpreferred creditor whose claim is usurious to share in the assigned estate.

Order accordingly.

In the Matter of the Assignment of GUSTAV RADTKE *et al.* to HARVEY T. CLEVELAND for the Benefit of Creditors.

(Decided December 4th, 1882.)

An assignee for the benefit of creditors, who fails to comply with an order of the court directing the payment by him as assignee of a sum of money generally, and not out of any specific fund, is not punishable therefor as for a contempt.

APPEAL from an order of this court denying a motion to punish, as for a contempt, an assignee under a general assignment for the benefit of creditors.

In April, 1880, a motion was made by Erastus H. Benn upon a petition, for an order to compel Harvey T. Cleveland, as assignee of Gustav Radtke and Albert Luscher, to pay the sum of $250, which motion was denied. An appeal having been taken to the General Term of this court, the said order was reversed with costs, and an order was made directing the said Harvey T. Cleveland as such assignee to pay to Erastus H. Benn, the petitioner, within seven days of the service of the order, the sum of $250, from the funds in his hands or obtained or received by him, as assignee of Gustav A. Radtke and Albert Luscher, together with the costs and disbursements of the motion.

An appeal being taken to the Court of Appeals by Cleveland from this order the same was affirmed, and Benn having made a demand for the amount due under the order, upon Cleveland, on the 23rd of June he made a motion to punish Cleveland for contempt for his refusal to obey the said order of the General Term, which motion was denied by the court upon the ground that the court had no power in this proceeding to punish for contempt; and from such order this appeal is taken.

E. H. Benn, in person.

D. C. Birdsall, for the assignee.

Van Brunt, J.—[After stating the facts as above.]—No case has been cited by the counsel for the appellant to support the view which he has taken as to his rights under the order of the General Term, except those in which a receiver has been attached for contempt in refusing to obey the orders of the court. The rights of the court over an assignee are entirely different from that which it has over a receiver. A receiver is an officer of the court; he is bound to obey its orders, and he is the servant of the court, and when he takes upon himself the duties of receiver, he obligates himself to obey all such orders, and the court has a right, when one of its own servants refuses to obey its proper orders, to enforce them by punishing the offender as for a criminal contempt.

The authority of a court over an assignee is entirely different. It has no greater authority to punish, for a failure to conform to its orders, an assignee, than it has to punish a trustee for his failure to comply with the judgment of the court. The jurisdiction of this court over trustees is precisely the same as the jurisdiction of all courts of equity jurisdiction over trustees.

This court undoubtedly possesses peculiar jurisdiction over the trusts of assignees, but such jurisdiction is not exclusive and is especially conferred by statute. Where in the cases of ordinary trustees jurisdiction is acquired by action, and by action only, in respect to assignees jurisdiction is expressly conferred by statute upon this court by petition, and having acquired jurisdiction over the assignee its right to enforce its judgments and orders is no greater than that of any other court which has competent jurisdiction over a trustee upon a bill filed. Therefore, unless it can be shown that this court has power to proceed to adjudge a trustee to be in contempt, and to punish him for such contempt in case of his refusal to abide by the order or judgment of the court, the refusal to punish the assignee in this case was proper.

There have been cases where, an order having been made upon a trustee in respect to some specific property which the trustee has in his possession, and which order the trustee has wilfully disobeyed, he has been punished for a contempt,

but I have been unable to find any case in which a trustee having been directed to pay generally out of funds in his hands, has been adjudged guilty of contempt because of failure to comply with the order.

It is urged upon the part of the appellant, that the case of *Watson* v. *Nelson* (69 N. Y. 536) sustains the position which he has taken upon this appeal. An examination of that case shows that no proceeding for contempt can be instituted except in the case of a direction against a specific fund or specific property which the trustee has been adjudged to have in his hands. All that was decided in the case of *Watson* v. *Nelson* was whether a decree or order directing a trustee to pay over money could or could not be enforced against the person, and the court held expressly that the disobedience of a decree or order merely directing the payment of money by an executor, trustee or other party was not a contempt.

It is not necessary here upon this appeal to discuss the question as to what should be the procedure of the appellant against the assignee. It is sufficient for the present appeal to say that he has no right because of the refusal of the assignee to obey the order of the General Term appealed from, to have such assignee adjudged to be in contempt, which was the motion made by him.

The order appealed from must be affirmed with costs and disbursements.

Beach J., concurred.

Order affirmed, with costs.

In the Matter of the Assignment of Rudolph Marklin *et al.* to William P. Wilder for the Benefit of Creditors.

[Special Term.]

(Decided February, 1883.)

Where an assignee for the benefit of creditors carries on the former business of the assignor, and it does not appear that such continuance was a benefit to the estate, he will not be allowed the expenses thereby incurred.

Payments made by the assignee in such case as wages for work done both before and after the assignment, will not be allowed him without proper vouchers, although made to persons who could not write, and in a business where it was not customary to give or take receipts therefor. Nor can the portions of such payments made on account of preferences in the assignment be allowed, where the amounts paid thereon are not shown in the account.

Application to confirm the report of a referee upon an accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

Van Brunt, J.—It is apparent from an examination of the evidence in this case, that the assignee, in conducting the business, did so for the purpose of enabling the assignors to make a compromise with their creditors, rather than because such continuance would be of advantage or benefit to the estate.

There is no evidence in this case that such continuance was an advantage or benefit to the estate. The amounts disbursed for such continuance were greater than the amounts received; consequently, the business was conducted at a loss. What amount of merchandise was consumed in the carrying on of the business, does not appear, and under these circumstances, the assignee must be chargeable with the expenses incurred during the carrying on of such business.

It further appears that no proper vouchers have been fur-

nished by the assignee for a large number of the payments made by him.

It is claimed that the payments made for wages due both before and after the assignment were made to persons, some of whom could not write, and in the course of business it was not customary to give or take receipts therefor. This is no excuse to the assignee. There is nothing shown upon the account as to what was paid as a preference and what was paid for work done subsequent to the assignment. These items in this state of the account must necessarily be disallowed.

If the assignee thinks that he can furnish competent proof of these items, separating those which are claimed to be on account of the preference contained in the assignment, from those which were made on account of work done subsequent to the assignment, he may have an order referring the case back to the referee for the purpose of taking such proof: the expense of such additional reference, however, to be a personal charge as against the said assignee, and not a charge as against the estate. Unless such reference back is made, the objections to those items of the account for which no sufficient vouchers have been furnished, are sustained, as well as the objection to those items of the account which appear to have been incurred in the continuance of the business.

Order accordingly.

In the Matter of the Assignment of KENNETH S. JOHNSON *et al.* to WILLIAM H. BURBANK for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided May 5th, 1883.)

If the fees of the referee upon an accounting by an assignee for benefit of creditors are objected to, they must be taxed.

An assignee for the benefit of creditors will not be allowed on his accounting, for services of an attorney in the defense of actions, the amount es-

timated by the attorney as the value of such services, without other proof as to their nature and value. Nor will any allowance be made for the charges of an attorney for services which the assignee was bound to render himself; such as preparing the inventory and schedules, advertising, attending an auction sale, &c.; but only for the preparation of the formal papers that have to be presented to the court in the different stages of the proceedings; as for preparing the order, &c., to advertise for claims, the citation to creditors, the papers requisite on the final accounting, and the decree of discharge. No allowance can be made for legal services upon an accounting, except when claims are litigated.

Application to confirm the report of a referee upon an accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

Charles P. Daly, Chief Justice.—The estate, on the final accounting, amounts to $4,050,94, and the attorney employed by the assignee asks to be allowed out of the estate $500 for his services. The referee's bill is $125. Objection is made by the assignee both to the allowance asked by the attorney and to the referee's bill.

As to the referee's bill, being objected to, it will have to be taxed by the clerk in the ordinary way, on the proper proofs.

The attorney claims that he is entitled to $150 for legal services in defending three actions of replevin, one of which was tried in a district justice's court, and the other two were settled after putting in answers, in all of which the assignee succeeded. There is nothing but the attorney's estimate of the value of his services in these three suits, which will not suffice. He should have shown before the referee what services he rendered in these actions, so that the referee might pass upon and find the value of the services on his final accounting, if they are all to be allowed as an expense incurred. As respects the further claim of $350, he submits an extract from his register, from October 1st, 1881, to April 21st, 1883, to show the services rendered by him. It begins with the drawing of the assignment, and ends with the preparation of

the order appointing a referee to take the final accounting. As respects the drawing of the assignment, his affidavit shows that he was paid $230 by the assignor, before drawing it, for advice and services in and about preparing the assignment, and for other business done by him previous to the assignment. So that as respects the service of preparing the assignment, he has been paid for it, even if it should be regarded as an expenditure that could be imposed on the assigned estate. The other entries from the register show that everything that was done under the assignment was done by him and not by the assignee; and he stated orally upon the hearing that he gave his time for two days in attending the auction sale of the goods, which consisted of the contents of a shoe store. The other charges, with the exception of the instances in which application had to be made to the court in the formal proceedings required by law, and in which the services of an attorney may be necessary, are for services which the assignee was bound to render himself, such as preparing the inventory of the property and the schedules of the debtors and creditors, the advertising, attending the auction sale, &c.; and if the assignee employed him to render such services as these, for the performance of which it was not necessary to have the services of a lawyer, he must look to the assignee for his compensation. Among these charges are twelve days spent in preparing the inventory and time spent in trying to effect an agreement for composition.

The rules which prevail in regard to allowances to trustees to reimburse them for expenses necessarily incurred in the execution of their trust apply to assignees in these proceedings; like other trustees, they are allowed reasonable fees paid for legal advice or assistance in the discharge of their duties, such allowances for legal expenses being always, however, within the discretion of the court; and they will be reduced if, in the judgment of the court, they are unreasonable. So, also, they may, like other trustees, employ agents, collectors, accountants and other persons, where such services are necessary, and an allowance will be made for such expenditures (Perry on Trustees, §§ 910, 912).

It was held by my late colleague, Judge ROBINSON, in *Levy's Accounting* (1 Abb. N. C. 182): "In the ordinary performance of such duties as an assignee for the benefit of creditors assumes, heat least engages his own personal competency to perform them, and he cannot involve the estate in the expense of employing counsel to advise him as to duties he has thus assumed, unless it were shown that some unusual complications existed which rendered it reasonable and proper that professional advice should be called in to extricate or alleviate the affairs of the assigned estate from some unanticipated complications. No such convenient rule exists as enables an assignee, at the expense of the estate, to retain a lawyer, as one among other employees that he may necessarily employ, for the purpose of affording him general advice as to his conduct in his office as trustee. The special exigency and reasonable necessity for the incurring of any such expense in the execution of the trust must, in all cases, be shown."

The court will recognize that the services of a lawyer are necessary in drawing the formal papers that have to be presented to the court in the different stages of the proceedings, as they must be carefully prepared to comply with the provisions of the statute regulating voluntary assignments, and with the rules of the court. They are, in most cases, mere formal papers which do not require either much labor or any great professional skill in their preparation, involving little else than a due observance of the provisions of the statute and the rules of the court. The papers here were simply of this formal character, the estate being a small one and its affairs in no way complicated or difficult. There will be allowed, therefore, for preparing the order, &c., to advertise for creditors, $10; for the citation for creditors to appear and prove their claims, $25; for the papers requisite on the final accounting, and the decree of discharge, $25. No allowance can be made for legal services by a lawyer upon an accounting, except where claims are litigated; but where, as in this case, the claims are simply submitted with the vouchers of the expenditures, all that is requisite upon the accounting must be done by the assignee and the referee who, in such a proceeding, discharges the duty

simply of an accountant in the examination of the accounts, with the right to take proof and try the question where claims are disputed, and the investigation assumes more or less of the character of a trial. Nothing of that nature existed here. There was no contest on the part of any creditor, and the accounting was merely a formal proceeding. There may be cases where the preparation of schedules, such as inventory of the assets and schedules of the debtors and creditors, involves such investigation and labor as to require the employment of a clerk or accountant; and where such is the case the estate will be charged with the expenditures thus incurred. But there was nothing of this kind in this case. There was no occasion to employ a lawyer who, according to his own account, spent ten days in preparing the schedules and inventory, which, after the examination of the schedules, must have been because he was not familiar with matters of account, and it therefore took him a long time to do what an ordinary accountant could do in a very short time. In my judgment, the assignee himself could have prepared these inventories and schedules, and if assignees cannot perform ordinary duties of this kind, they should not accept such a trust. Sixty dollars, therefore, for the legal services rendered by the attorney in these proceedings, is all that can be allowed, instead of $350, which is asked for, and this $60 is allowed simply as necessary disbursements.

His additional claim of $150 must await the further examination and report of the referee.

Order accordingly.

In the Matter of the Assignment of SAMUEL ROSENBACK *et al.* to FERDINAND JUNG for the Benefit of Creditors: MOSES MAY, Appellant, *against* FERDINAND JUNG, Respondent.

(Decided May 15th, 1883.)

Where, on a final accounting by an assignee for the benefit of creditors, a decree is made which adjudges that the assignee has in his hands a certain sum of money out of which it directs him to pay specified sums to creditors, a creditor is not entitled thereupon, as a matter of course, to docket a judgment, for the amount thereby directed to be paid to him, against the assignee personally.

APPEAL from an order of this court vacating an order for the examination of an alleged judgment debtor in proceedings supplementary to execution.

A general assignment for the benefit of creditors having been made by Samuel Rosenback and Isaac Lauterbach to Ferdinand Jung, a citation to the latter to account, as assignee, was obtained by Moses May, one of the creditors of the assignors. The assignee then, upon petition, obtained a general citation to all persons interested to attend his final accounting, and on the proceedings thereon had, on June 17th, 1881, a decree was made and filed on application of the assignee, and with consent of May, by which the assignee was ordered to pay a dividend of ten per cent. to creditors out of the sum of $14,000.63 found to be in his hands as assignee; the sums ordered to be paid to May being $1,789.82 on one claim and $899.10 upon another. On December 21st, 1881, May procured a judgment for $2,688.92, the aggregate of said sums, to be docketed in his favor against Jung, the assignee, on the basis of said decree, and issued execution thereon to the sheriff of the city and county of New York, which execution was returned wholly unsatisfied. May then procured an order for the examination of Jung in supplementary proceedings, which order was vacated by the court on the grounds: First, that the judgment was entered against Jung, as assignee, not personally;

second, that May had signed a composition agreement with the assignors prior to the entry of the decree, and had accepted a cash payment thereunder.

It appeared that while the accounting proceedings above referred to were pending before the referee to whom the assignee's accounts had been referred, May, with other creditors, agreed to a composition of twenty-five per cent., fifteen in cash and ten in notes, and received the cash on May 5th, 1881. The notes were tendered subsequently, but he refused to receive them. May alleged that he signed the composition agreement upon the representation that it was exclusive of the dividend he was to receive upon the accounting. The assignee alleged that the composition was based on the accounts then in process of settlement.

It was also shown that a proceeding by motion had been instituted by Jung on December 22d, 1881, to have the execution set aside on the ground that the decree in favor of May had been paid and satisfied; that the court referred to a referee the question of fact, but that the proceeding was dismissed by consent before any determination was arrived at; and that the decree and judgment were still in force, and the execution had not been set aside.

From the order vacating the order for the examination of Jung in supplementary proceedings, May appealed.

Ira Leo Bamburger, for appellant.

Benjamin M. Stilwell, for respondent.

Van Brunt, J.—I entirely fail to see by what authority a party to a decree in equity upon an accounting by a trustee, which simply adjudges that the trustee has in his hands, as trustee, a certain sum of money, out of which he is directed to pay certain sums, can docket a judgment personally against the trustee as a matter of course. It is true that the assignment law provides that the decree shall be entered, docketed and enforced the same as if made in an original action brought in the county court, but it certainly was not intended that any

different course should be pursued than if an action had been commenced in a court of equity against a trustee as such for an accounting. In such an action no individual judgment against the trustee as such can be entered, unless provision was made therefor in the decree.

In the case at bar there is not the slightest hint in the decree but that the assignee has not the money to pay the amount directed to be paid, and, without any neglect or default upon his part being brought to the notice of the court, a judgment is docketed against him individually and execution issued against him individually.

If this is the practice under the Assignment Act, then the moment a decree is entered upon the accounting of an assignee, directing the assignee to pay out of his hands certain moneys to creditors, each creditor has the right to docket a judgment at once against the assignee individually, and issue execution against his individual property, no matter how willing the assignee may have been to pay the claims against the estate.

No trustee has ever been placed in this position before, and it does not seem to me that the Assignment Act was ever intended to work such an injustice. What the power of the court might be, upon its being shown that an assignee had not complied with its decree, it is not necessary to determine; but that an assignee was intended to occupy a relation so different from that of every other trustee in the method of enforcing decrees against them does not seem to be possible.

It is a familiar principle that a trustee is not liable individually unless he has been guilty of a breach of trust; but in the case at bar he is condemned and executed without ever having had an opportunity of being heard upon the subject as to whether or not he had been guilty of a breach of trust. A breach of trust in general creates only a single contract of debt, and must be enforced as such; but when the trustee has, under seal, covenanted to apply the trust fund according to the trusts declared, a breach of that engagement would create a special debt against him (Hill on Trustees, 519).

If this is the rule, it seems to be clear that a trustee can-

not be charged individually as for a breach of trust without having an opportunity to be heard.

I am of the opinion that the judgment entered against Ferdinand Jung was void, the clerk having no authority to enter the same, and the order appealed from should be affirmed.

Charles P. Daly, Ch. J.—I concur with you that the order appealed from be affirmed.

J. F. Daly, J., dissented.

Order affirmed.

In the Matter of the Assignment of Cornelius Van Horn to Frederick W. Rebhan for the Benefit of Creditors.

[Special Term.]

(Decided May 17th, 1883.)

An assignee for the benefit of creditors will not be allowed fees of counsel upon a general retainer for advising the assignee in the management of his trust; nor for litigations in which he involved himself by continuing the business of the assignor; nor for resisting applications by preferred creditors for payment before his accounting.

Application to confirm a report of a referee upon an accounting by an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

J. F. Daly, J.—The greater part of the services rendered by the assignee's counsel, for which his charges have been allowed to the amount of $1,500, are not properly chargeable against the fund. He is to be allowed for drawing the assign

ment a reasonable fee, but none for preparing schedules; he is not to be allowed upon a general retainer for advising the assignee in the management of his trust (*Levy's Accounting*, 1 Abb. N. C. 177). Most of the legal expenses incurred by the assignee were rendered necessary by difficulties arising out of his permitting the assignor virtually to continue business with the assigned stock. He cannot pay his counsel out of the fund for assisting him to watch the assignor, or to manage the business. Nor can expenses of counsel be allowed to the assignee for defending the action brought against him by the landlord of the premises occupied for such business by the assignee. He involved himself in that litigation by his own acts. As the assignee is a lawyer, he might have, with propriety, defended himself in that litigation. Employment of counsel was not necessary in respect to the applications by preferred creditors for payment.

The report will be referred back to ascertain what is a reasonable charge for preparing the assignment. The other exceptions to the report are disallowed.

Report referred back.

In the Matter of the Assignment of CHARLES CROWDER *et al.* to GEORGE A. HETTRICK for the Benefit of Creditors.

[SPECIAL TERM.]

(Decided May 17th, 1883.)

An assignee for the benefit of creditors will not be compelled to permit an inspection by the creditors of the assigned stock. If the creditors make an offer to purchase, the assignee will be responsible for the exercise of his discretion in accepting or refusing such offer.

APPLICATION by creditors of the assignors in a general assignment for the benefit of creditors for the removal of the

assignee, an examination of the books of the assignors, and an inspection of a stock of goods, part of the assigned estate.

The facts are stated in the opinion.

J. F. Daly, J.—The papers do not show sufficient grounds for the removal of the assignee. There does not seem to be any reason for believing that the trust estate will not be properly administered by him. The application to remove him will be denied. The application for examination of the books will be granted. There does not seem to be any authority for compelling the assignee to permit creditors to inspect the assigned stock. If they make an offer to purchase it, the assignee will exercise his judgment in accepting or rejecting such offer, being responsible for his good faith and discretion in so doing.

Order accordingly.

In the Matter of the Assignment of Israel T. Potter to Bertrand Clover for the Benefit of Creditors.

(Decided June 25th, 1883.)

A creditor who receives a percentage of his claim from his debtor's assignee for benefit of creditors, and in consideration thereof executes an assignment of the balance to such assignee, which assignment is taken by the latter for the benefit of the debtor, will not be permitted to avoid his assignment by showing that he executed it under the impression that it was a mere receipt on account, he not being able to read the paper owing to defective vision and the want of glasses, there being no fraud nor false representations on the part of the assignor or the assignee, nor any act done to induce him to sign, and it appearing that similar assignments were made and percentages received by other creditors under an arrangement with the assignor after an attempted composition at that rate with all the creditors had failed, the original proposed composition deed having however been signed by the creditor in question, with others.

A court of equity will relieve parties from a mutual mistake of fact; but not when ignorance or mistake is confined to one party, and no unconscientious advantage is taken by fraud or concealment by the other.

Even if the creditor had the right to avoid his assignment of the balance of his claim, he would have to refund the sum received.

The principles that govern transactions between trustees and *cestuis que trust* do not apply to the transaction, because the assignee did not secure to himself any benefit by the assignment of the claim, but took it for the sole benefit of the assignor. As, however, there was no definite finding of fact to that effect, the assignee was required to file a stipulation that such assignment was taken in behoof of and for the assignor and his estate.

Where a party who has filed exceptions to a referee's report afterwards moves to confirm it, he must be held to support it as correct in fact and conclusion.

APPLICATION to confirm the report of a referee upon a trial of a disputed claim under a general assignment for the benefit of creditors.

The claim was made by William G. Ellsworth, as a creditor of the assignor, Israel T. Potter, who had deceased since making the assignment, and it was disputed by the assignee, and also by Sarah L. Potter, the administratrix of the assignor. The referee found in favor of the claim, and the creditor thereupon made this application to confirm the report of the referee. The facts found by the referee are stated in the following opinion, rendered at Special Term, October 27th, 1882.

Nelson Smith, for the creditor.

Dewitt C. Brown, for the assignee.

Waldorf H. Phillips, for the administratrix of the assignor.

VAN BRUNT, J.—This is a motion to confirm the referee's report made upon a claim presented by W. G. Ellsworth as a creditor of Israel T. Potter, deceased, who had made an assignment to one Bertrand Clover.

The referee finds that on December 5th, 1876, the said Israel T. Potter made an assignment for the benefit of creditors to Clover; that on the 21st of December, 1876, a compromise deed was drawn up and executed by many of Potter's creditors,

whereby they agreed to accept 40 cents on the dollar as and in full settlement of their claims. There was a provision in said deed, however, that the same should not be binding except it should be signed by all the creditors of said Potter. This composition deed was first signed on behalf of Mr. Ellsworth by C. G. Hall, his attorney, and afterwards by Ellsworth himself. Many of the creditors having refused to sign the composition deed, a suggestion was made by the assignee and assented to by many of the creditors, providing for the payment of 40 per cent. of their claims, and the assignment of such claims to Clover in his individual capacity—the evidence showing that such assignment was to be for the benefit of Israel T. Potter. Some 150 or 200 creditors made such assignments to Clover and received their 40 per cent.

On the 23d of January, 1877, $1,200 was paid to W. G. Ellsworth, being 40 per cent. of the amount of his claim, and on the 24th of January, Ellsworth executed a paper similar to that which had been executed by all the other creditors who had received the 40 per cent., by which he acknowledged the receipt of the 40 per cent. of his claim, and which he had agreed to accept under the composition deed theretofore signed by him as in full of said claim, and in consideration of such sum he assigned to Clover all his right, title and interest in said claim against Potter.

The referee further finds that Ellsworth executed this instrument in mistake, supposing it to be a mere receipt or acknowledgment that he had been paid $1,200 on account of his claim; that its contents were never read or explained to him, nor could he then read or understand it to be other than such supposed receipt, as he did not have his glasses with him on that day and his eyesight was defective; that Clover did not pay Ellsworth under the composition deed and would not have given him the money as a compromise merely, and during the reference offered to cancel the assignment of his claim if Mr. Ellsworth would restore the $1,200, which offer Mr. Ellsworth did not accept.

The referee further finds at the request of the counsel for the assignee that neither Clover nor Genung, who actually made

the payment, practiced any fraud upon Ellsworth in procuring his signature to the assignment of his claim.

The referee was requested to find the following fact:— "Did not Ellsworth have full opportunity to examine the assignment before executing it, and did not, in fact, Ellsworth examine the assignment before he executed it, and did he have his glasses with him that day?" and in answer to these requests the referee finds as follows: "I find the defective eyesight prevented a full opportunity of examination; that Mr. Ellsworth did not examine this instrument so as to become aware of its actual contents."

The referee further finds that Genung, who made the payment, did not know, nor did Ellsworth inform him of the fact, that he had not his glasses and could not examine the paper; that the assignment executed by Ellsworth was precisely like that executed by nearly all the creditors, but that no creditor got 40 per cent. upon the amount of his debt without executing an assignment of his claim.

The referee further finds that after the refusal of some of the creditors to sign the composition deed, this method of settlement was the one adopted, and that at the time of the execution of this assignment, Clover and Genung supposed that Ellsworth had consented to execute an assignment of his debt, and that Clover would not have paid Ellsworth the $1,200 if he had refused to execute the assignment of his claim.

Upon these facts, the referee finds that Ellsworth is not bound by the assignment which he has made, because of the relation of trust which existed between Ellsworth, the creditor, and Clover, the assignee.

In coming to this conclusion, I am of the opinion that the referee has entirely mistaken the rule of law applicable to the facts of the case.

It is true that a trustee cannot deal with his *cestui que trust* for his own benefit. This rule is founded upon the relation of trust which is supposed to exist between a trustee and his *cestui que trust.* That the facts proven bring this case within the rule above named governing the relations of trust between an assignee and the creditor of his assignor, I fail to

see. There are no confidential relations between an assignee appointed by the assignor to wind up his estate and divide the proceeds among his creditors. It is undoubtedly true that, if the assignee makes any representations in regard to the condition of the estate, in regard to the probabilities of the dividend which the estate will declare, or any facts of that description, he is held to the strictest accountability in case of any misstatement or misrepresentation. But that a composition deed or a settlement of the claims of creditors is to be held void merely because a creditor has signed at the request of the assignee has never yet been established.

It is true that the assignments in question were taken to Clover individually, but the evidence clearly shows in the case that such assignments were taken for the benefit of Potter, the assignor, and that they were not for the individual benefit in any respect of the assignee. It was not claimed, and has not been claimed upon the argument of this motion, that Clover was to derive any individual benefit from such assignment, but that he had charged himself only with the amount of money which he had actually paid for the purpose of procuring such assignments. He was not dealing with the creditors or with the trust estate for his own benefit. He was endeavoring to carry out a composition deed which Mr. Ellsworth had signed, and which it was impossible to complete because of the refusal of some of the creditors to sign it. A composition deed is always supposed to reserve some benefit to the debtor, and the carrying out of this composition deed by the means which were adopted of paying a dividend and taking assignments of the claims was undoubtedly understood by the creditors to be in some way beneficial to the assignor.

In fact the policy of the assignment law is to further compositions, because it provides that, in the case of a composition deed, the creditor who refuses to sign the composition deed shall only receive so much of the estate as he would have received had none of the creditors signed the composition deed and the whole estate had been divided amongst all the creditors.

The finding of the referee in this case that there was no fraud; that Ellsworth could have examined this paper if he

had chosen to do so; that Clover and Genung supposed that he had done so, and that they would not have paid the money had he not executed the assignment, shows that if there has been any negligence or any fault it is upon the part of Mr. Ellsworth, and that he now cannot come in and claim to be relieved from the results of his own negligence. If he had asked that the receipt and assignment be read over to him he would have been aware of their contents. He was in the habit of consulting with Mr. Potter, the assignor; he was his intimate friend; this process of settlement had undoubtedly been the subject of discussion among the creditors of Potter; and Clover had the right to assume that Ellsworth was acquainted with the proceedings which were being taken to relieve Potter from the claims of his various creditors.

It is not necessary that I should discuss this branch of the case further, because the referee seems to place his decision entirely upon the relation of trust existing between Clover, as assignee, and Ellsworth, as creditor.

As I have already said, I fail to see that any such relation of trust exists in reference to a compromise with the assignor of his debts. If the assignee makes any representations in regard to the condition of the estate for the purpose of inducing a creditor to sign a composition deed, he should be held to the strictest accountability, because of his superior knowledge; but there is no rule which would render void a composition deed, or an assignment of a claim to the assignee for the benefit of the assignor, unless there was some fraud upon the part of the assignee. There may be a grave question of doubt as to whether the referee had the right upon this order of reference to try the validity of this assignment, but as his right has not been questioned by the counsel, it is not necessary that I should discuss that proposition. I am of the opinion, therefore, that the exception to the finding of the referee, that Ellsworth was a creditor, should be sustained.

An order in accordance with this decision was entered, and from the order Ellsworth appealed to the General Term, at which the following opinion was rendered, June 25th, 1883.

Beach, J.—The appellant moved at Special Term to confirm the referee's report, and, notwithstanding he filed exceptions, must be held to support it as correct in both fact and conclusion. The learned justice in the court below was not called upon to review the testimony in order to justify the legal conclusion, when the facts found called for an opposite result. Had the appellant desired to pursue such a course he should have filed such exceptions and moved to set aside the report. If the judgment was not upheld by the facts, it was equally prejudicial to him as if the referee had based an unsatisfactory legal conclusion upon facts in accord with his contention. In this court, the review must be had upon the facts found by the referee, especially as those most important and controlling seem justified by the proofs.

The finding that no fraud was practiced in procuring appellant's signature to the assignment of his claim negatives his contention of its having been obtained by false representations and concealment. It is found that the appellant executed the instrument under a mistake, supposing it to be a receipt for a sum paid on account of his claim, and that it was not read over or explained to him, nor could he then read it, having defective eyesight and being without glasses. The question thus arises whether these facts, in connection with the absence of any fraud by the assignee, called for a conclusion different from the one reached by the court at Special Term. I am of the opinion they do not. The suppositions entertained by the appellant when he signed the paper are not material. He was of full age, and in complete mental vigor, the instrument before him was legible, and he had abundant opportunity to read it and act intelligently. No compulsion, misrepresentation or request for hurried action, was used to induce him to sign, and doing so voluntarily, even if temporarily unable to read, precludes him from asking relief from the effect of his act. A court of equity relieves parties from a mutual mistake of fact, but not when ignorance or mistake is confined to one party, and no unconscientious advantage is taken by fraud or concealment by the other (*Moran* v. *McLarty*, 75 N. Y. 25; *Paine* v. *Jones*, Id. 593; *Jackson* v. *Andrews*, 59 N. Y.

244). Even if the appellant had the right to avoid the assignment of his claim to the assignee individually, from ignorance of its contents, he would have to refund the sum received. Clover, the assignee, undoubtedly intended by the payment to secure an assignment of the claim, and his error is equally potent to call for repayment as appellant's to avoid the instrument.

The final question, whether or not the evidence calls for an application of the principles regulating dealings between trustee and *cestui que trust*, if not substantially disposed of by the foregoing conclusions, may be settled from a brief consideration of the facts. The appellant signed the composition deed, and agreed to receive forty per cent. in full satisfaction of his claim. No pretense is made that in so doing he acted in ignorance or by mistake. The referee finds the assignee's action relative to the assignment by appellant to him individually free from fraud, and the proofs tend to show the absence of any intent or desire for personal profit. The assignee asks no credit in his accounting beyond the amount actually paid out. The instrument given must be considered in the light of these facts. It is a receipt to Bertrand Clover for $1,200, being forty per cent. of appellant's claim against Israel T. Potter, which he agreed to accept under composition deed theretofore signed by him as in full of said claim. I think the appellant thereby waived the condition in the composition deed, which required the signing by all creditors, and became bound by his prior signature to that instrument.

The succeeding clause, assigning to Bertrand Clover all his right, title and interest in and to all sums of money now due or to grow due upon his claim against the assignor, is of little effect, because Clover, as assignee, seeks no personal gain therefrom. So far as the paper indicates, the money paid belonged to Clover, and independent of his being assignee would simply amount to a purchase of the claim by a third party for a less sum than its total amount. That this third person was the assignee works no change, because he seeks no advantage from the purchase, and any benefit accrues to the insolvent assignor. In my opinion, the first clause of the

paper is controlling, and renders the record containing the assignment of so little utility as not to furnish a foundation for the question so prominently considered by the referee regarding action by a trustee. In the absence of a definite finding, there appears to be some uncertainty, upon the evidence, as to whether or not the assignee seeks personal benefit from the assignment he took. In case a stipulation shall be given by him that the assignment was taken on behalf of and for the benefit of the assignor Potter and his estate, the order appealed from should be affirmed, without costs of this appeal, and in case it be not given within five days after this decision, the proceedings should be remitted to the referee for a finding upon that question.

Charles P. Daly, Ch. J., and J. F. Daly, J., concurred.

Order accordingly.*

In the Matter of the Assignment of Edmund Darrow to William Peet for the Benefit of Creditors.

[Special Term.]

(Decided July 31st, 1883.)

Though twenty-five years have not elapsed since the execution of an assignment for the benefit of creditors, the court will refuse an application to compel the assignee to account where the assignor and the creditors have slumbered for many years upon their rights, and the assignee, by reason of the loss of papers, and the death of many persons with whom transactions in the settlement of the estate were had, would be put to great disadvantage in accounting.

Where there is nothing to explain the laches of the assignor and the creditors, and where no fraud or embezzlement is charged against the assignee, the parties will be left to an action for an accounting.

* The order entered upon this decision was affirmed by the Court of Appeals, January, 1884.

Matter of Darrow.

APPLICATION for a citation to an assignee for the benefit of creditors to account.

The application was made by the assignor and a creditor.

The facts are stated in the opinion.

VAN HOESEN, J.—Mr. Darrow, in 1861, made an assignment. In 1883, for the first time, he asks for an accounting. Nothing has prevented him from making an earlier demand, and naturally the long delay challenges inquiry as to his motive in exhuming the remains of the assignment. As twenty-five years have not elapsed since the assignment was executed, the statute of limitations cannot be interposed by the assignee as a bar, but nevertheless the reasons he gives for objecting to an accounting at this late day address themselves to the discretion of the court. The death of so many persons who had knowledge of the proceedings, taken more than twenty years ago by the assignee, for the winding up of the estate, the loss of papers showing what those proceedings were, the silence of the assignor for so long a time, and the acquiescence of the creditors of Darrow, show not merely that it would be difficult for the assignee now to prepare an account, but also that in settling the estate years ago, the assignee did nothing that called for an appeal by Darrow or his creditors to the court. Vigilance is the duty of the assignor as well as of the assignee. Why has Darrow suddenly awakened to the necessity for an accounting? Why has Alling just discovered that there are in the hands of Mr. Peet moneys to which he is entitled? If Mr. Darrow and Mr. Alling are really anxious for an accounting, let them, after having waited so many years, go into a court of equity, where they will not only obtain an account, but also incur the risk of costs in case their action is dismissed. If there were reason to suspect fraud or embezzlement on the part of the assignee, or if any reasonable excuse existed for the long delay of the assignor and Mr. Alling to compel an accounting, I should unhesitatingly require Mr. Peet to file an account. But, upon the case disclosed by the papers, I shall

deny the application, and leave Mr. Darrow and Mr. Alling to their remedy by action.

Application denied.

In the Matter of the Assignment of Ferdinand Mayer *et al.* to Simon Danzig, for the Benefit of Creditors.

(Decided December, 1883.)

That an assignee for benefit of creditors has obtained an order of the court that he file a provisional bond, and has filed such bond, before the expiration of the time allowed for the filing of inventory and schedules by the assignor; and that he has proceeded thereupon to pay preferred claims, even before their maturity, and although unpreferred creditors are threatening proceedings to set aside the assignment as fraudulent, will not justify the removal of the assignee.

An assignee for benefit of creditors drew by check out of the funds of the assigned estate on deposit in a bank, sums of money, the amounts of which were entered in his cash book as charges against himself. After a demand, by parties interested in the estate, to see the checks and his official check book, had been refused, he added to the entries in the cash book the words "special deposit." Upon motion for his removal, the assignee stated that, for the purpose of obtaining interest on the money, it had been placed on deposit, at interest, and upon the security of United States bonds as collateral therefor, with a person whose affidavit to the fact, and whose receipts for the money bearing the same dates as the cash-book entries, were produced; but the actual dates of making such deposits were not otherwise shown, and although counsel for the assignee promised to produce proof that the deposits were in fact made at the dates when the respective sums of money were drawn, he failed to do so. *Held*, that this was, within the meaning of the Assignment Act, "misconduct" on the part of the assignee, for which he should be removed; although it did not appear that he had taken the money for his own benefit, or that he had not replaced it, or that the estate would lose it.

Application for the removal of an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

Blumenstiel & Hirsch, for the petitioning creditors.

Richard S. Newcombe, for the assignee.

Van Hoesen, J.—Most of the grounds assigned for the removal of the assignee are unsubstantial. Whatever may be the true construction of section 5 of the Assignment Act, it would be absurd to hold the assignee responsible for the act of the court in prematurely ordering him to file a provisional bond. I do not say that the time for the filing of a provisional bond had not arrived when the order for the filing of it was made; but I do say that, conceding such to be the fact, the assignee would not be made the scapegoat for the errors of the court. Again, the charge that the assignee has paid some preferred debts before the attorneys for the moving parties have succeeded in obtaining any evidence to show the assignment to be fraudulent, is not entitled to serious notice. The assignee deserves praise instead of censure for having proceeded without delay to execute his trust and pay the preferred debts. I should not hesitate for a moment to remove an assignee who, instead of performing his duty, delayed the execution of his trust and the payment of preferred creditors for the purpose of enabling non-preferred creditors to hunt for evidence that the assignment was fraudulent. Nor is any fault to be found with the assignee for taking the assignment for his chart and compass and paying the debts in the order therein set down. If some of the preferred debts are not matured, it is nevertheless his duty to pay them, making the necessary deduction of interest. It is his duty to carry the assignment into effect as well as to defend its validity. If any creditor believes that the assignment is fraudulent in fact, or fraudulent because it conflicts with the law, he must take proceedings to have it set aside; and if he does not take such proceedings he has no right to ask that the assignee delay, even for an hour, the performance of what the assignment requires him to do.

Without discussing all the accusations made against the assignee, I shall proceed to consider one charge that seems to me to be very serious. I say here that I do not believe that the

assignee intended to misappropriate a dollar of the estate. It is proved that he is a merchant who bears an unblemished reputation and enjoys the confidence of many estimable men. I think he has made a serious mistake, however, in one matter, and I regret that he has not thought it best to be frank with the court with respect to it.

It appears that on October 31st, the assignee drew out of the moneys of the estate deposited in the Central National Bank $8,000, and that on November 5th he drew the further sum of $7,000. Both these drafts were entered on the cash book of the assignee on the last mentioned day. On November 9th one of the attorneys for the parties making this motion saw these entries and asked to see the assignee's check book. The assignee refused to show the check book. This refusal was improper, for the rules of this court expressly provide (Rule 19) that "the assignee shall keep full, true, exact and regular books of account of all receipts, payments and expenditures of money by him, which said books shall always during business hours be open to the inspection of any person interested in the trust estate." The assignee said that his official check book was his private affair. In this he erred. He had voluntarily assumed the position of a trustee for others, and his action respecting property in which they were interested was in no sense his private affair. But his attention was called to the fact that these entries had challenged inquiry, and then he thought it best, for some reason that does not appear, to cause the words "special deposit" to be added to the entries. Why those words were not written at the time the entries were made, and why they were inserted after inquiries had been made as to the purpose for which the money had been drawn from the bank, no explanation has been given.

The assignee does, however, give an explanation of the circumstances under which the money was taken by him. He says that the money was drawing no interest, and that for the purpose of getting interest upon it he placed it on deposit with Charles Minzesheimer & Co., who agreed to pay interest at the rate of four per cent., and who pledged with him three per cent. Government bonds as collateral security for the loan. As proof

that such a transaction took place, he produces two receipts from Charles Minzesheimer, the dates of which correspond with the dates of the entries in the cash book to which I have referred. The presumption is, of course, that these receipts were given at the time at which they are dated, and perhaps it was because of this presumption that the assignee does not state in his affidavit that he made a special deposit of $8,000 with Minzesheimer on the 31st of October, or that he made a special deposit of $7,000 on the 5th of November. Mr. Minzesheimer, in his affidavit, is silent as to the times at which these "special deposits," as they are called, were made. He says that the assignee placed in his hands $15,000 of the money of the assigned estate, but he does not say when this was done. This being the state of affairs appearing by the affidavits at the time, the motion for the removal of the assignee was argued. The counsel who appeared in support of the motion called attention to the fact that there was no distinct assertion that the special deposits had been made before notice of motion for the assignee's removal was served, and that it was essential to the completeness of the assignee's explanation that he should show that the so-called special deposits were not an afterthought, but were actually made at the dates of the receipts. To this the counsel for the assignee assented, and he said that he would produce Mr. Minzesheimer's affidavit to prove that the deposits were made—the first on the 31st of October, and the second on the 5th of November. I have waited for several days in expectation of receiving an affidavit, if not from Minzesheimer, at least from the assignee, that the deposits were actually made at the times the receipts bore date. No such affidavit has been furnished, and the question for me now to determine is whether, in view of the fact that I do not believe the estate to be in danger of losing the $15,000, and in view of the fact that many of the largest creditors are desirous that the assignee should be retained, I should hold that as the charge is really one of misappropriating money, the burden of proof is on the moving party, and that (though the assignee's explanation is not satisfactory) the evidence offered against him is insufficient to establish the charge, or whether I should hold that the circum-

stances proved by the petitioners created so strong a probability of the assignee's misconduct as to require a full explanation of his use of the money, and that as he had it in his power to prove by his own oath that the deposits were made at the times of the dates of the receipts, his failure to produce such proof warrants the strongest inference against him, and justifies the conclusion that the receipts of Minzesheimer are only fabricated evidence designed to conceal the truth as to the use made of the $15,000? Strong presumption arises from the suppression as well as from the fabrication of evidence.

What inference is fairly to be drawn from the fact that the assignee refused to show his check book, which must have contained entries relating to the withdrawal from the bank of these two sums, $8,000 and $7,000? Why was the cash book afterwards changed by the inserting of the words "special deposit?" Why is not the affidavit of the assignee produced when he is informed that it is of the highest importance that he should show that the money was actually deposited with Minzesheimer at the dates of the receipts? Why has he not explained his inability to procure the affidavit of Minzesheimer? What inference is to be drawn from the fact that the assignee, when challenged to produce proof that the special deposits were made at the dates of the receipts, voluntarily undertakes to furnish such proof (which, if it exists, must necessarily be in his own hands), and then fails to produce it? The answer seems to be that the assignee has made such use of the money that he cannot disclose the purpose to which it was applied. I say again that I do not believe that he took it for his own benefit, or that he has not replaced it, or that the estate will lose it. An assignee, without criminal intent, may, from pure good nature, lend to a necessitous friend, without security, the money of the assigned estate: but if he does so he violates his duty, and becomes liable to removal. It may very well be that the assignee has not, but that others have, had the benefit of these two sums; but the law will not tolerate any action, however benevolent may be the motive that prompted it, which turns the trust fund from the use to which the creator of the trust directed its application.

I think I am bound to decide that the conduct of the assignee, in concealing from the creditors the purpose for which the money was drawn, and in withholding from the court evidence that he undoubtedly possesses as to the times at which he deposited the money, though he promised to produce the evidence, amounts to misconduct within the meaning of the Assignment Act, and calls for his removal.

An order may be entered therefore for the removal of the assignee and for the appointment of a substituted assignee in his room.

Order accordingly.

In the Matter of the Assignment of De Wilton Robinson to George A. Wicks for the Benefit of Creditors.

[Special Term.]

(Decided January 3d, 1884.)

The provisions of the Code of Civil Procedure do not apply to proceedings under the General Assignment Act.

The bond of an assignee for the benefit of creditors must, in the County of New York, be approved by a judge of the Court of Common Pleas. An approval by a justice of the Supreme Court is a nullity, and confers no authority upon the assignee to dispose of the assigned property.

An assignee for the benefit of creditors who pays as fees to his counsel money of the assigned estate with the understanding that his counsel shall furnish sureties on his bond and pay what is necessary to procure them, is to all intents and purposes using the assigned estate for the purchase of bondsmen, and should be removed.

Application for the removal of an assignee under a general assignment for the benefit of creditors.

The facts are stated in the opinion.

Van Hoesen, J.—The bond of the assignee has never been approved. A justice of the Supreme Court has no power to

approve the bond of an assignee appointed under the General Assignment Act of 1877, and his action in approving such a bond is a nullity. The Code of Civil Procedure does not apply to proceedings under the Assignment Act. The bond of an assignee under the Act of 1877 can not be approved by any other judge than a county judge (L. 1877, c. 466, § 5). The assignee has therefore been acting without lawful authority in disposing of the assigned estate. Before he could lawfully "sell, dispose of or convert to the purposes of the trust any of the assigned property," it was his duty to obtain the approval of his bond by a judge of the Court of Common Pleas. This is sufficient cause for removal.

But there is another cause.

In order to obtain sureties, he paid out money of the assigned estate. Directly he did not pay his sureties for becoming his bondsmen, but he gave to his counsel money belonging to the estate, with the understanding that his counsel would furnish the sureties, and pay what was necessary to procure them. This is, to all intents and purposes, using the assigned estate for the purchase of bondsmen.

The assignee must be removed.

Application granted.

JOHN G. SMITH, Appellant, *against* THOMAS BOYD *et al.*, Respondents.

(Decided January 21st, 1884.)

The certificate of acknowledgment of an assignment for benefit of creditors, after stating the venue and date, was in the following words: "before me personally appeared C. H. S. and J. G. S." [the assignor and assignee], "of the City of New York, to me personally known to be the individuals described and who executed the same, and who acknowledged to me that they executed the same for the purposes therein mentioned." *Held*, that this did not set forth that the officer knew the persons acknowledging to be the persons described in and who executed the conveyance; that the instrument, therefore, was not entitled to be recor-

ded, and passed no title to the assignee; and that the irregularity could not be cured, so as to give the assignee title or right to the assigned property, as against attaching creditors of the assignor.

Appeal from a judgment of this court entered upon a dismissal of a complaint on a trial before a referee.

The action was brought to recover damages for the wrongful taking by the defendants of personal property claimed by the plaintiff as assignee under a general assignment for the benefit of creditors. To the assignment, which was made to the plaintiff by Clinton H. Smith, was annexed a certificate of acknowledgment in these words:

"State of New York, City and County of New York, ss.:

"On this twenty-first day of February, one thousand eight hundred and eighty-two, before me personally appeared Clinton H. Smith and John G. Smith, to me personally known to be the individuals described and who executed the same, and who acknowledged to me that they executed the same for the purposes therein mentioned.

"John N. Brown,
"Commissioner of Deeds, N. Y. County."

The assignment was filed in the office of the clerk of the City and County of New York; and subsequently warrants of attachment were obtained by the defendants against the assignor and levied upon a portion of the assigned estate, which was the alleged wrongful taking for which the action was brought.

On the trial before the referee the plaintiff offered the assignment in evidence. The defendant objected to its admission, on the ground that it was not duly executed and acknowledged. It was admitted that the instrument was signed by the parties to it; that the plaintiff took possession of the property mentioned in the schedule annexed to it; that the defendants took the property referred to in the complaint out of plaintiff's possession by virtue of attachments. The referee allowed the assignment in evidence, reserving the question as

to the legal effect of the paper until the close of plaintiff's case. The plaintiff rested, and the defendant moved to dismiss the complaint on the ground that the assignment was not duly acknowledged or executed as required by the statute. The motion was granted, and judgment for the defendants was entered on the dismissal of the complaint. From the judgment the plaintiff appealed.

John J. Adams, for appellant.

Otto Horwitz and *Daniel Clark Briggs*, for respondents.

J. F. Daly, J.—An assignment for the benefit of creditors is not valid if not duly acknowledged and recorded (L. 1877, c. 466, § 1; *Rennie* v. *Bean*, 24 Hun, 123; *Hardmann* v. *Bowen*, 39 N. Y. 196; *Britton* v. *Lorenz*, 45 N.Y. 51; *Jones* v. *Bach*, 48 Barb. 568; *Treadwell* v. *Sackett*, 50 Barb. 440). If it be not duly acknowledged the recording goes for nothing; it is not recorded (*Rennie* v. *Bean*, *supra*; 2 R. S. 759, §§ 16, 20). In determining the validity of the recording of a conveyance, it is the certificate of the officer who takes the acknowledgment that must be considered, for unless the acknowledgment be certified in the manner prescribed by the statute the instrument is not entitled to be recorded (2 R. S. 759, § 16). The manner of certifying an acknowledgment is for the officer who takes it to indorse upon the conveyance a certificate of the acknowledgment, wherein he shall set forth the matters required by the statute to be done, known or proved on such acknowledgment, &c. (2 R. S. 759, § 15). The officer must know or have satisfactory evidence that the person making the acknowledgment is the individual described in and who executed such conveyance (2 R. S. 758, § 9). According to the 15th section of the statute, such knowledge shall be set forth in the certificate.

In the certificate of acknowledgment to the assignment before us, it is not set forth that the officer knew the persons acknowledging to be the persons described in and who executed the conveyance. The words "the same" relate to nothing and

identify nothing. There is an utter absence of certification by the officer of matters required to be certified. It may be a clerical error merely, but the matters are not in the certificate, and without them the certificate is not in the manner required by the statute, and the conveyance was not entitled to be recorded.

I have referred to the foregoing provisions of the Revised Statutes as applicable to the acknowledgment and recording of insolvent assignments for this reason: the Assignment Act (L. 1877, above cited) requires that the assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and recorded in the office of the clerk of the county where the debtor resided or carried on business at the date thereof. The act does not state the requisites of an acknowledgment nor of a certificate thereof. The Assignment Act of 1860 provided that the certificate of acknowledgment should be indorsed upon the assignment, but this provision is omitted in the act of 1877. The omission was probably owing to the fact that the Revised Statutes are explicit as to how acknowledgments shall be taken and certified. The act of 1877 merely requires that the assignment shall be duly acknowledged. "Duly" signifies regularly, or exactly (*People* v. *Walker*, 23 Barb. 304), that is to say, in conformity with some regulation on the subject; and as the only rule in the matter is found in the Revised Statutes, the acknowledgment and certificate must conform to them.

Under the act of 1860 it was held that the assignment was invalid if not acknowledged before delivery. Under the act of 1877 no time is fixed for acknowledgment, but it must be before recording, for the reasons above stated; and under the authorities above cited, if the instrument be not acknowledged and recorded, it is invalid and passes no title to the assignee.

The irregularity in the certificate of acknowledgment cannot be now cured so as to give the assignee title or right over the attaching creditors, the defendants. He gets no title until the assignment is recorded. If no rights intervene he might obtain a proper certificate and have the assignment

recorded properly, but his title to the assigned property would vest only from that time.

The referee was right in giving judgment for defendants, and it must be affirmed with costs.

Van Brunt and Van Hoesen, JJ., concurred.

Judgment affirmed, with costs.

Thomas D. Wiberly, Appellant, *against* James Brander Matthews, Respondent.

(Decided January 3d, 1881.)

Parties to a building contract agreed to submit disputes in regard to allowances for extra work done or materials furnished, or deductions for work not done or materials not furnished, or any other matters in dispute under the contract, to one of the architects under whose supervision, by the terms of the contract, the work had been done, and who had himself accurate and full knowledge of the items and extent of the extra work done and of the extra materials furnished, and their value, and was equally familiar with the omitted work, and knew the cost of it. The arbitrator thus appointed, without giving notice to the parties of any time or place for hearing them, and not having been sworn or taken any proofs, awarded that the contractor was entitled to a certain sum from the owner of the building. *Held*, that the submission was valid and binding upon the parties; that the requisites of an oath by the arbitrator, notice to the parties of the time and place of hearing, and the taking of proofs, may be waived by the parties; that such waiver was to be implied in this case, as it was evident from the facts, and particularly from the conduct of both parties, that the arbitrator was relied upon by each as an expert who was to ascertain, by a personal inspection of the building, the amount and value of the omissions from the contract, and of the extra work and materials, and, having done this, was then to settle finally between them how much was to be paid, and that his award was valid, and a bar to a subsequent action for an amount claimed to be due under the contract.

Appeal from a judgment of this court, entered upon the report of a referee.

The facts are stated in the following opinion of Hon. J. S. Bosworth, the referee.

The complaint alleges that one Thomas Drummond, between the 26th of October, 1876, and the 4th of June, 1877, at the request of the defendant, performed for him work and labor, and furnished materials to and for him "to be used in building a building in the City of New York," and that the defendant promised to pay what such labor and materials were reasonably worth; that they were worth $3,317.70; and claims that such amount is due, with interest from June 4th, 1877. It alleges that Drummond thereafter duly assigned the claim to the plaintiff, and judgment is asked for $3,317.70, with interest from June 4th, 1877. The assignment is dated October 1st, 1877.

The answer alleges: First—That Drummond about the day of October, 1876, entered into a written contract with the defendant, by which Drummond agreed to furnish work and materials for and complete No. 452 Broadway, for a stipulated sum; that during the performance of the contract, Drummond agreed to perform extra work and furnish extra materials, being the extra work and materials named in the complaint; that Drummond did not do all the work or furnish all the materials required by the contract of October , 1876, and did not do the extra work and furnish the extra materials as requested, and that a dispute arose between them; and that, in order to put an end to the same, the defendant and Drummond, by an agreement dated June 14th, 1877, submitted the matters to the arbitration of Emile Gruwé, and that the said arbitrator made his award on the 18th of June, 1877, to the effect that Drummond was entitled to receive $893.05, exclusive of the balance due on the contract of October, 1876, and that such submission and award embraces all the matters mentioned in the complaint; that the defendant paid to Drummond the full amount due to him on his contract, and tendered payment of the $893.05, awarded to Drummond, which he refused to receive. Second—By way of counter-claim, the defendant alleges non-performance by Drummond of the contract of October , 1876; alleges that work required by the contract was omitted, and that the value

of the extra work and materials is less than the amount of damages sustained by the defendant, and claims to set off the damages against any amount that it may be found the extra work and materials were worth.

"The plaintiff for reply to the answer, alleges that this plaintiff denies each and every allegation contained and set forth in said answer by way of counter-claim, and this plaintiff denies that the defendant has any counter-claim or set-off to the claim of the plaintiff in this action."

By the contract of October 20th, 1876, Drummond agrees to "erect and finish the new building, 452 Broadway," for $25,000.

The *fifth* article of this contract provides that any dispute as to "the true construction or meaning of the drawings and specifications" shall be decided by Schweizer & Gruwé (the architects), but should any dispute arise respecting the true value of the extra work, or of the works omitted, the same shall be valued by two competent persons, one employed by the owner, and the other by the contractor, and those two shall have power to name an umpire, whose decision shall be binding upon all parties."

This contract having been put in evidence by the plaintiff, the defendant claims that by the legal force and effect of the fifth article of the contract, a valuation of the extra work in the manner provided thereby is a condition precedent to his right to maintain an action to recover the value thereof. To this it may be replied, that the answer does not set up any such defense; it does not aver that the contract which it states was made contained any such clause or provisions as is expressed by the *fifth* article thereof. The answer does allege "that said Drummond did not perform the conditions on his part in said contract contained, and did not complete said work in a good and workmanlike manner, but failed to do various portions of said work, and to supply various materials in accordance with said contract, and to comply with other stipulations thereof." Non-completion of the work in a good and workmanlike manner, and a failure to supply various materials, and to comply with other stipulations, are the defendant's

specifications of non-performance by Drummond of conditions to be performed by him. They all relate, either to not doing what the contract required him to do in erecting the building, in the manner required by the contract, or to the omission of some things which by the contract he was to do to complete the building.

I do not think that this case is like *President, &c. Delaware, &c. Canal Co.* v. *Pennsylvania Coal Co.* (50 N. Y. 250).

By the agreement in the case cited, the additional toll to be paid after the enlargement of the canal, at a rate per ton of 2,240 lbs., was "to be established after the completion of the said enlargement in the manner following." This rate when established was to regulate a future continuous business. In view of the peculiar terms of the instrument, and of the subject matter of the agreement, the court held that the prescribed mode of adjustment and settlement of the rate is a part of the agreement for the additional toll, and modifies and qualifies the right, so that the right does not attach until the same is established (Id. 263).

In the case before us, the *fifth* article of the contract in question is a separate and independent covenant, to settle all disputes and differences by arbitration, or in the modes therein specified. It is difficult to discriminate between this case and those of *Kill* v. *Hollister* (1 Wils. 129), and *Thompson* v. *Charnock* (8 T. R. 139). The Court of Appeals, as I understand the opinion (50 N. Y. 266), does not intimate that in cases like those the rule there enforced should not be followed.

I think the parties to that contract mutually waived the *fifth* article thereof, by their written agreement to submit their matters of difference to the arbitration of Emile Gruwé; that agreement was made June 14th, 1877.

Hence the next important question is—what is the legal effect of the award made by Gruwé?

It is entirely clear upon the evidence, that the arbitrator (Gruwé) did not notify the parties to the submission of any time and place when and where he would hear them in respect to the matters submitted. This omission is fatal to the

validity of the award, unless the parties waived such notice, and left the matters in controversy to the arbitrator, to be decided by him on his knowledge of the facts (*Elmendorf* v. *Harris*, 23 Wend. 628.).

The arbitrator in this case may be regarded as an expert arbitrator. He had as accurate and full knowledge of the items and extent of the extra work done and the extra materials furnished by Drummond, as Drummond had. He knew the value of the extra materials furnished, and the value and amount of the extra labor performed. He was equally familiar with the omitted work. The building was to be, and was erected and completed under his supervision as an architect. The work for which the plaintiff, as Drummond's assignee, claims to recover was done almost wholly by his order as such architect; so Mr. Drummond in substance testifies. He was familiar with the omitted work, and knew the cost of it. A man with such knowledge, assuming that he would act impartially between the parties, might well be supposed capable of doing as full justice between them as could be expected to result from any action at law, prosecuted to judgment, according to the course and practice of the court.

It is quite clear from Mr. Drummond's testimony, that he did not expect that there was to be or would be any formal hearing before the arbitrator, or that the parties would be notified to appear before him for a hearing of the matters submitted. He presented to the arbitrator a copy of the account, or bill of items of extra work and materials, which was given in evidence on this trial. He testified that before the submission was signed, he and Mr. Gruwé went over this account, and that Mr. Gruwé claimed that some of the items were charged too high, and that he and Gruwé agreed upon deductions to be made, amounting together to over $300, and that Gruwé agreed that if the matter was submitted to him, he would report the balance of the account for extra work as due to Drummond. Gruwé denies that he so agreed, but Drummond swears that he did, and believing this, and that Gruwé would so award, there was no object in his making proof of what he had done and furnished extra, or of the value thereof. It is also clear that

he did not desire or expect to be heard before the arbitrator, in respect to the omitted work. The arbitrator understood everything relating to it, and Drummond expected that he would act on that knowledge. He testifies in substance, that before the award was made he asked Gruwé why he did not report, or how soon he would report, and that a day or possibly two days before the award was delivered, he was at Gruwé's office, and he then told Drummond that he was drawing his report, or was making it up.

It is therefore incontestible, as I think, upon Drummond's testimony, that he did not desire or expect any other hearing than such a one as he had had; and he was inquiring when the report or award would be made, understanding that all the hearing had been had which either party expected, or had a right to expect, as a preliminary to making the award. The defendant laid before the arbitrator his claim for omitted work, and that was all that he desired or expected to do. He knew what Mr. Drummond claimed for extra work. If it had been expressly agreed in the submission that the arbitrator should examine and decide upon the matters in controversy, upon his knowledge of the facts, he having full knowledge thereof, and that his decision should be final, it cannot be doubted, as I think, that an award of the arbitrator, free from fraud, would be conclusive.

It is not thus stipulated or agreed in the submission. But it is clear, as I think, that it was well understood between the parties that such was to be the character of the arbitration; and it is also clear, as I think, that just such an arbitration was had in all that relates to the proceedings before the arbitrator, as both parties expected and desired. Drummond, who alone (through the plaintiff, as his assignee) complains of the award, shows by his testimony that the method of procedure before the arbitrator was all that he desired or expected.

In *Brazill* v. *Isham* (12 N. Y. 15), Gardiner, Ch. J., states as elementary law, that "A person, undoubtedly, may be selected to state an account between men, who agree to abide by his report. On such a case the report would have the same effect as though the parties had themselves stated the account,

and agreed upon the balance." (See Morse on Arbitration, 143, 144.)

It is competent to the parties to waive any notice, to which, by the legal import of the submission, they would be entitled. They may waive acts, which, if not waived, would be sufficient cause for setting the award aside.

In *Fudickar* v. *Guardian Mutual Life Ins. Co.* (62 N. Y. 392), the arbitrator, after the case had been substantially closed, wrote to one party for a statement of facts affecting the merits (Id. 395), but before sending it the plaintiff was notified of what the arbitrator intended to do, and the reply was shown to the plaintiff, and the arbitrator promised him an opportunity to give answering evidence, provided the arbitrator concluded to use the statement. The arbitrator after that advised the plaintiff that he should not use the statement, and reported that he had utterly ignored it. The court held (Id. 405), that it was the duty of the plaintiff to object to this proceeding when informed of it, if he did not approve of it, and said that "he ought not to be permitted, after having lain by and taken the chance of a favorable award, to object when he finds the award against him."

It is stated in Morse on Arbitration (143), that "if a person is selected as an arbitrator by reason of some special knowledge or skill possessed by him with reference to the matter in controversy, so that it is apparent that the parties intended to rely upon his personal information, investigation and judgment, it may be that he will be justified in refusing altogether to hear evidence."

In this case, there was not any refusal, or failure to hear all the evidence which either party wished to give, or all the suggestions, criticisms, or statements which either party wished to make.

The objection to the validity of the award is, that the arbitrator did not notify the parties of a time and place when he would hear them in reference to the matters in controversy.

It being clear that the arbitrator was selected by reason of his thorough knowledge of all the matters in controversy, and his entire competency to do justice to the parties on account of

his knowledge of all the items of claim on either side, and of their value, and that they intended to rely upon his personal information, investigation and judgment, and to be bound by his decision formed upon such personal information, investigation and judgment, and that neither party expected or desired any formal hearing, I think it is too late to object now that no formal notice of a hearing was given. If either party intended to claim that such a notice should be given, he should have so stated to the arbitrator; Drummond should not be permitted, after urging the arbitrator to make his award, and knowing that neither party expected any such notice, to lay by and take the chance of a favorable award, to object on this ground after he finds that the award is against him.

I think, therefore, that Mr. Drummond (and the plaintiff as his assignee) is concluded by the award, unless it is impeachable for the fraud or corruption of the arbitrator, or by reason of some mistake apparent on its face.

There is no evidence tending to establish any fraud or corruption on the part of the arbitrator touching the award, unless it be found in the testimony of Mr. Drummond, to the effect that Gruwé promised him, that if Gruwé was selected arbitrator, he would report in Mr. Drummond's favor the amount of his bill for extra work, less the amount of deductions upon which (as Mr. Drummond testifies) he and Mr. Gruwé had agreed. This testimony is flatly contradicted by Mr. Gruwé.

Gruwé testifies, that before the award was made "Mr. Drummond stated that there should be no trouble about this matter of extra work; that he would send a $500 bill to a little boy in Hoboken, if I would pass the bill. I happened to live in Hoboken. Q. That was before you had given your award. A. Yes, sir." Drummond pointedly denies having said this. One or the other of them testifies untruly. Any one who would make such a promise as Drummond says Gruwé did, is not fit to be an arbitrator, and any party to an arbitration, who would enter into a submission to arbitrate on being induced to do so by such a promise, presents himself in an unpleasant attitude before the court.

There is no evidence of any prejudice or partiality on the part of the arbitrator adverse to Drummond, unless the evidence given on this trial tends to show that the arbitrator could not reach the conclusions stated in his award, otherwise than by yielding to strong prejudice against Drummond, or great partiality in favor of the defendant.

If an action had been tried before a court and jury, and a verdict had been rendered in Drummond's favor for $893.05 on just such evidence as has been given on this trial, I do not think it would be set aside as being clearly contrary to or unsustained by the evidence. The award concludes thus: "I hereby decide that Thomas Drummond is entitled to a sum of ($893.05) eight hundred and ninety-three dollars and five cents, exclusive of balance due on contract."

Extra work and materials furnished	$2,265 25
Work not done, and materials omitted	$1,362 20
	$893 05

EM. GRUWÉ.

The extra work and materials, as footed up on exhibit 1, amount to $3,317.70. The complaint claims that to be their value.

If from - - - - - - - - -	$3,317 70
there be deducted the amount found by the award	2,265 25
The difference is - - - - - - - - -	$1,052 45
Drummond testifies, that he and Gruwé agreed upon deductions amounting to - - - - -	340 00
The award allows to Drummond - - -	$712 45

less than the amount which he testifies that he and Gruwé had agreed upon before the submission to arbitration was signed.

Upon the evidence given on the trial, I think the item "For connecting steam-pipes with the boiler, engine, elevator and pump, $295," should be wholly disallowed. Drummond testifies that he and Gruwé agreed upon this at $260, Drummond consenting to a deduction of $35 from the charge of $295. I think it should be disallowed, because it is a part of the contract work, being included in the "Specification of

Steam-heating," and because the work was done by Elder & Hudson, by the defendant's direction, and the defendant paid them $260 for doing it. The ground on which the plaintiff claims this item, and the evidence in support of it, are unsatisfactory. The item "for planking up the south wall in rear, $200," should, I think, be wholly disallowed. Drummond says he agreed with Gruwé to deduct $100 from this charge, and I think the other $100 should be disallowed. This is not, in proper sense, extra work. The planking up was done to keep out the rain, and enable the workmen to work inside in stormy weather. Gruwé says, "that when he and Drummond looked over the bill of extra work, he insisted that this item should be disallowed." The charge for labor employed in doing the planking is a trifling part of the whole charge. The plank which Drummond used, he sold. I do not perceive any just grounds for sustaining any part of this charge.

The item "for building flue on north wall, &c," is at least $200 too large, as the wall of the building formed one side of the flue. Drummond should be allowed for only the brick required for the front and sides of the flue. He used old brick taken out of the building pulled down. It is, to say the least, doubtful whether they were not the property of the defendant. But assuming them to be the property of Drummond, $12 per 1,000 was a large price for them, and at that rate the building of the flue would not be worth over $252, and it is doubtful upon the evidence whether it would be worth that.

These further deductions added together make $560 00
which being deducted from - - - - - 712 45

would leave - - - - - - - - - $152 45

There are other items upon which upon the evidence further reductions should be made, which I do not deem it important to consider critically with a view to the point now being discussed, viz. : whether a verdict for the amount of the award upon just such evidence as has been given on this trial could be set aside as unsupported by the evidence. If the

views here presented are correct, it does not appear that injustice was done to Mr. Drummond in allowing him only $2,265.25 for extra work and materials.

Does it appear clearly, that $1,362.20, charged against him by the arbitrator for "work not done, and materials omitted," was excessive?

On this question Mr. Drummond takes the singular position, that for omitted work, by agreement between him and Gruwé, he did other extra work besides that for which this suit is brought, and which was accepted as substitute for the omitted work. The singular position consists, in part, in this, that the omitted work, according to Drummond's testimony, was of the value of only - - - - - - $268 22
while the substituted work was worth - - - 638 37
including $200 of damages claimed for "delaying his work, by a sale by the defendant of the southerly party wall of 452 Broadway, taking down, setting and furnishing cast-iron columns—30 days," and without this item to $438.69. Mr. Gruwé denies the existence of any such agreement, but testifies that he said to Drummond that the extra work he was doing would be an offset against the omitted work.

Gruwé testifies that he made out a bill of items of the omitted work, affixed to them their values, amounting to $1,362.20, and talked with Drummond about all the items, and he thinks he gave Drummond a copy of it, but will not be certain; that this was a precise estimate of the work omitted, and that he handed the originals to Mr. Matthews and Mr. Drummond. A verdict on Gruwé's testimony, given on this trial, as to the items and value of the omitted work, finding it to be worth $1,362.20, I think, would not be set aside as contrary to evidence. The only adverse testimony is that of Mr. Drummond, and in whatever good faith it may have been given, is quite loose and unsatisfactory. The theory that he did extra work, not charged as extra work, worth at least $438.69, as a substitute for omitted work, worth only $268.22, I cannot accept.

The justice of the award, if the merits were open to investigation, is not impeached. I understand that the award,

if valid, is a bar to this action. If held to be valid and a bar, and on appeal that view should be deemed erroneous, the court, though reversing the judgment, might be compelled to award a new trial, if, upon the facts found, the referee should have reported in favor of the plaintiff. I think, upon the whole evidence, that the extra work is worth - $2,265 25
and that the value of the work omitted is - $1,362 20

For the balance - - - - - - - $893 05
with interest to the date of the report, the plaintiff should have judgment, unless the award is a bar to this action.

If the court should think that it is not, then on the facts found I do not perceive why judgment should not be given for the plaintiff for the amount found due, unless he should prefer a new trial, and to take his chance of recovering more. I have reached the conclusion, though not without some hesitation, that the award is valid, and a bar to this action.

Judgment for the defendant was entered upon the referee's report. From the judgment the plaintiff appealed.

H. T. Cleveland, for appellant.

W. D. Hennen, for respondent.

Charles P. Daly, Chief Justice.—The oath of the arbitrator could be waived by the parties; and, that it was waived may, I think, be implied from the facts and circumstances of this case (*Browning* v. *Wheeler*, 24 Wend. 259; *Winship* v. *Jewett*, 1 Barb. Ch. 183; *Howard* v. *Sexton*, 1 Den. 440; *Day* v. *Hammond*, 57 N. Y. 483; *Nason* v. *Ludington*, 8 Daly, 149).

The submission was for the purpose of ascertaining the amount to be paid under the contract, as there was extra work, for which an allowance was to be made, and omissions, for which there was to be a deduction; and it is well settled that such a submission is valid and binding upon the parties (*Pres't. &c. Delaware, &c. Canal Co.* v. *Pennsylvania Coal Co.*, 50 N. Y. 250, *Scott* v. *Avery*, 5 H. of L. Cas. 811).

In respect to the objection upon which the appellant main-

ly relies, that the award was made by the arbitrator, without notifying the parties of any time and place when and where he would give them a hearing upon the matter submitted; it is sufficient to state, that although this is requisite to the validity of an award, it may be waived by the parties (*Elmendorf* v. *Harris*, 23 Wend. 632), and is waived, where it was plainly the intention of the parties that there was to be no hearing, which, I think is manifest in this case, as the arbitrator was one of the architects under whose supervision, by the terms of the contract, the building was erected, and who, it is evident from the facts, and the conduct of both parties, was relied upon, by each, as an expert, who was to ascertain, by a personal inspection of the building, the amount and value of the omissions from the contract, and of the extra work; and having done this, was then to settle finally between them, how much was to be paid by Matthews to Drummond.

Indeed, I am so thoroughly satisfied of the correctness of the finding of the learned referee, as to the facts and the law, that I prefer to adopt his opinion, as conveying my own view of this case, as concisely and as clearly as I could express it in words.

The judgment given on the report of the referee should be affirmed.

J. F. Daly and Van Hoesen, JJ., concurred.

Judgment affirmed.*

* The judgment entered upon this decision was affirmed by the Court of Appeals January 23d, 1883 (see 91 N. Y. 650).

In the Matter of Edward A. Benson, an Imprisoned Debtor.

(Decided February 7th, 1881).

The provisions of the Revised Statutes regulating the discharge of debtors imprisoned on execution, impose on a creditor opposing the discharge the burden of showing that the proceedings on the part of the prisoner are not just and fair.

A judgment that the copartnership of which an imprisoned debtor was a member has been guilty of a fraudulent disposition of their firm property, does not necessarily preclude his discharge from imprisonment under an execution on such judgment, if his personal participation in the fraud is not shown.

Appeal from an order of this court discharging from imprisonment a debtor imprisoned under execution.

The petition of the debtor showed that he was imprisoned under two executions against his person issued upon judgments recovered by one Joseph Morris in two actions against William R. Mowe, Lewis H. Cole, and the petitioner, claiming damages for fraudulent purchases of goods from the plaintiff by the defendants as copartners under the firm name of Mowe, Cole & Benson. Morris appeared and opposed the application of Benson for his discharge; and from the order granting the discharge, Morris appealed.

S. F. Kneeland, for appellant.

Geo. W. Wingate, for respondent.

Van Brunt, J.—The petitioner, having been imprisoned under an execution, presented his petition to this court to be discharged from imprisonment under the provisions of the Revised Statutes. Certain evidence was taken in that proceeding, and upon that evidence the court ordered his discharge.

It seems to be conceded that the firm of which the petitioner was a member, made certain fraudulent dispositions of

its property prior to its failure, and the question involved in this application is the determination as to whether the petitioner participated in those frauds or not. The appellant seems to misapprehend the burden of proof upon this issue. The statute provides that unless the opposing creditor shall be able to satisfy the court that the proceedings upon the part of the petitioner are not just and fair, the court shall order an assignment and grant a discharge. Every presumption, therefore, is in favor of the application, and the opposing creditor must show by competent proof that the proceedings upon the part of the petitioner are not just and fair. It is not sufficient that the opposing creditor should show that the firm of which the petitioner is a member have been guilty of fraud, but it is necessary to show that the petitioner himself has participated in that fraud.

An examination of the evidence in this case fails to establish that the petitioner Benson was a participant in any of the frauds which were perpetrated by the firm of which he was a member prior to its failure, or that he in any manner knowingly participated in the fruits of that fraud.

It was urged by the counsel for the appellant that the judgments in the cases in which the orders of arrest and executions were issued, make this question *res adjudicata.*

Each partner is liable to arrest for the frauds committed by the other members of the firm, although he may have been entirely innocent of such frauds.

In the statute regulating the discharge of imprisoned debtors, the duty is imposed upon the opposing creditor to show that the proceedings upon the part of the prisoner are not just and fair. Consequently a judgment, that the firm of which the petitioner is a member has been guilty of a fraudulent disposition of its property, does not necessarily preclude the discharge of one partner, because the statute regulating such discharges requires evidently personal participation in the fraud of the applicant in order to justify the court in denying such discharge.

I have been unable to satisfy myself upon an examination

of the testimony in this case that the petitioner was cognizant of the apparent conspiracy of his copartners to defraud the persons of whom they should buy goods prior to their failure.

I think, therefore, that the order appealed from discharging the petitioner should be affirmed with costs and disbursements.

CHARLES P. DALY, Ch. J., and BEACH, J., concurred.

Order affirmed, with costs.

GROCERS' BANK, Appellant, *against* RICHARD G. MURPHY, Respondent.

(Decided March 7th, 1881.)

The right of membership in the New York Stock Exchange is property, which a member of the exchange may be compelled to apply towards the satisfaction of a judgment against him.

APPEAL from an order of this court denying a motion, made in proceedings supplementary to execution, to compel a judgment debtor to apply certain property to the satisfaction of the judgment.

The plaintiff recovered a judgment against the defendant on the 18th February, 1880, and execution was immediately issued to the sheriff of the City and County of New York, where the defendant resided. Subsequently, the plaintiff, proceeding under subdivision 2 of section 292 of the Code of Procedure, procured an order, upon the usual affidavit, requiring the defendant to appear before one of the judges of this court to make discovery on oath concerning his property, to be applied toward the satisfaction of the judgment; and it appeared that he owned a seat in the New York Stock Exchange. A motion by the plaintiff to compel the defendant to apply this to the satisfaction of the judgment was denied; and from the order denying the motion, the plaintiff appealed.

Ten Broeck & Van Orden, for appellant.

Rastus S. Ranson, for respondent.

BEACH, J.—If the judgment debtor is alleged to have property which he unjustly refuses to apply towards the satisfaction of the judgment, the statute provides this mode of inquiry, and upon the fact appearing, the judge may order it applied, if not exempt from execution, and not earnings necessary for a family wholly or in part supported by the debtor's labor. If, therefore, the seat in the Stock Exchange is property, the plaintiff has a right to its application. The learned justice below held it was not, and his conclusion is supported by statements contained in opinions given by the courts of a sister state, whose expressions are entitled to great respect. In *Thompson* v. *Adams* (Weekly Notes of Cases, Vol. 7, No. 18), plaintiff claimed to be the equitable owner of the seat of a deceased member, in the Philadelphia Stock Exchange, he having advanced the money for its purchase, the debt being unpaid. He therefore demanded the whole proceeds of sale, or to share equally with creditors who were members of the board. The court held the moneys applicable, first, in payment of indebtedness to members, which exhausted the fund. ELCOCK, J., before whom the case was tried, said, "a seat in the board is a species of property, incumbered with conditions. It is not a matter of absolute purchase, for it never was freed from the conditions and duties of the constitution and by-laws." Upon appeal the court say: "The seat is not property in the eye of the law; it could not be seized in execution for the debts of the members."

In *Pancoast* v. *Gowen* (Weekly Notes of Cases, Vol. 7, No. 29), the question before the court was whether or not the seat could be reached by an attachment execution, and it was held, it could not be levied upon, under that process or a *fi. fa.* The above cases are somewhat fully quoted to show that the question of the seat being property, was not directly before the court, for decision, in either. The first related to the disposition of the proceeds of sale, and the second to the power of certain process to reach the property.

In *Ritterband* v. *Baggett* (42 Super. Ct. 556), *Hyde* v. *Woods* (4 Otto, 524), and *In Matter of Ketcham* (Daily Register, February 9th, 1880), the point was clearly involved. These adjudications decide the seat to be property, and consequently applicable to debts. Justice Choate's opinion *In re Ketcham*, *supra*, exhausts the subject, and little, if aught, can be added here. The learned court below suggests, as one reason for its conclusion, that the right of membership,—the privilege, seat, or whatever else it may be termed,—does not fall within any definition of property. This may be so, and still, if the modes of doing business, in the present time, have given rise to property rights, bearing no similarity to those heretofore existing, and consequently undefined, the law under which the question at issue arises will still apply to them, if upon investigation they are found to possess qualities and characteristics common to recognized subdivisions of property. The controlling feature appurtenant to a seat in the Stock Exchange, is that it may be bought and sold subject to the rules of the association, and in case of the owner's death a sale is made by the exchange and the proceeds distributed. Herein exists the difference between it and membership of a social club. The latter can neither be bought nor sold. It has no general value, or marketable quality. There is no provision for transfer, and nothing remains after a member's death. It is in itself but a purely personal right dependent upon election and terminated in every way by demise. There is but one condition common to both,—the necessity for an election. In the former, one desiring membership, and acceptable to the committee on admissions, pays money for the seat, which thereafter represents whatever sum was needful for its purchase. That amount is withdrawn from the assets of the purchaser, and, if the conclusion of the court below is correct, has been, without warrant of law, so changed in character, as to be relieved from the obligation resting upon all property, to wit, liability to creditors of its possessor. If such a result may be attained, the effort of active imagination cannot circumscribe the associations human ingenuity will produce, to-thus transmute veritable assets, into intangible, and yet most

substantial and valuable shadows. Thus would follow the nullification of the legal principle which makes the debtor's possessions liable to his creditors, and honest claimants would be remediless, because of the inefficiency of a statute enacted to facilitate the collection of just demands. There may be minor difficulties in the practical application of the statute, but these in my opinion are easily surmounted. Probably an order appointing a receiver, containing directions for the judgment debtor to do whatever may be deemed needful to transfer the seat, under the rules of the exchange, would accomplish the result sought. This, however, is properly within the province of the court below. The right existing, the law is sufficiently comprehensive and powerful for its enforcement.

The order must be reversed with costs.

Charles P. Daly, Ch. J., concurred.

Van Brunt, J., dissented.

Order reversed, with costs.

Simon Auerbach, Respondent, *against* Marcus Marks *et al.*, Appellants.

(Decided April 4th, 1881.)

Goods having been replevied in an action therefor against the assignors and assignee in a general assignment for the benefit of creditors, they, to procure the return of the goods to them, gave the requisite undertaking for the delivery of the property to the plaintiff in replevin, if such delivery should be adjudged, and for the payment to him of such sum as might be recovered against them in the action. Upon trial of the replevin suit, the complaint was dismissed as against the assignee, but judgment for the delivery of the goods or their value was recovered by the plaintiff against the assignors; execution upon which was returned unsatisfied. *Held*, in an action upon the undertaking against the sureties therein, that they were not entitled to show, as a defense thereto, that the property when replevied was in the sole possession of the assignee, and that they executed the undertaking only on his behalf and to procure a return of the property to him.

Auerbach *v.* Marks.

APPEAL from a judgment of this court entered upon the verdict of a jury by direction of the court.

The action was brought upon an undertaking given to obtain the return, to the defendants in a replevin suit, of the property replevied. The replevin suit was commenced by Simon Auerbach, the plaintiff in this action, against Samuel M. Jacoby and Simon Batt, composing the firm of Batt & Jacoby, who had made a general assignment for the benefit of creditors, and Elias Goodman, their assignee. The property claimed was taken by the sheriff, but was returned upon the delivery to him of an undertaking executed for that purpose by Marcus Marks and Edward Marks, the defendants in this action, as sureties; by which undertaking, after reciting the taking of the property by the sheriff, and that the defendants were desirous of having it returned to them, they bound themselves "for the delivery of the said property to the plaintiff, if such delivery shall be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendants in this action."

At the trial of the replevin suit, the complaint was dismissed as to the defendant Goodman, the assignee, with costs, and a verdict was rendered for the plaintiff against the defendants Jacoby and Batt, upon which a judgment was entered "that the plaintiff, Simon Auerbach, recover of the defendants Samuel M. Jacoby and Simon Batt the possession of the personal property described in the complaint, or $423, the value thereof, in case a delivery of said property cannot be had; and also that the plaintiff recover of said defendants Batt & Jacoby $121\frac{79}{100}$, costs," &c. No delivery of the property to the plaintiff was had, and an execution issued upon the judgment was returned unsatisfied.

The plaintiff thereafter brought this action against the sureties in the undertaking, alleging in his complaint the facts above stated. The answer of the defendants alleged that at the time of the commencement of the replevin suit the property replevied was in the sole possession of Goodman, the assignee; that they executed the undertaking at his request,

and in his behalf, and to procure a return of the property to him, and not otherwise; that the property was thereupon returned to Goodman, and that neither Batt nor Jacoby had any interest in or possession of the property at the time of the commencement of the replevin suit; and they claimed that, no judgment having been recovered against Goodman, their liability ceased. At the trial, evidence offered by the defendants of the facts set up in their answer was excluded, and a verdict directed for the plaintiff, upon which judgment in favor of the plaintiff was entered. From this judgment the defendants appealed.

Blumenstiel & Hirsch, for appellants.

Meyer Auerbach, for respondent.

Charles P. Daly, Chief Justice.—The defendants were not entitled to show that at the time of the commencement of the suit the property replevied was in the possession of Goodman, and that they executed the undertaking on his behalf only. The latter part of the offer was, in effect, to contradict the recitals in the undertaking, which they were estopped from doing (*Decker* v. *Judson*, 16 N. Y. 439); and the fact that Goodman had the property in his possession when the suit was brought, was immaterial. When the undertaking was entered into by the defendants the property was in the possession of the sheriff. The undertaking recites that the sheriff had taken it as empowered by the proceedings instituted; that the plaintiff claimed that it should be delivered to him; that the defendants were desirous that it should be delivered to them, and that in consideration of the delivery of it to them, the defendants in this action bound themselves for the delivery of it to plaintiff, if a delivery of it to him should be adjudged, and for the payment to him of such sum as might, for any cause, be recovered against the defendants in the action.

The fact that no cause of action was established against the defendant Goodman, and that the complaint was dismissed as to him, does not discharge the defendants from their obliga-

tions. They became bound for the delivery of the property to the plaintiff, if a delivery of it to him should be adjudged, and the result of the action was that it should be delivered to him; and in case a delivery could not be had, that then he should recover the value of it, $423, with interest, out of the personal or real property of the defendants Jacoby and Batt. The sheriff's return showed that he could not find the property to deliver to the plaintiff, nor any real or personal property of the defendants Jacoby and Batt out of which to satisfy the judgment.

In consequence of the undertaking, the property was returned to all of the defendants, Jacoby, Batt and Goodman. This is inferable from the language of the instrument, the recitals in effect being that they, Jacoby, Batt and Goodman, were desirous of having it returned to them; and that in consideration of the return of it to them, the defendants in this action became bound, &c.

The complaint avers that upon the execution of the undertaking, the property was thereupon returned to the defendants in the action. The answer avers that it was returned to Goodman. The necessary effect of the execution of the undertaking was the delivery of it to the defendants in this action, and if the defendants in this action were entitled to show that it was returned to Goodman, which, in connection with other facts, I think might have been shown, they made no offer to show it. They became bound for the delivery of the property by each and all of the defendants if a delivery of it to the plaintiff was adjudged, and it does not discharge their liability that the defendant Goodman was released from any obligation to deliver it by a judgment in his favor. They still remained bound for the delivery of it by the other defendants. All that occurred was a dismissal of the complaint as to Goodman, the only effect of which was to entitle him to costs. It in no way affected the plaintiff's right to the property. Goodman claimed in his answer that the property be returned to him; but the court did not award a delivery of it to him, but on the contrary, a delivery by the other two defendants to the plaintiff. As respects him, therefore, it must be regarded simply as a judgment that he did not wrongfully detain it, and such a judgment

does not entitle a defendant to a return of the property, for it in no way affects the ownership or title of the property (*Angell* v. *Hollister*, 6 Trans. Ct. of Ap. Rep. 209, 210; *Bemus* v. *Beekman*, 3 Wend. 667; *Pierce* v. *Van Dyke*, 6 Hill, 613).

Where there are several defendants the court may adjudge the return of it to one of them and refuse it to others, or may award it to all of them, or part to one and part to another, or to the plaintiff, as the rights of the parties shall appear (Wells on Replevin, §§ 478, 481, 482); or judgment may be given for a defendant on the ground that he did not take or wrongfully withhold, where he came into possession of it for a lawful purpose or in good faith by delivery from the wrongdoer, in which case no return of the property is awarded to him (*Ely* v. *Ehle*, 3 N. Y. 509, 510); which would seem to have been the case here, from Goodman's answer that the property came into his possession as an assignee for the benefit of creditors.

The action of replevin is found upon a tort. It is brought by a party entitled to property against those in possession of it who have wrongfully taken or wrongfully withhold it, or who wrongfully conceal or put it out of their possession to defeat the suit. Where there are several defendants sued as wrongdoers, each may set up a separate defense; each may claim exclusive title to the property, or set up any matter in defense without reference to the pleading or defense of the other; and judgment may be given in favor of one and against the others, or judgment may be for both parties (Wells on Replevin, §§ 16, 21). Thus a defendant may succeed and not be entitled to a return, for a return of the property is ordered only when it appears just.

If the rule were, as the appellant contends, that the sureties are not liable unless judgment is recovered against all the defendants and they are all required by it to make delivery to the plaintiff, then the death of one of the defendants would discharge the sureties altogether, for the cause of action in replevin being regarded as in the nature of a tort, the death of one of the defendants abates the action as to him, though not as to the rest (*Lahey* v. *Brady*, 1 Daly, 443; *Hopkins* v. *Adams*, 5 Abb. Pr. 351; *Webbers* v. *Underhill*, 19 Wend.

447), and the effect would be, if the appellant's construction were adopted, that the plaintiff's suit would go on as respects the other defendants deprived of the security by virtue of which the defendants got the property delivered to them; that the plaintiff would then lose a security that the statute meant for his benefit if he recovered and failed to get his property or the value of it, a result the statute did not intend; and that construction should be adopted which will beneficially carry out what the statute intended in respect to the party for whose indemnity, in the event of recovery, the instrument is given (*Hoffman* v. *Etna Ins. Co.*, 32 N. Y. 413; *Archibald* v. *Thomas*, 3 Cow. 284; *Wright* v. *Williams*, 20 Hun, 323; *Marvin* v. *Stone*, 2 Cow. 781).

The sheriff was bound to deliver the property to the defendants upon their giving an undertaking in the form prescribed by the statute (Code of 1870, § 211), which was the undertaking here given, and which, under the appellant's construction, would be discharged or of no avail to the plaintiff if one of the defendants should die pending the suit. The plaintiff could get his judgment for the return of the property against the other defendants, but without the security for his indemnity that the statute meant he should have, if the property, instead of being delivered to him in the action upon the undertaking given by him to the sheriff, is delivered by the sheriff to the defendants upon the undertaking which gives them the right to have it delivered to them.

What the sureties undertook was to be bound for the delivery of the property if delivery of it should be adjudged to the plaintiff, and the payment of such sum as might be awarded against the defendants. The argument is that the sureties agreed to be bound if all the defendants failed to deliver it. The answer is that one of the defendants was relieved from delivering it by the judgment of the court. In the language of the undertaking, a delivery of it by him was not adjudged, but it was adjudged that it should be delivered to the plaintiff by the other two defendants; and it is for their failure to deliver or pay the sum recovered, if the property was not delivered, that the defendants are answerable.

It is probably the fact that the judgment, in respect to Goodman, was erroneous in point of form. The averment in the complaint was that the other two defendants, Jacoby and Batt, became wrongfully possessed of the property, and transferred it to Goodman, who wrongfully detained it. Jacoby and Batt deny any wrongful taking of it by them, and aver that they purchased it from the plaintiff, and Goodman avers that he became lawfully possessed of it as the property of Jacoby and Batt, under an assignment made by them to him, for the benefit of creditors; and that he was lawfully entitled to it as such assignee. To maintain the action upon these issues it was incumbent upon the plaintiff to establish a wrongful taking of the property by Jacoby and Batt; and to sustain the action against Goodman, which was predicated upon a wrongful detention of the property on his part, it was necessary to show a demand of it from him, and that he refused to deliver it to the plaintiff. This being proved, the judgment would then have been generally that the defendants deliver it to the plaintiff. If no demand of it had been made of Goodman he would have been entitled to a judgment for his costs, and the property would have been adjudged to the plaintiff, with costs against the other defendants. If the property had been delivered to the plaintiff upon the undertaking given by him, it would have been an easy matter, in this way, to have adjusted the rights and obligations of the respective parties. The property could have been adjudged to the plaintiff in a judgment against the defendants Jacoby and Batt; and the action dismissed as against Goodman, with costs, for the want of a demand of it from him; or if he after demand had refused to deliver it to the plaintiff, it could have been adjudged to the plaintiff, with costs against all the defendants; but the property having been delivered to the defendants upon the undertaking given by them to the sheriff, it was to be regarded as in the possession of all of them; and as all that we know from the record is simply that the action was dismissed as to Goodman, the conclusion must be that it then remained in the possession of the other two defendants, against whom judgment was rendered.

We do not know whether a demand of it from Goodman and a wrongful refusal by him was proved or not. If it was, the judgment should have been against him; or if not, and it had appeared that he came innocently into the possession of it, the judgment should have been that the plaintiff recover the property from all the defendants; that a delivery of it be made by them to him, or if not delivered that the plaintiff recover the value of it, to be made out of their personal or real property; and that Goodman recover his costs, upon the delivery of the property to the plaintiff; for replevin differs from other actions in this respect, that judgment may be given, as the rights of the parties happen to be in respect of the property, in the condition, situation or status that it is at the time of the trial and the rendition of the judgment (Wells on Replevin, c. 15, § 136; *Buckley* v. *Buckley*, 12 Nev. 428).

I think it very probable that a state of facts might have been shown by proving what occurred in the trial of the action against Jacoby, Batt and Goodman—that is, the evidence that was given, upon which the judgment in the action was founded —which would have shown that no recovery could be had against the sureties upon the undertaking on the ground that no liability on their part could arise from the want of a proper judgment and proper proceedings under it. But this was for the defendants to show. All that we have before us is the record in the action against Jacoby, Batt and Goodman, which the plaintiff gave in evidence; and all that that proves is that the property was delivered to the defendants in that suit upon the undertaking given by the defendants in this; that the suit was dismissed as to Goodman, which relieved him from the obligation of delivering the property, and that a delivery of it by the remaining defendants to the plaintiff was adjudged. The defendants saw fit to rest their case upon the evidence given by the plaintiff instead of putting in evidence exactly and fully what occurred in the action against Jacoby, Batt and Goodman. All questions determined in the replevin suit are res adjudicatæ, and cannot be inquired into in a suit upon the bond; but matters not settled or disposed of in that suit may be (Wells on Replevin, §§ 447, 448, and cases there cited).

It is the defendants' own fault, therefore, if a state of facts that might have been inquired into could have been shown, which would have established that there had not been such a judgment, and the proper proceeding under it, as the law requires, to charge the sureties for the failure to deliver the property adjudged to the plaintiff, or to pay the value of it, as fixed at the trial, on the facts before the court below. The judgment, in my opinion, was right, and the only one that could be given, and it should be affirmed.

J. F. Daly, J., concurred.

Van Hoesen, J., concurred in the result.

Judgment affirmed.

John F. Brigg *et al.*, Respondents, *against* The Central National Bank of the City of New York, Appellant.

[Decided April 4th, 1881.]

The plaintiff deposited with the defendant, a bank, for collection, a check drawn by a third person upon a bank in another state. The drawee being the collecting agent of the defendant for that state, the check was sent to it by the defendant for collection. By arrangement between the two banks, collections for the defendant were credited to it by the other bank in a collection account, which was settled weekly, and the total amount due on such settlement remitted. Upon receipt of this check by the drawee the amount of it was accordingly credited to the defendant in the collection account and charged to the drawer in his account with the drawee. On the next day, before the time for the weekly settlement with the defendant, the drawee suspended payment. *Held*, that the transaction amounted to a payment of the check by the drawee to the defendant, and that the defendant was liable for the amount of it to the plaintiff.

Appeal from a judgment of this court entered upon the verdict of a jury rendered by direction of the court.

The facts are stated in the opinion.

George A. Strong, for appellant.

Blumenstiel & Hirsch, for respondents.

CHARLES P. DALY, Chief Justice.—The judgment should be affirmed. The appellant claims that this is an action for money had and received, and cites *The People* v. *The Merchants'*, *&c. Bank of Troy* (78 N. Y. 269), as authority for the proposition that an action for money had and received cannot be sustained unless the money was actually received, either by the defendant or through his agent; in respect to which, in the present case, it is sufficient to say what was said in the case that the appellant cites of *People* v. *Merchants'*, *&c. Bank*, that "all the facts are set forth in the complaint, and that if they disclose a good cause of action, the plaintiff may recover, notwithstanding he may have assigned an insufficient ground of recovery." The grounds assigned for a recovery by the plaintiff are the facts stated in his complaint, and if they constituted a cause of action, it is wholly immaterial whether the action is called an action for money had and received or what name is given to it.

The facts substantially stated, and which have been proved, are that the plaintiffs deposited with the defendants for collection a check for $610.97, drawn by O. W. Haines on the First National Bank of Newark, New Jersey; that the defendants forwarded the check to that bank, which bank was then, and had been for fifteen years, the defendants' collecting agent of checks, drafts and other commercial paper, in New Jersey. The National Bank of Newark, on receipt of the check, charged it against the account of the drawer, and as they kept a collection account with the defendants they credited the defendants with the amount of the check, in that account, as a cash item, in pursuance of an arrangement made between the two banks, by which checks, drafts and commercial paper, when collected, were credited to the defendants in a collection account, which was settled every Tuesday by the Newark bank, and the amount collected remitted to the defendants by draft. When the Newark bank charged the check to the drawer's (Haines') ac-

count, his account had been overdrawn; but he had been in the habit of so overdrawing, having done so some thirty times during the nine months preceding, and in this instance he made good the overdraft, and the check was returned to him as a paid voucher. On the day after the check was charged to his account and credited by the bank to the defendants' collection account, the Newark bank failed and passed into the hands of a receiver.

The charging of the check by the Newark bank to the drawer's account, and crediting the amount of it in the collection account kept with the defendants, was a payment of the check by the bank to the defendants as effectually as if the bank had paid it in money over their counter. In *Eyles* v. *Ellis* (4 Bing. 112), the defendant had been directed by his creditor to pay a certain sum in a bank where they both kept accounts. The defendant accordingly directed the bank to transfer that amount from his account to the credit of the plaintiff's account, which was done, and the bank failed before the plaintiff knew of the transfer. The court held that this was a payment of the amount to the plaintiff; that although no money was transferred in specie, it was an acknowledgment by the bank that they had received that amount for the plaintiff; that the plaintiff might then have drawn for it, and the bank could not have refused to pay his draft. This was a case of money paid into a bank. *Bolton* v. *Richardson* (6 T. R. 139), was a case of money to be drawn from one. A. held B.'s check on a bank where each had an account. On presenting the check, the amount of it was transferred from B.'s account with the knowledge of both parties. The bank failed before the check fell due; and it was held that this was a payment of the check.

In *First National Bank of Jersey City* v. *Leach* (52 N. Y. 352), it was held that the certifying of a check by a bank in which the drawer had funds to meet it, where the bank within an hour or so failed, operated as a payment of the check between the parties.

I see nothing to distinguish this case from those above cited. It is simply the presentation of a check to a bank by a person entrusted with the collection of it, where both he and the

drawer have accounts in the bank, and where the bank, instead of paying the check in so much money, simply charges the amount of it against the account of the drawer and credits the amount to the account of the collector, returning the check to the drawer as collected and paid.

As between the defendants' bank and the Newark bank, this mode of collecting—by placing the amount to the defendants' credit and settling the collection account every Tuesday—had been in use from the year 1876, the time of settlement before that being every ten days; and when this amount was transferred from Haines' account, and credited in the account of the defendants, the check was paid as effectually as if the amount of it had been handed to the receiving teller of the defendants' bank in national currency.

The plaintiffs have no claim against the Newark Bank (*Commercial Bank of Pennsylvania* v. *Union Bank of New York*, 11 N. Y. 211). It was their agent for the collection of the check. It did what it and the defendants regarded as the collection of it, and if the defendants did not get the proceeds, in consequence of the Newark bank's suspending payment, it was owing to the business arrangement between the two banks by which collections made were credited to the defendants, and the collection account settled every Tuesday, and but for this arrangement, which was for the convenience of both banks, the money could have been drawn upon the presentation of the check, for the Newark bank met all its engagements that day up to the close of business hours. The plaintiffs, as I have said, can maintain no action against the Newark bank to recover from it what they have never received—the amount of the check. The defendants, on the contrary, are creditors of that bank to the amount of it, and have already received a dividend upon it from the assets of that bank. When the Newark bank stopped payment and went into the hands of a receiver, it owed the defendants a balance of $5,976.22; and the defendants filed and proved claims before the receiver for that amount, as expressed in the claim for collecting sundry accounts in respect to which the defendants were acting as agents, and upon the claims so filed, a dividend

was declared of 80 per cent., 70 per cent. of which the defendants had received at the time of the trial.

The judgment should be affirmed.

J. F. Daly and Van Hoesen, JJ., concurred.

Judgment affirmed.*

Henry Brooks, Respondent, *against* William C. Conner, Sheriff of the City and County of New York, Appellant.

(Decided April 4th, 1881.)

A warrant of attachment against an absconding debtor was levied by the sheriff upon certain goods which had been in the possession of the debtor, among them articles claimed by the plaintiff as samples which he had consigned from London to the debtor in New York, and from which, as samples, sales were to be made by the latter of the plaintiff's goods. *Held*, in an action against the sheriff for such alleged wrongful taking, that upon the question of identity of the goods shipped by the plaintiff with those levied on by the sheriff, the entry by the consignee in the custom house at New York, and the invoice filed by him, upon which he obtained possession of the goods, were admissible in evidence as part of the *res gestæ*, even though irregular or defective in respect of the requirements of the customs laws; and a question to a witness upon the same issue, whether the numbers he found upon the goods were also the numbers referred to in the invoice already in evidence, was not objectionable, as it was confined to a comparison between the numbers which the jury might themselves have made.

A demand of the consignee, for which he might have had a lien on the goods, was adjusted and settled between him and an agent of the plaintiff. *Held*, that although this was, so far as the sheriff was concerned, a transaction between third parties, proof of it was admissible against him as showing the plaintiff's right to possession of the goods as well as his title to them.

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* The judgment entered upon this decision was affirmed by the Court of Appeals, May 30th, 1882 (see 89 N. Y. 182).

Brooks *v.* Conner.

Where a demand for property is refused solely on the ground that the property belongs to a person other than the one on whose behalf the demand is made, without objection to the authority of the person making the demand, and no question of such authority is raised on the trial of an action brought in consequence of such refusal, the question cannot be considered upon appeal from the judgment.

APPEAL from a judgment of the general term of the Marine Court of the city of New York, affirming a judgment of that court entered on the verdict of a jury.

The action was brought to recover for an alleged wrongful taking and detention of goods of the plaintiff. The defendant, as sheriff of the city and county of New York, proceeding under an attachment against the property of one Henry M. Franklin, had levied upon the goods in question, which, with other property, had been in the possession of Franklin. Other facts are stated in the opinion.

At the trial, the jury found for the plaintiff, and judgment in favor of the plaintiff was entered on the verdict. From the judgment the defendant appealed to the general term of the Marine Court, which affirmed the judgment; and from this decision the defendant appealed to this court.

Vanderpoel, Green & Cuming, and *Carlisle Norwood, Jr.*, for the appellant.

H. G. Batcheller, for respondent.

J. F. DALY, J.—The evidence was sufficient to warrant the finding of the jury, and there does not appear to be any error in the rulings or the charge. Plaintiff, residing and doing business in London, England, consigned to Henry M. Franklin at New York, certain goods as samples, from which to make sales on commission. The main question in the case was the identity of those goods with property seized by the sheriff. The proof showed: 1. The consignment on June 25th, 1874, to Franklin under the personal supervision of plaintiff, who identifies the goods shipped as the articles set forth in an invoice copied from his books and produced in evidence with-

out objection; 2. An invoice produced from the files of the New York Custom House, which is a copy of that referred to in plaintiff's testimony, together with the original entry of the goods by Franklin on July 16th, 1874, as imported per steamer Celtic from Liverpool; 3. After the seizure by the sheriff, on December 26th, 1875, Thomas L. Barnett, the plaintiff's agent, took an inventory of these goods in Franklin's store, identifying them by a comparison of the trade numbers stamped on each article and the numbers referred to in the invoice and from the style of the goods. The goods in the inventory made by witness appear to be of the same kind as those specified in the invoice.

The trial judge left to the jury the question whether these goods belonged to plaintiff or to Franklin. He was asked to charge that if the plaintiff allowed this property to remain in the possession of Franklin and allowed him to deal with it as his own, he is estopped from any right or title in the recovery. There was no evidence to show that the plaintiff had assented to any such disposition of the goods by Franklin, or had parted with his title. The judge refused to charge as requested, but stated that "it is a very strong circumstance for the jury to take into consideration." His refusal was not error.

The defendant objected to the introduction of the invoice and entry from the files of the custom house as irrelevant and incompetent. The plaintiff was entitled to show the whole transaction by which these goods came into Franklin's possession at New York from the plaintiff in London, and the entry by Franklin at the custom house with the invoice produced and filed by him there with his entry were admissible as part of the *res gestæ*. Any act of Franklin in getting the goods that plaintiff had shipped, might be shown, even if the act were not done in pursuance of the customs statutes or regulations. It was not necessary to show that the entry by Franklin was in conformity with law, or that the invoice he filed was regular. The evidence was not offered to prove a record, but the act of Franklin, and the papers were relevant and competent for that purpose, there being no question that the entry was Franklin's act, done for the purpose of getting possession

of the goods. The defendant's objection to the entry was that "it purports to be a declaration by Franklin and is not binding against defendant in any way." It was signed by Franklin.

Regarding the entry and invoice filed with it in this light, it is of no consequence that the invoice was irregular or defective as to the oath or certificate taken and attached to it at the place of exportation. If Franklin obtained possession of the goods shipped by plaintiff, on this invoice and entry, the evidence of the fact was competent and relevant with other facts to establish the delivery to him of plaintiff's goods. The delivery commenced with the shipment of the goods at Liverpool and ended with their arrival at Franklin's store in New York, and proof of the processes by which this was accomplished was competent evidence of the fact of delivery.

Just prior to the seizure by the sheriff the plaintiff's agent Mr. Barnett called on Franklin in reference to the transfer of the consigned goods to other parties (Howard, Sanger & Co.). Mr. Barnett was allowed (under defendant's objection that the evidence was irrelevant and immaterial) to state the conversation between himself and Franklin. The evidence given was relevant and material, and showed that plaintiff through Howard, Sanger & Co. had discharged the only claim made by Franklin against the goods or the plaintiff, viz: a claim for seventy or eighty dollars for expenses incurred—advertising and incidental expenses. This transaction, *i. e.* the adjustment and settlement of Franklin's demand, for which he might have a lien on the goods, was necessarily a transaction between third parties, so far as the sheriff was concerned, but, like the original consignment and delivery to Franklin, was competent and material to show plaintiff's right to possession of the goods as well as his title in them. The witness Barnett was as competent to prove this transaction as Franklin would have been; and the objection on which appellant lays great stress in his points, namely, that admissions or declarations of Franklin as to the ownership of the goods were thus allowed and were hearsay, is not tenable. Defendant attempted to prove declarations of Franklin to his own attorney at other times as to the

ownership of the goods, but this was an entirely different matter, and such declarations were properly excluded.

The case does not show that defendant sought and obtained a ruling on the admission of the schedule of prices proved by the witness Barnett. The only exception taken was to the witness being allowed to answer whether he was acquainted with the London prices. The witness Hoff afterwards testified to the value of the goods in the New York market. He stated it to be $612.89. The jury gave a verdict for less than half this amount.

The exception taken by defendant to the question put to the witness Barnett as to whether the numbers he found on the goods "were also the numbers referred to in the invoice" was not well taken, as the evidence was clearly confined to a comparison, made by the witness, between these numbers. The jury might have made the comparison. The witness did not assume to have any other knowledge of identity between the invoiced goods and those he inventoried and there was no room for inference on the part of the jury that his testimony went further than the mere statement of the fact of similarity in the numbers.

A demand for these goods was made of the sheriff before the action. The demand was made by the plaintiff's attorney and was verbal. The sheriff refused to deliver because "it was claimed the goods belonged to Henry M. Franklin and that he had seized them as belonging to him." No question of the attorney's authority to make the demand was raised and the refusal was put on a ground which made it unnecessary to produce evidence of authority (*Tuttle* v. *Gladding*, 2 E. D. Smith, 157). No question of authority was raised on the trial, and it cannot be considered here.

The judgment should be affirmed.

Charles P. Daly, Ch. J., and Van Hoesen, J., concurred.

Judgment affirmed, with costs.

MARY A. BROWN, Appellant, *against* HORACE K. THURBER *et al.*, Respondents.

(Decided April 4th, 1881.)

An action may be maintained by a married woman, even in a court having no equity powers, upon a cause of action transferred to her directly by her husband.

Part of the subject matter of a conveyance was described as "all book accounts, bills receivable, judgments, claims and demands whatsoever, due or belonging to" the grantor. *Held*, that this included a claim on which a suit by the grantor was pending, and which was expected to ripen into a judgment.

Under a stipulation, unqualified in its language, that the testimony of a witness upon a former trial may be read in evidence, no objection to the admissibility of such testimony can properly be entertained.

After the dismissal, by the general term of the Marine Court of the city of New York, of an appeal by defendants from an order continuing an action in the name of an assignee of the plaintiff, it is erroneous for the general term of that court, on a subsequent appeal by the defendants from a judgment in the action, to reverse such order, and to reverse the judgment on account of supposed error in making that order; although, *it seems*, on an appeal to the Court of Common Pleas from the judgment, a review of the order which dismissed the appeal might have been had.

APPEAL from an order of the general term of the Marine Court of the City of New York, reversing a judgment of that court entered upon the verdict of a jury, and directing a new trial.

The action was brought by Arthur A. Brown to recover damages for the alleged conversion by the defendants of six barrels of stock ales, the ownership of which was claimed by Brown, but which, being in the possession of a dealer in liquors named Michael Healy, were levied upon and sold under an execution issued on a judgment recovered by the defendants in this action against Healy. Upon the trial of the action the jury found a verdict for the plaintiff, but on appeal from the judgment entered in his favor, it was reversed and a new trial ordered. The new trial also resulted in a verdict for

the plaintiff, but the judgment for him was again reversed on appeal and another trial directed. After the second trial the plaintiff died, and the action was continued in the name of his wife, Mary A. Brown, as his assignee. At the third trial, the jury again found a verdict for the plaintiff, and a judgment in her favor was entered thereon. The defendants appealed from the judgment to the general term of the Marine Court, which reversed the judgment, and again ordered a new trial. From this decision the plaintiff appealed to this court.

Van Hoesen, J.—This case was carefully tried by the experienced justice who presided at the trial term of the Marine Court, and there are no errors which I have been able to discover in his charge or in his rulings during the trial. He clearly stated to the jury the questions of fact on which they were to pass, and the rules of law applicable to the facts. I can find nothing in the case to justify the assertion of the respondent that questions of law were submitted to the jury for decision. Counsel for both parties felt it to be their duty to present, at the close of the evidence, a long-drawn-out series of prayers for instructions, but the gist of most that was valuable in them is found in the concluding words of Justice McAdam's charge: "Let me repeat, that if these ales were to form part of Healy's stock in trade as a retail dealer, and were to be used or sold by him, as he used and sold other portions of his stock, the plaintiff cannot recover. I cannot make myself understood any plainer than that."

That was the simple question which the jury was to decide, and which it did decide in favor of the plaintiff, who is now before this court as the appellant. The verdict of the jury has been reviewed by the general term of the Marine Court, and has been declared by that tribunal—whose decision upon the matter is final—not to be against the weight of evidence. The judgment of the trial term was reversed, and a new trial ordered, not because the verdict was not supported by the evidence, but because of some supposed errors of law found in the case. It is said by the respondent that there was absolutely no evidence to support the verdict, and that upon the

uncontroverted facts the court should have directed a verdict for the defendant. In answer to this, it may be observed that three juries have, at different times, found for the plaintiff, and that the court below, both at special and at general term, has refused to disturb the verdict as against the weight of evidence. After a careful reading of the evidence, I have been led to the conclusion that there is enough to sustain the verdict, though had the case been submitted to me, I should probably have decided in favor of the defendant. A strong impression has been left upon my mind that the unspoken understanding between Brown and Healy was that Healy might sell the ales as his trade required, and pay for them from time to time, as he retailed them to his customers. But if I should so hold, I should be compelled to reject as unworthy of credit evidence which the jury had a perfect right to believe and to found their verdict upon. It cannot be said that the verdict is wholly unsustained by evidence.

We are then to examine the case in order to ascertain if any errors of law were committed in the court below which required the reversal of the judgment rendered at the trial term. The principal reliance of the respondent appears to be on the point that Mary A. Brown, the plaintiff, could not acquire by a conveyance directly to her from her husband any title to the subject of this action, or to any other property whatsoever, which a court of law without equity powers could either assist her in establishing, or regard otherwise than as void. Whilst he is compelled to admit that the courts of New York have taken cognizance of actions in which the wife has sued to recover upon a claim assigned to her by her husband without the intervention of a trustee, the counsel for the respondent contends that such actions have been maintained only by courts possessing equity powers, and that a court with common law jurisdiction merely is now, as it was before the changes in our legislation, compelled to pronounce null and void any conveyance made by the husband directly to the wife. The decisions of the court of last resort do not sustain that view of the law. In *Kelly* v. *Campbell* (2 Abb. App. Dec. 494), the Court of Appeals said: "A gift by a husband to a wife will be upheld,

where the rights of creditors are not in question, without the aid of the statutes of 1848, or 1849, or 1860, or 1862." In *Rawson* v. *Pennsylvania R. R. Co.* (48 N. Y. 216), where the wife sued to recover the value of certain property given directly to her by her husband, the court said: "Prior to the recent legislation in this state in reference to the rights of married women, gifts of personal property from husband to wife would be upheld in equity, though void at common law, and such gifts could be impeached only by creditors. In equity the property would be treated as the wife's separate estate, and she would be protected in its enjoyment and possession, even against the interference of her husband. This estate, under the statutes of 1848, 1849, 1860 and 1862, if not absolutely converted into a legal estate, is clothed with all the incidents of a legal estate, and she is the proper person to sue and be sued in reference thereto."

In *Seymour* v. *Fellows* (77 N. Y. 178), the Court of Appeals, in an action brought by the wife to recover for the wages of her husband, a claim for which had been assigned to her, said: "The appellant objects that the assignment of the cause of action, having been made directly to the plaintiff by her husband, is void. The rights of creditors are not in question, and we think the court below properly overruled the objection." In *Thompson* v. *The Commissioners* (79 N. Y. 54), where the wife as the grantee of her husband sought to redeem lands from a sale under foreclosure, it was objected that she could not sustain the action because she acquired no title by a conveyance directly from her husband to herself, but the court said: "Under recent legislation the husband has a right to convey to his wife," and cited chapter 172 of Laws of 1862, and 76 N. Y. 262. The latest decision of the Court of Appeals, as will be seen from the case last cited, is that the act of 1862 gave the husband the right to convey to his wife, but independently of that decision, the case of *Rawson* (48 N. Y. 212) is clear and express upon the point that a conveyance from the husband gives to the wife, under the statutes already referred to, if not a legal estate, at least an estate clothed with

all the incidents of a legal estate, including the right to sue and the liability to be sued.

Whether the conveyance by the husband to the wife gives her a legal estate, or merely an equitable estate with the incidents of a legal estate superadded, the result is the same, for in either event she has the right to sue in a court of law.

It is next objected by the respondent that the claim in suit, which is for the value of ales converted by the defendants, is not one of the claims embraced by the conveyance on which the plaintiff relies. The conveyance transferred to the plaintiff the ales specified therein, certain materials used in brewing, horses, trucks, safes, office furniture, and "all book accounts, bills receivable, judgments, claims and demands whatsoever, due or belonging to the grantor." It is conceded that the first rule of construction is to seek the intention of the parties to the instrument, but it is said that that intention is to be ascertained by applying another rule, that where general words follow particular ones, they must be construed as limited to subjects *ejusdem generis*. Without saying that that rule is applicable to this instrument, when the question of its construction arises between a grantee and a defendant sued for the conversion of a part of the property alleged to be embraced in the conveyance, it is sufficient to observe that a claim *in suit* which is expected to ripen into a judgment, is, without serious doubt, *ejusdem generis* as a judgment; and, therefore, there was no error in the decision of the justice at the trial term, that the conveyance transferred to the plaintiff the claim in this action.

All the objections made to the admission of the testimony of Arthur A. Brown, or of any parts of it, are answered by the stipulation found at folio 5 of the case, which provides that either party might read from the printed case used on the trial, the evidence which Brown gave at a former trial. The stipulation is unqualified in its language, and under it no objection to the testimony could properly be entertained. The defendant, if he supposed any of the testimony to be incompetent, should have so framed his stipulation as to reserve the right to object to it.

Taken as a whole, the charge fully and correctly stated the

law. It is true that there was no testimony which in so many words stated that the agreement between Brown and Healy was, that Healy might use a single cask without paying for it in advance, but that he should not use any more till that cask had been paid for; and the charge would be less obnoxious to criticism if the plaintiff's seventh, fifth, sixth and tenth requests had been unqualifiedly refused; but with the qualifying language used by the judge in disposing of those requests, taken in connection with the rest of the charge, I do not see how the jury could possibly have been misled. It is impossible to read the charge, and the observations made by the judge in passing upon the swarm of requests which darkened the close of the trial, without seeing that never for an instant were the jury permitted to withdraw their attention from the point on which the case turned. The was no misunderstanding the question: did Healy have Brown's leave, express or implied, to sell the ales in the cellar as he sold the liquors in the shop?

The order continuing the action in the name of Mary A. Brown was entered on the 1st of November, 1879. The defendants did not appeal from it until December 31st, 1879. The Marine Court general term dismissed that appeal on the 27th of January, 1880. After the dismissal of that appeal, the defendants could not obtain a review of the order by the Marine Court general term. It is probable that on the appeal from the judgment to this court, the defendants could have obtained a review of the order which dismissed the appeal, and a reversal of that order would have been followed by a hearing of the merits of the order at special term which allowed the action to be continued in the name of Mary A. Brown. But after the appeal had been dismissed by the Marine Court general term, the special term order was not reviewable, unless the order of dismissal were first vacated. It was erroneous, therefore, for the Marine Court general term, on the hearing of the appeal from the judgment, to reverse, as, perhaps, it did reverse, the order continuing the action, and it was also erroneous to reverse the judgment, as, perhaps, it did, on account of the supposed error in the making of that order. It must not be supposed that the other points made

by the parties have not been examined because they are not discussed. I think the order granting a new trial should be reversed, and that the judgment of the trial term should be affirmed with costs.

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

Order reversed, and judgment of trial term of Marine Court affirmed, with costs.

HENRY L. LEVY, Plaintiff, *against* WILLIAM H. TERWILLIGER, Defendant.

(Decided April 4th, 1881.)

The complaint in an action to recover back money paid to the defendant, alleged that the defendant falsely represented to D., with whom the plaintiff had on deposit money to pay for purchases of merchandise, that the plaintiff had purchased of defendant an iron safe at the price of $150, and that D., believing the representations to be true, by mistake of fact, paid that sum to the defendant on said representations. The evidence on the part of the plaintiff was that the plaintiff went to the place of business of the defendant, a dealer in safes, named Terwilliger, and after looking at a safe for which $165 was asked, requested the defendant's salesman to ascertain the rates of freight to Austin, Texas, where he wished to ship the safe, if purchased, and to send the rates to the place of business of D.; giving to the salesman a card with the names of the plaintiff and D. and the latter's address written on it by himself. Later, on the same day, the plaintiff went to the place of business of another dealer in safes, in the same street, having the same general name —"Terwilliger & Co."—and there bought a safe for $150, directing the bill to be sent to D. He then went to D., and told him "when Terwilliger sends bill of $150 for safe, pay the same." The next day the defendant's salesman called on D., showed him the card written by the plaintiff, with the amounts $20 and $150 written on it, and spoke to him about the rates of freight, and was told by D., that it was all right, that the plaintiff had given him orders, providing a bill of lading came from Terwilliger, to pay $150 for the safe. Thereupon the salesman shipped the safe by steamer to the plaintiff at Austin, Texas, and the following day brought the bill of lading therefor to D., who then paid him $150 for the plaintiff, upon which D. claimed and received for himself 5 per cent. as

discount. The plaintiff, two days later, on discovering that the money was paid to the defendant instead of to Terwilliger & Co., demanded the return of it from the defendant, which was refused. D. subsequently assigned all his claims against the defendant to the plaintiff. *Held*, that even if the plaintiff could, under the circumstances, have any remedy against the defendant, the safe having been shipped to him and paid for in consequence of his own acts and negligence, he had at least failed to prove the cause of action set forth in his complaint, and a verdict was properly directed for the defendant.

EXCEPTIONS taken by the plaintiff at a trial term of this court ordered to be heard in the first instance at the general term.

The facts are stated in the opinion.

Edward Van Ness, for plaintiff.

Geo. E. Horne and *Thomas Darlington*, for defendant.

CHARLES P. DALY, Chief Justice.—There could be no recovery by the plaintiff against the defendant, upon the facts in this case. The evidence shows that the plaintiff went to the defendant William H. Terwilliger's store, in Maiden Lane, and looked at an iron safe, for which the defendant asked $165. The plaintiff said that he had a long way to ship it. The defendant asked where, and the plaintiff said, to Austin, in Texas; upon which the defendant said he would go out and get the rates. The plaintiff told him he could do so, and to send them to him at 6 Beekman street; giving the defendant's salesman, Howard, a card, with this written upon it, partly in pencil: "H. L. Levy, Austin, 6 & 8 Beekman street. N. Doll."

The plaintiff testified that the price asked was $165; the defendant and the defendant's salesman, Howard, that that was the price first asked, but that it was agreed that the price should be reduced to $150, which the plaintiff denied. Afterwards, the plaintiff went to another dealer in safes, who had his place of business also in Maiden Lane, and who had the same general name, Terwilliger & Co., where he saw a safe, which Terwilliger & Co. asked $180 for, but which they finally

agreed to sell and the plaintiff to buy, for $150; and the plaintiff told them to send the bill to N. Doll, 6 Beekman street. The plaintiff then went to N. Doll's, with whom he had deposited money to pay his bills, and told him, as he testifies: "When Terwilliger sends bill of $150 for safe, pay the same." And Doll's testimony is, that the plaintiff told him that he had bought a safe of Terwilliger, and if Terwilliger brought a bill of lading, that he, Doll, should pay him $150. The next morning, Howard, the defendant's salesman, called upon Doll and showed him the card before referred to, which contained, in addition to what the plaintiff had put on it, the figures $20 and $150. Doll, upon seeing the card, told Howard that it was all right; that the plaintiff had given him orders, providing a bill of lading came from Terwilliger, to pay $150 for the safe, and told him that if he brought him the bill of lading he would give him a check. Howard then went and shipped the safe on a steamer for Austin, in Texas; and having done so, upon the next day, he brought the bill of lading and a receipted bill for $150 to Doll. Doll then said: "I suppose you will give me 5 per cent. discount if I give you a check," and Howard said yes; upon which Doll gave him a check for $150 for Terwilliger, which was paid, Doll receiving from Terwilliger the discount for himself.

Doll was asked if Howard showed him any rate of prices for freight, and answered that he believed he said something about rates, after he, Doll, had said it was all right, upon the first interview; that when he showed him the card, he said nothing about rates, but that he, Howard and Terwilliger were at the office a little time before, and that Howard mentioned something about rates to give to him next morning; that he believed he showed him some figures on a card, but that he could not remember what Howard said. Afterwards Doll testified that Howard told him simply that he had the rates.

This is the transaction as stated by the plaintiff and Doll; Howard and the defendant giving a different account of it; and one that would clearly show that the defendant was under no obligation to return the purchase money; but the correct-

ness of the decision of the court below, as the court gave judgment for the defendant, without submitting the case to a jury, must rest solely upon the testimony offered by the plaintiff. It must appear, as matter of law, that the defendant was entitled to judgment, assuming the transaction to have been as detailed by the plaintiff's witnesses.

When the plaintiff returned and discovered the mistake that had been made, Doll attempted to stop the payment of the check, but was not successful. He and the plaintiff then went to the defendant's store. The plaintiff asked him if he had bought a safe at his house, and the defendant said no. The plaintiff then asked him upon what order he shipped the safe to him, and the defendant said that Mr. Doll gave him the order and that he shipped it. The plaintiff then asked what safe he had shipped, and the defendant showed him one, as the plaintiff testified, "near like the one he shipped." The plaintiff then demanded the return of the money, which the defendant refused, as the safe had been shipped. The plaintiff and Doll went again to the defendant's on the following day, and asked him how he could ship a safe to him that he asked $165 for at $150, without his knowledge, and the defendant answered: "If I am not mistaken, I came down $15, and if you would have pressed, I would have sold you the safe for $145, or even less;" and that the defendant, at least, understood that the price of the safe was to be $150, appears by the figures $150 on the card, which was shown by Howard to Doll, on the first interview. It further appears, that whatever right Doll might have to recover back the money from the defendant, he has by assignment transferred to the plaintiff.

The result of the state of facts, as above narrated, is that the defendant delivered the safe on board a steamer for Texas, addressed to the plaintiff at Austin, and procured a bill of lading therefor, which he delivered to the person to whom he was directed by the plaintiff to send the rates of transportation, and by whom the defendant's agent, Howard, was told, when he called, that it was all right, to get the bill of lading and bring it to him with a receipted bill for $150, and he would pay it; which he did, when the bill of lading and the

receipted bill were brought to him. I fail to see why, on this state of facts, the plaintiff is entitled to recover from the defendant the money paid for the safe by the plaintiff's agent. It was through his own act that the defendant's safe was shipped to him and paid for. If he has any remedy in such a case against any one, which I very much doubt, it is, in my opinion, not against the defendant. When he, after what occurred at the defendant's store, concluded to buy the safe shown him by Terwilliger & Co., it was an easy matter for him to go again into the defendant's, T. W. Terwilliger's store, and inform him that he need not send the rates of transportation, as he had bought a safe elsewhere. Both establishments were in the same street. He knew that both had the same name, as he had been in both stores; knowing this, he not only left the defendant to ascertain and bring to his agent the rates of transportation, which, on the defendant's part, was then unnecessary, the plaintiff having concluded to buy a safe from the other Terwilliger; but he took no precaution to guard against the possibility of mistake from the fact that there were two venders of the same article, of the same name, and in the same street, by instructing his agent that he was to pay for a safe to be sent by Terwilliger & Co.; and if any one came with his card, from the defendant, with the rates, to inform him that he had bought a safe elsewhere. All, however, that he did, according to his own testimony, was to say to his agent: "When *Terwilliger* sends bill of $150 for safe, pay the same;" without distinguishing between the two Terwilligers, and leaving his agent liable to make the mistake that he did, by supposing that the person who came to him in the name of Terwilliger, with the defendant's card, was the one with whom he was to close the transaction. It was by the plaintiff's own negligence, therefore, that both his agent and the defendant were led to ship the safe, that a bill of lading for it was obtained, delivered to his agent, the purchase money paid by the agent, and a receipt given for the payment of it. As the safe was delivered on board of a steamer for Texas, to be brought there as a part of the cargo, it does not follow, that two days afterwards, the defendant could go to the steamer and get it

re-delivered to him. Cargo is stowed as it is received, and where a coast steamer is taking in cargo at this port, for Texas, an article of merchandise may, in a very short time, be so covered up by what is subsequently received, as to make it troublesome and expensive to overhaul what is stowed over it, so as to get the article out of the vessel again. Those in charge of the vessel would be under no obligation to get it out again, at their own cost or expense, and might reasonably require that whatever expense it involved, should be borne by those who wanted it taken out. If the safe, after the plaintiff discovered the mistake that had been made, could be obtained and restored to the defendant, it was the plaintiff's duty to see that it was done, and to bear any expense incident to doing it, as it was through his act and negligence that the safe was shipped to him and paid for.

The rule laid down by Lord Mansfield in *Price* v. *Neal* (3 Burr. 1354), and approved in *Franklin Bank* v. *Raymond* (3 Wend. 74), is, that money paid by mistake or ignorance of the facts can never be recovered, unless it is against conscience to retain it. It certainly is not against conscience that the defendant should, in this case, retain the price paid to him after having parted with the safe, when the plaintiff, through whose act and negligence it was shipped, has never made any effort to get it from the vessel and restore it to the defendant; but without doing or offering to do anything to repair what he himself brought about, asks the court to compel the defendant to restore to him the $150. The cause of action, as averred in the complaint, is that the defendant falsely represented to Doll that the plaintiff had purchased the safe, and that Doll, supposing and believing that representation to be true, and having no knowledge to the contrary thereof, by mistake of fact, paid $150 to the defendant on that representation. It is, I think, sufficient to say, that no such cause of action as is here set forth has been proved by the plaintiff, and that the judgment given for the defendant should be affirmed.

J. F. Daly and Van Hoesen, JJ., concurred.

Exceptions overruled, with costs.

JOHN MATTHEWS *et al.*, Appellants, *against* WILLIAM SNIFFEN *et al.*, Respondents.

(Decided April 4th, 1881.)

In an action for the recovery of personal property, the plaintiffs, three in number, claimed the property under a mortgage of it to a firm whose name was identical with that of one of them, but there was no evidence that the plaintiffs composed such firm, or that any interest in the mortgage had been assigned to the other two of them. *Held*, that, the defense of misjoinder of parties having been set up, judgment was properly given for the defendants.

In making a mortgage of personal property a printed form was used, in which a blank space was left for the description of the mortgaged property to be written in, followed by the printed words "and all other goods and chattels mentioned in the schedule hereunto annexed, and now in possession of the said party of the first part." Nothing was written in the blank space. The schedule annexed contained a very particular description of 90 distinct soda water apparatuses, and concluded with the words "and all of the above apparatuses and all other manufacturing and dispensing apparatus owned by me, whether in my place, or at my customers." *Held*, that a soda water apparatus, not in the possession of the mortgagor and not specifically described in the schedule, although in the possession of a customer of the mortgagor, was not embraced in the mortgage.

APPEAL from a judgment of a district court in the City of New York.

The action was brought by John Matthews, George Matthews, and Elizabeth Matthews, to recover from the defendants William Sniffen and George Sniffen, the possession of certain personal property claimed by the plaintiffs to have been conveyed to them by Leopold Freund by a mortgage made by him to the firm of John Matthews. The facts are stated in the opinion. Judgment was rendered in favor of the defendants; and from the judgment the plaintiffs appealed to this court.

CHARLES P. DALY, Chief Justice.—This was an action brought by the plaintiffs to recover certain personal property wrongfully detained by the defendants. The property is described in the complaint, as a white marble soda water appa-

ratus, with sixteen syrups and five draughts, together with couplings and other articles belonging to it. The defense was a general denial and misjoinder of parties. The plaintiffs claimed the property as having been conveyed to them by Leopold Freund, in a mortgage made by him to the firm of John Matthews. The mortgage was given in evidence; but no evidence was given or offered by the plaintiffs, to show that the plaintiffs, who are three in number, compose the firm of John Matthews, or that any assignment of any interest in the mortgage had been made to the plaintiffs George Matthews and Elizabeth Matthews, by the other plaintiff, John Matthews, and this, under the defense of misjoinder, which the defendants set up, was, of itself, a sufficient reason for giving judgment for the defendants.

But, in addition to this, there was no evidence, nor any offer of evidence, showing that this property was, or was intended to be, conveyed by the mortgage. The evidence of Freund, the mortgagor, was that he manufactured and owned this apparatus in the spring of 1879, and that after he made it, he put it in the store of one William Kruss. The mortgage was given by him in August, 1879; and, as would appear from the evidence, when this apparatus was in the possession of Kruss. In the mortgage, no particular species of property is mentioned. The words are: "do grant, bargain and sell, unto the said parties of the second part and all other goods and chattels mentioned in the schedule hereunto annexed, and now in possession of the said party of the first part," nothing being written in the blank space left in such instruments, when printed, for a description of the property, general or otherwise. The property here referred to, is property then in the mortgagor's possession, and does not include this apparatus, as it was not then in the possesssion of Freund, but of Kruss, one of Freund's customers.

The matter is not helped by referring to the schedule attached to the mortgage. It is a long inventory of five and a half closely-written pages, in which ninety soda water apparatuses are specifically enumerated, and so particularly, that each can be distinguished from the other, by the description given of

it, and there is among these, no white marble soda water apparatus with sixteen syrups and five draughts. The appellant claims that this apparatus comes under a general item in the schedule in the words: "and all of the above apparatuses (the ninety before referred to) and all other manufacturing and dispensing apparatus owned by me, whether in my place, or at my customers." It is fair to assume that if this apparatus was intended to be embraced in the mortgage, it would have been specifically enumerated with the ninety that are so described that they can be separately distinguished, as it is a very large one, with sixteen syrups, there being only one with that large number of syrups, among the ninety specifically enumerated.

All "other manufacturing or dispensing apparatus" may or may not mean an apparatus of this kind. It is not only a very loose clause in the schedule, but is inconsistent with the body of the mortgage, which refers to what is mortgaged, as goods and chattels in the schedule, *then in the possession* of the mortgagor; and this particular clause in the schedule refers to property, whether in the mortgagor's possession, or in the possession of his customers; "whether at my place, or at my customers:" and where, in a particular like this, the schedule is in conflict with the mortgage, the mortgage, I apprehend, must govern, for the annexing of the schedule neither limits nor enlarges the generality of the description in the mortgage, but is annexed for greater certainty and exactness in the description of the property, so that it may be easily identified (*Winslow* v. *Merchants' Ins. Co.*, 4 Met. 306). The general rule is, that any description will suffice, that will enable third persons to identify the property, aided by inquiries which the mortgage itself indicates (2 Hilliard on Mortgages, 3d ed. 374),—such as all the goods and chattels in a particular store, or any indicated place (*Conkling* v. *Shelly*, 28 N. Y. 362; *Russell* v. *Winne*, 37 N. Y. 593); or, as was held in *Galen* v. *Brown* (22 N. Y. 37), where a certain quantity of property (which in that case was so many feet of lumber) is described as in the mortgagor's store, but only one-fifth of that amount was in his store and the rest elsewhere, it may be shown by parol that a certain quantity of property of a particular kind

had been purchased by the mortgagor, and that the mortgage had been made to secure the indorsers of a note given by the mortgagor upon that purchase; to establish that it was that particular property that was intended to be mortgaged, although only a part of it was then in the mortgagor's store. In the present case, the mortgage was of the goods and chattels mentioned in the schedule, and *then in the mortgagor's* possession; and as this apparatus was not, like many other articles of this kind, specifically enumerated in the schedule, nor then in the mortgagor's possession, the construction should be that it was not meant to be embraced in the mortgage. I do not mean to say that this construction is so certain, as to shut out parol evidence of a state of facts clearly showing that the intention was to embrace it. But no such state of facts was elicited, nor were any of the questions ruled out by the justice of a nature to prove any such facts. They were questions, either asking for the conclusions of witnesses, or for facts that were immaterial. The witness who took the inventory was asked if he could point out this apparatus in the mortgage, and his reply was, "not now." The same question was put to the mortgagor, and his answer was that he could not read English; and that neither of them could point it out appears by the inspection of the schedule, in which there is no apparatus of sixteen syrups and two draughts.

The judgment should be affirmed.

J. F. Daly and Van Hoesen, JJ., concurred.

Judgment affirmed, with costs.

MARY E. SACIA, Appellant, *against* JOHN J. DECKER *et al.*, Respondents.

(Decided April 4th, 1881.)

The provision of section 832 of the Code of Civil Procedure, making persons convicted of a crime or misdemeanor competent witnesses, applies to such a person after as well as before sentence has been pronounced.

Such a witness may properly be allowed to explain the circumstances of the case in which he was convicted.

In an action for an alleged conversion of personal property by taking it from the plaintiff by means of a writ of replevin, the defense was that the property had been obtained from the defendants,—the plaintiffs in the replevin suit,—by a conspiracy to which the plaintiff was a party, in pursuance of which the defendants were induced by false representations to deliver the property to B., one of the conspirators. It appeared that B. had afterwards transferred the possession of it to another alleged co-conspirator, since deceased, who had presented it as a gift to his son's wife, the plaintiff in this action. *Held*, that B. was a competent witness for the defendants, to testify to transactions between himself and the deceased, being the facts on which the claim of fraud was founded.

An objection to the competency of a witness by reason of interest, if not taken at the trial, cannot be considered on appeal.

Where property has been fraudulently obtained by means of a pretended purchase, the recovery of a judgment for the price by the defrauded vendors while ignorant of the fraud, is not an affirmance of the sale, and does not bar their right to disaffirm and recover the property upon discovery of the fraud.

APPEAL from a judgment of the general term of the Marine Court of the City of New York, affirming a judgment of that court entered upon the verdict of a jury.

The action was brought to recover damages for the alleged unlawful taking of a piano-forte, in February, 1875. The defense was that the piano was obtained in August, 1873, from defendants, by fraud and conspiracy on the part of John L. Bough, Charles Sacia and Henry T. Bassford, to which plaintiff and her husband were parties.

The piano was sold by defendants to Bough, in August,

1873, he giving his note at four months for the price. The note was not paid, and defendants recovered judgment thereon against Bough, January 30th, 1874.

In February, 1875, defendants took the piano from plaintiff's possession in replevin proceedings against her husband's father, Charles Sacia, they claiming then to have discovered that the piano had been obtained originally from them in pursuance of fraud and conspiracy. For such taking, plaintiff (to whom the piano had been conveyed by her father-in-law, who got it by sale from Bough), brought this action. Defendants recovered a verdict, upon which judgment was entered in their favor. From the judgment the plaintiff appealed to the general term of the Marine Court, which affirmed the judgment; and from this decision the plaintiff appealed to this court.

Upon the appeal the plaintiff claimed that the judgment against her should be reversed, because: I. The alleged fraud and conspiracy were not proved; II. Because the recovery by defendants of the judgment on the note of Bough for the price was an election to affirm the sale to the latter, and a bar to any right to the return of the piano; and III. That the testimony of Bough, the only witness to prove the alleged fraud and conspiracy, was inadmissible. Several exceptions were taken by plaintiff in the course of the trial, which she claimed required a reversal.

Chatfield & Ransom, for appellant.

John D. Townsend and *W. D. Ladd, Jr.*, for respondents.

J. F. Daly, J.—[After stating the facts as above.]—There was sufficient evidence of fraud and conspiracy to warrant the finding of the jury. Bough testified that the Commercial Hotel (159 Greene street, Jersey City), being in the market for sale, Marcus Sacia came to him, asked him to buy it, and said "it would be a good place to buy goods on credit;" Marcus Sacia was to furnish him notes made by parties named Nash and Pearsall. He tried to buy a billiard table from Collender & Co., but they refused to take the notes. He then

arranged with Sacia as to getting the piano in question. It was necessary to have references. Charles Sacia was asked by his son, Marcus, to stand as reference; H. T. Bassford was asked to do the same. Bough went to defendants, who were piano manufacturers, ordered a piano, and gave Charles Sacia and Bassford as references. Before going, Bough and Marcus Sacia discussed, in the presence of Charles Sacia, what interest they were to have in this matter, and one-quarter interest in any goods he should purchase was spoken of. Marcus Sacia spoke also of the Deckers, telling Bough they were very easy men to work upon. When Charles Decker called on Charles Sacia to inquire about Bough's responsibility, Sacia told him the latter was responsible, and that he was trying to raise money on Bough's property in Hoboken. The fact was that Bough was worth nothing, and had to borrow $350 to take the proposed hotel. In November or December, 1873, Charles Sacia came to the Deckers' place of business, and said he wanted to sell them a mortgage which Bough had turned over to him, and to have the price of the piano deducted from the amount to be paid for the mortgage. At about this time, Sacia was in possession of the piano, it having been transferred to him by Bough without consideration, as Bough swears. In July, 1874, Sacia transferred to the plaintiff, who was the wife of his son, Marcus T., the piano, without consideration. In October, 1873, a letter signed "Frederick Sharp," the writer of which was unknown, was sent to defendants, warning them that Bough was going to cheat them out of the piano; that he had sold it to a party who intended to call for it on the 16th, the date of the letter. The defendants took the letter to Bough, who showed it to Charles Sacia. The transfer from Bough to Charles Sacia took place two or three weeks after that.

This evidence, if true, showed that Charles Sacia was privy to the scheme of his son and Bough to take the hotel in Jersey City, get goods on credit by a false reference to Charles Sacia, Marcus T. Sacia to have a quarter interest in the goods thus obtained; and that Charles Sacia, knowing the fraud by which the piano was obtained, afterwards got it from Bough,

knowing it had not been paid for, and made a present of it to his daughter-in-law.

The only evidence to contradict this was that given by Edward Kelly, formerly bar-tender for Bough, who swore that he saw Charles Sacia pay Bough $650 for the piano—$200 in September, and $450 in the middle of October, 1873. Charles Sacia was dead at the time of the trial, and Marcus T. Sacia was in the Trenton state prison. The plaintiff showed that Bough had been twice convicted and sentenced, once for forgery, and once for attempt to commit burglary in the third degree, on his own plea. He was pardoned for the latter offense, and by a record produced on this appeal, it appears he obtained a reversal of the former conviction for forgery and was granted a new trial.

The jury had the right to weigh the testimony before them and to give credit to such statements as they believed to be true. Their finding shows that they were satisfied there had been fraud committed on defendants, and that Sacia was a party to it. The evidence supports the finding.

Defendant's exceptions are next to be considered.

The witness Bough was not disqualified as a witness, although under sentence for a felony. By the Code (§ 832), persons convicted of a crime are, notwithstanding, competent witnesses. In legal parlance, conviction denotes the final judgment of the court in passing sentence. It cannot have been intended by the legislature that a person convicted by the verdict of a jury, of a felony, should be a competent witness, but after sentence has been pronounced he should not be. The legislature must have intended that the legal meaning of the term convicted should be understood (*Schiffer* v. *Pruden*, 64 N. Y. 52; *Blaufus* v. *People*, 69 N. Y. 107). It was shown, besides, by the record produced on this appeal, that Bough's conviction had been reversed and a new trial granted him, before he was offered as a witness in this action.

When the witness Bough was questioned as to his transactions with Charles Sacia, deceased, his evidence was objected to on the ground that he could not give evidence of transac-

tions between himself and deceased, through whom the plaintiff obtained title to the piano, and to whom Bough had conveyed it; as a party who conveys title cannot impeach it. This rule might apply if the suit were brought by or against Bough, or if these defendants derived their title from Bough. But defendants were impeaching the title Bough attempted to get from them by fraud, and the title which plaintiff and Charles Sacia attempted to establish through the same fraudulent transaction. Any party to the transaction was competent as a witness on behalf of the defrauded vendor, to testify to the facts on which the claim of fraud was founded.

Another objection to his evidence is taken for the first time on appeal, viz.: that he is interested in the event of this action, because if defendants recover their property, the contract of sale to him is rescinded and he is discharged (Code, § 829). Without going into the question as to what relief Bough now has against the judgment defendants hold against him for the price, it is enough to say that this particular objection should have been taken at the trial, for it was one that might have been obviated. Defendants might have shown a release to Bough, or otherwise disposed of the objection to his interest. Where an objection that might have been obviated was not taken at the trial, it cannot be raised on appeal (*Height* v. *People*, 50 N. Y. 392).

Bough was allowed to explain the circumstances of the case in which he was tried and convicted of burglary. This was not error. As the conviction did not disqualify him, but went to his credibility, it is admitted as a proof of his guilt, and must be considered *prima facie* evidence, which may be rebutted. The conviction now stands, I apprehend, on the same footing as a foreign conviction stood, before the adoption of the new Code. Such foreign judgments did not disqualify the witness, but might be offered as *prima facie* evidence of the crime (*Sims* v. *Sims*, 75 N. Y. 466). It is doubtful, however, if plaintiff's exception is sufficient to reach the testimony given, as a new question, unobjected to, was put after the exception and before the testimony was given.

The judgment obtained by defendants against Bough for the price of the piano was not a bar to their right of disaffirmance and of recovery of the chattel. The judgment was obtained before they had knowledge of the fraud practiced upon them (3 Wait's Actions and Defenses, 470, 475; Kerr on Fraud and Mistake, 297). The position of plaintiff or of Charles Sacia, to whom Bough transferred the piano, was not altered in the least, and the objection is purely technical. There was no election of remedies, for until defendants knew of the fraud, they could not know they had a choice. Proceeding to sue and recover judgment against Bough for the price, while ignorant that they had a right to reclaim the property, was no more an affirmance of the sale than retaining his note would have been.

It was contended by plaintiff that the receipt by defendants of the "Frederick Sharp" letter of October 16th, 1873, warning them of the attempted fraud, was notice to them, and that their subsequent suit for the price was ratification with knowledge. Defendants proved that they took that letter to Bough. Plaintiff objected to what Bough said to the Mr. Decker who took the letter over to show him. The jury were left to assume what they pleased from this exclusion of testimony, even to inferring that, as defendants took no steps against Bough, he being then in possession of the piano, and his note not having matured, they were re-assured by him, and that any suspicions aroused by the letter were lulled. But the trial judge did all the evidence could possibly require; he left to the jury the question whether, in view of the receipt of the Sharp letter, the suit on the note, and the circumstances, the defendants made their election; charging the jury that if the defendants received information that they were defrauded, they were bound to make the election. He also charged that if the defendants acted negligently at the time of sale, or on the receipt of the Sharp letter, they were guilty of laches, and could not obtain the property as against an innocent purchaser. Upon this charge, so very favorable to plaintiff, the jury found for defendant.

The judgment should be affirmed, with costs.

Charles P. Daly, Ch. J., and Van Hoesen, J., concurred.

Judgment affirmed, with costs.

James Talcott, Respondent, *against* Isaac D. Einstein, Impleaded, &c., Appellant.

(Decided April 4th, 1881.)

In May and June, 1879, goods were purchased or ordered from the plaintiff, without any note or memorandum subscribed by the parties, or any acceptance of the goods or payment of purchase-money, within the requirements of the Statute of Frauds. The goods remained in the plaintiff's possession until August 14th, 1879, when, the purchasers having sent for them on the preceding day, they were delivered. Between the dates of the purchase and the delivery, the purchasers had become financially embarrassed, and on August 20th, 1879, made a general assignment for the benefit of creditors, with preferences. *Held*, in an action of replevin for the goods by the vendor against the assignee, that the circumstances warranted an inference by the jury of fraud on the part of the purchasers in obtaining the delivery of the goods on August 14th, 1879; and that, as there was no valid contract of sale before such delivery, a verdict for the plaintiff should be sustained.

Appeal from a judgment of the general term of the Marine Court of the City of New York, affirming a judgment of that court entered upon the verdict of a jury, and from an order affirming an order denying a motion for a new trial.

Between May 12th, 1879, and June 5th, 1879, the firm of Nathan Mayer & Co. made, it was claimed, five different purchases of goods from plaintiff, and the bills made out by plaintiff were all substantially as follows, except as to the goods and amounts:

"*Claims for damages or errors must be made on receipt of goods.*

NEW YORK, May 12th, 1879.

Mr. Nathan Mayer & Co.

Bought of James Talcott,
Commission Merchant,
108 and 110 Franklin street.

5–30. Sept. 1.
1367. 30 doz. 246 White S.
18 " " " D.
1763. 48 " " " S. 96, *a* 2.35 - - - - $225.60

Received May 19th, 1 case.
Held subject to your order."

The second bill was of May 15th, 1879, for $210; the third, of May 22d, 1879, for $260; the fourth, of May 28th, 1879, for $130; and the fifth, of June 5th, 1879, for $135. None of the goods, except the one case mentioned in the first bill as "received May 19th," were delivered until August 14th, 1879, when they were all delivered upon an order received from Mayer & Co. the day before. On August 20th, 1879, the vendees made a general assignment, with preferences, to the defendant Isaac D. Einstein. Plaintiff demanded the goods from the assignee on August 23d, 1879, and brought this action to recover them, alleging that they were obtained by fraud.

At the trial the jury found a verdict for the plaintiff. A motion by the defendant for a new trial was denied, and judgment in favor of the plaintiff was entered on the verdict. From the judgment and and the order denying his motion for a new trial the defendant appealed to the general term of the Marine Court, which affirmed both; and from this decision the defendant appealed to this court.

Blumenstiel & Hirsch, for appellant.

L. L. Van Allen, for respondent.

J. F. Daly, J.—[After stating the facts as above.]—It is not claimed that Mayer & Co. were embarrassed or insolvent at the dates these goods were purchased or ordered, viz., from May 12th to June 5th, 1879. As their circumstances, however, afterwards changed, and they became embarrassed in July and August, 1879, their sending for the goods and obtaining them from plaintiff on August 14th, 1879, without disclosing their condition, and their subsequently making the general assignment of August 20th, 1879, are circumstances warranting the inference, as plaintiff claims, that they intended to defraud him, and to obtain these goods in order to swell the assets, which were to be devoted to paying preferred creditors.

Whether such a fraudulent intent existing in July and August, 1879, and not before, would affect the vendees' title to these goods, depends upon whether the title passed at the date of the bills or the date of delivery. That question was left to the jury; the plaintiff having asked the court "to charge that the transactions of May and June, not being consummated by the delivery until August, that there was really no sale until the delivery;" to which the court answered: "The sale was not proved." The defendant excepted to that, and the court said: "The whole matter is, however, to be taken into consideration by the jury."

As far as the evidence goes in the case before us, there was no sale at any of the dates which the bills, put in evidence by defendant, bear. The contract was void under the Statute of Frauds, for there was no memorandum signed by either party (*Justice* v. *Lang*, 42 N. Y. 493; 52 N. Y. 323), no part payment, no delivery or acceptance. There is no evidence to show what was done between vendor and vendee at the dates in May and June, recited in the bills, and there seems to have been no liability incurred by the vendee until the delivery and acceptance on August 14th. The recitals in the bills made out by the vendor that the goods were held subject to the vendees' order, did not bind the latter. It did not take the case out of the statute for the purchaser to say or agree that the goods might remain on bailment with the vendor.

Words are not sufficient to make a delivery (*Shindler* v. *Houston*, 1 N. Y. 261).

For all that appears in proof, the transaction might have been repudiated by either party up to the actual delivery on August 14th, and that date must therefore be taken as the date of the contract of sale, as well as of the delivery. If the facts in evidence justified a presumption to the contrary, it was for the jury to make the presumption, but it appears that the jury by their verdict found there was no presumption to the contrary.

On the question of fraud, the proof, as already remarked, warranted the inference of the jury that there was an intent to deprive plaintiff of these goods. This question on the facts must always be a question for the jury; the embarrassed state of Mayer in July and the early part of August, and his general assignment, with preferences, within a week after ordering all these five purchases, are sufficient to sustain the verdict.

There was no error in sustaining the objection to the question put to the witness Rosenbaum: "State whether, in August, when Mr. Mayer returned, you had made any promises to help Mr. Mayer out with a loan of money?" (21 Hun, 642) because the question was not so framed as to relate to a time in August prior to the 13th, when these goods were ordered to be delivered. The question permitted an answer as to promises made at any time in August, Mr. Mayer having returned in the middle of July.

The judgment and order appealed from should be affirmed.

Charles P. Daly, Ch. J., and Van Hoesen, J., concurred.

Judgment and order affirmed, with costs.

HENRY M. WHITEHEAD, Respondent, *against* CORNELIUS J. VANDERBILT, Appellant.

(Decided April 4th, 1881.)

Upon the loan of a mare by the plaintiff to the defendant, in May, 1878, the defendant agreed to return her to the plaintiff in good condition in the fall of that year, unless he should then desire to purchase her, in which case, or in the event of his failure to return her in good condition, by reason of accident or otherwise, he should pay the plaintiff a specified sum, her agreed value, and her market value in fact. The mare died in July or August of that year, while in the possession of defendant. *Held*, that as the death of the mare did not appear to have been due to any act or neglect of the defendant, he was discharged from liability either as bailee or upon his special contract.

APPEAL from a judgment of this court entered upon the report of a referee.

The facts are stated in the opinions.

Lord & Lord, for appellant.

H. M. Whitehead, for respondent.

J. F. DALY, J.—The referee found as fact: That at the city of New York, in or about the month of May, 1878, the plaintiff loaned to the defendant, at the defendant's request, a bay mare, on the condition and agreement on the part of the defendant that he would return the said bay mare to the plaintiff in good condition in the fall of that year, unless he should then desire to purchase her—in which case, or in the event of his failure to return her in good condition, by reason of accident or otherwise, he should pay the plaintiff $2,500, her agreed value, and her market value in fact. That the mare thereafter, and in the month of July or August, 1878, sickened and died at Croton, New York, while still in the possession and control of the defendant, which rendered it impossible to return her as agreed. That the defendant has never paid

the plaintiff any sum whatever for said mare. And the referee found as conclusions of law: That there is due from the defendant to the plaintiff $2,500, with interest thereon from the first day of January, 1879, and he should have judgment therefor and also for the costs of this action.

On the facts found the judgment should have been for defendant. The defendant was bailee of the mare, with the privilege of purchasing her at the price of $2,500, and with the obligation to return her in good condition, in default of which he was also to pay $2,500 to plaintiff. He was not to be excused from returning her in good condition by reason of accident or otherwise. In the agreement thus made between the parties there was no provision for the contingency which actually occurred—the death of the mare before the time at which she was to be returned to her owner. The defendant had the whole period up to the fall to comply with his agreement to return her in good condition; he was prevented from doing so by her death in July or August; there is no finding and no presumption that her death was owing to his act or neglect; the performance of his contract became impossible by the act of God. Under such circumstances he is discharged from liability either as bailee or upon his special contract (*Carpenter* v. *Stevens*, 12 Wend. 589; *Hyland* v. *Paul*, 33 Barb. 241; *Worth* v. *Edmonds*, 52 Barb. 40; *Wolfe* v. *Howes*, 20 N. Y. 197). The contract to return the mare, or upon failure to return her in good condition to pay $2,500, does not make the defendant liable, as on special contract, in case of her death. In *McEvers* v. *Steamboat Sangamon* (22 Mo. 187), which was an action to recover the value of a barge which plaintiff hired to defendant at $8 per day, the defendant agreeing to return her at any time and deliver her in *good condition*, the usual wear and tear excepted, and defendant answered that the barge had been destroyed by ice in the Mississippi River without any fault on defendant's part, the Supreme Court of Missouri reversed a judgment in favor of plaintiff, and Judge Larned, in his opinion, said: "If there had been no obligation on the boat for the return of the barge other than what the law implied upon the bailment, from the

transaction itself, this defense, it is admitted, would have been sufficient. But it is insisted that here the party imposed the duty upon himself and therefore took the risk of such casualties; the distinction being between a duty imposed by law and one imposed by the parties themselves." . . "The question here, then, is, was this risk within the engagement of the defendant, so that no matter how the loss occurred, the party is bound; and we think it was not. Here is a general undertaking to return the property in good order, and it has perished without any fault on the part of the defendant, by a natural force that could not be resisted, and we are of opinion that an undertaking to assume such a risk ought to be special and express, and so clear as not to admit of any other construction."

In *Keas* v. *Yewell* (2 Dana, 249), where the action was on a bond to have two slaves forthcoming to answer any decree in a foreclosure of a mortgage upon them, it was set up in defense that one of the slaves had run away. Plaintiff had judgment, but it was reversed, the court saying: "The casualty by which the slave was lost is a peril incident to the very nature of such property, and therefore in contracts and covenants concerning such property that peril should never be presumed to have been intended to be guarded against unless so expressly stipulated."

In this case the death of the animal is a peril incident to such property, and if defendant is to be held to the onerous responsibility of that risk, his obligation to do so must be express, it cannot be implied. His agreement here was to return the mare in good condition or to pay $2,500. As his obligation goes to the *condition* of the animal at the time fixed for its return, the parties plainly contemplated her being in existence at that time, and they abstained from making provision in case of her death. It was also plain that the continued existence of the subject was essential to the performance of the contract, and if at the time fixed performance became impossible by the destruction of the thing without the fault of the party sought to be charged, he is not liable (Anson on Contracts, 315–16; 12 Central Law Journal, 9). The defend-

ant was not an insurer of the mare. In *Field* v. *Brackett* (56 Me. 121), it was held that a naked verbal promise to return in good order and at a specified time does not import a contract on the part of the hirer of a chattel to insure it against loss occurring without his default.

Judgment should be reversed and a new trial ordered, costs to abide event.

Charles P. Daly, Chief Justice.—The testimony of Simmons was that the defendant agreed to be answerable in case of accident or death. The plaintiff's evidence was that he instructed Simmons that the defendant might have the mare, assuming all risks. The testimony of the defendant, however, was that he never stipulated or promised to pay for the mare if she died or any accident happened to her. And the referee found, on this conflicting testimony, that the plaintiff's agreement was simply to return her in good condition, which, upon the referee's findings, we must assume was the agreement, and I concur with Judge Daly, that, this being the agreement, there could be no recovery for the price of the mare, as the referee found that she died from paralysis, not occasioned by any act or fault of the defendant.

Van Hoesen, J., concurred.

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

Oscar Knapp, Appellant, *against* Joseph Scheider *et al.*, Respondents.

(Decided June 6th, 1881.)

In an action for the recovery of the possession of personal property, brought before the provisions of the Code of Civil Procedure relating to such actions took effect, the complaint alleged a wrongful detention of the goods, and the answer was simply a general denial. Upon the trial, it appeared that the goods had been furnished by the plaintiff to the defendants under a contract for their manufacture; and the complaint was dismissed, on the ground that there was no sufficient proof of a rejection of the goods by the defendants or a demand for them by the plaintiff. *Held*, that as, under the then existing law, the issues raised by the answer entitled the defendant to claim a return of the property, proof of a demand by the plaintiff was unnecessary; and that there was sufficient evidence to be submitted to the jury upon the question whether the goods were rejected by the defendants, which rejection, taken in connection with their defense, would render a formal demand by the plaintiff unnecessary.

Appeal from a judgment of this court entered upon the dismissal of a complaint.

The facts are stated in the opinion.

Daniel Daly, for appellant.

Lewis Hurst and *Wm. W. Badger*, for respondents.

Charles P. Daly, Chief Justice.—The complaint was that the defendants wrongfully detained chattels, the property of the plaintiff. The answer was simply a general denial, which put in issue the plaintiff's title and the alleged wrongful detention of the property by the defendants. It was incumbent, therefore, on the plaintiff to prove that he was entitled to the possession of the property, or to some part of it, and that it was wrongfully withheld from him by the defendants. The complaint was dismissed, and a judgment entered for the defendants. The appeal is from the judgment, but the judgment is not set forth. All that appears from the case is that

judgment was entered for the defendants for $81.25, and that the chattels named in the complaint were taken in the action from the defendants.

The action was brought in 1878, and is consequently not affected by the new provision in the present code regulating actions for the recovery of chattels. It does not appear from the case how this judgment was rendered. The defendants did not claim a return of the property as may now be done under the code by the service of a notice (§ 1725); and as the law stood, before the present code, the judgment for the defendant, upon the dismissal of the complaint, would have to be simply for the defendant's costs unless they claimed a return of the property in their answer, and it was established by the evidence that they were entitled to the possession of it; for a return of the property to a defendant, or its value, if a delivery of it cannot be had, will not be awarded unless the defendant claims it in the action and the evidence shows that he is entitled it; for a claim by the defendant for a return of the property, or its value, is in the nature of a cross judgment (*Rogers* v. *Arnold*, 12 Wend. 30; *Ely* v. *Ehle*, 3 N. Y. 506; *Stowell* v. *Otis*, 71 N. Y. 36; Wells on Replevin, §§ 272, 485, 553). It does not follow that a defendant in replevin is entitled, upon a general verdict, to a return of the property or its value, as that involves an inquiry into and a decision upon the merits, which is rendered by the court only as the rights of the parties may require (Wells on Replevin, § 485, and cases there cited).

If the traverse in the answer of the plaintiff's right to the property in the chattels, which put him upon the proof of his title, is to be regarded as equivalent in its effect to a demand for a return of the property to the defendants, or its value, if a delivery of it could not be had, as I am inclined to think it is (*Pierce* v. *VanDyke*, 6 Hill, 613; *Ingraham* v. *Hammond*, 1 Hill, 353; *Prosser* v. *Woodward*, 21 Wend. 205; *Stowell* v. *Otis*, 71 N. Y. 38), then proof of a demand and refusal was not required. Where a defendant comes rightfully into the possession of property, a demand of it from him is necessary before an action of replevin can be brought to recover it, for he may

return it if requested, and it is not to be assumed that he would not, or that there has been a wrongful detention of it, until it has been demanded of him and he has refused to give it up (*Thompson* v. *Shirley*, 1 Esp. 31; *Millspaugh* v. *Mitchell*, 8 Barb. 333). But where it appears that a demand would have been unavailing, as where the defendant sets up ownership in the property in himself, or gives a general order to all in his employment, not to deliver it to the defendant, the proof of a demand is not necessary to maintain the action (*Simpson* v. *Wrenn*, 50 Ill. 224; *Johnson* v. *Howe*, 2 Gill, 344; *Hawkins* v. *Hoffman*, 6 Hill, 588; *Powers* v. *Bassford*, 19 How. Pr. 309; *La Place* v. *Aupoix*, 1 Johns. C. 406). This is the case also where the defendant in his answer claims that he had a right to the property and asks that a return of it be adjudged to him, or the value of it if delivery cannot be had; for the very nature of the defense set up shows that it would not have been delivered to the plaintiff, and that a demand of it would have been an idle formality. Mr. Wells, in his recent work on Replevin, after citing several authorities in support of the above, as the law, pertinently says that if the defendant "claims any lien or interest in the property he ought not to be permitted to set it up and then recover, under pretense that he would have surrendered the property if he had been requested to do so, ... where he insists on the want of a proper demand he ought in fairness to be confined to that defense, or be required to abandon it, ... for to recover under pretense that he would have surrendered the goods had they been demanded, and then ask that they be returned to him, would seem to be absurd. The utmost that he can ask would seem to be costs" (Wells on Replevin, 372). It was held in *Pierce* v. *Van Dyke* (6 Hill, 613), that the success of a defendant upon a plea of non-detinet does not entitle him to a return of the property or a judgment for the value of it, that he must add an avowry or cognizance, or plead property in himself or a third person; that if he does this, and the jury should find both branches of the issue in his favor, or that the plaintiff had no property in the goods, he is then entitled to a return.

In the present case the complaint was dismissed when the

plaintiff rested, upon the ground that the proof of a demand was insufficient, or, as the judge expressed it, because the plaintiff had failed to prove a rejection. This, I think, was erroneous, if the issues raised by the answer entitled the defendants, as I think they did, to claim a return of the chattel, which must have been the conclusion of the court below, unless what is meant by judgment for the defendants for $81.25, was a general judgment for the defendants with costs. If this were the judgment, then the conclusion of the court must have been that the answer had not set up any right to the property, and there being no evidence of a demand of it of the defendants, and a refusal by them to deliver it, that the facts proved would not sustain an action of replevin for a wrongful detention, which would have been equally erroneous. The facts show a delivery of it to the defendants under the contract; a letter by the defendants' foreman, that he found some of the dies all right, upon whose certificate that the dies were properly made or adapted for the work, the defendant Scheider declared he would pay the plaintiff; the refusal of the defendant Scheider afterwards to accept the dies, and his referring to only one that was not right. His reply—upon several applications of the plaintiff for the payment of the one-third of the price provided for in the contract—that he could not accept them, but repeating, on each occasion, to come next day and he would try to accept them; and the inability of the plaintiff to find Scheider thereafter or to ascertain from those at his place of business or his residence where he could be found, would ordinarily be nothing more than evidence of breach of contract on his part, or facts that would entitle plaintiff to bring an action for the recovery of the price. But when these facts are coupled with a defense that the defendants had a right to the property, and demand in the action a return of it to them, it presents the case in a very different aspect, and required, I think, the submission to the jury of the question whether defendant had not rejected the goods, *i. e.*, whether his conduct did not amount to a rejection. If they found in the affirmative the action could be sustained, without proof of formal demand, after such rejection. What-

ever inferences were to be drawn from defendants' conduct it was for the jury to draw, and not for the court.

I think the judgment should, therefore, be reversed and a new trial ordered, costs to abide event.

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

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

John H. Mecabe, Plaintiff, *against* George Jones, Defendant.

(Decided June 6th, 1881.)

In an action for damages for the publication of a libel, it appeared that the alleged libel was printed in a newspaper published by a joint stock association; that the defendant was secretary and treasurer of the association; that he owned a majority of the shares of its stock, and thereby occupied a controlling position, and had a kind of supervision of the articles that appeared, but that he had never exercised a controlling influence; and that he had no knowledge of or personal connection with the publication complained of. *Held*, that, upon these facts, no personal liability of the defendant for the publication was shown.

Exceptions taken at a trial term of this court ordered to be heard in the first instance at the general term.

The facts are stated in the opinion.

Thos. C. E. Ecclesine, for plaintiff.

B. F. Einstein, for defendant.

Beach, J.—It appears from the evidence that the libelous article was printed in the New York *Times*, a newspaper published by a joint stock association, called The New York

Times Publishing Association. The defendant is its secretary and treasurer, and also owns a majority of the shares of the stock; but had no knowledge of or personal affinity with the publication complained of. He testified to occupying a controlling position by virtue of the number of shares owned by him, and perhaps a controlling influence as to the conduct and general management of the paper, if he chose to exercise it in that way, which he had never done. The latter declaration evidently refers to the ownership of a majority of the stock.

The proprietor of a newspaper is liable for defamatory matter published without his knowledge, because of the delegation by him to others of power to do the wrong; the printer and editor, by reason of their direct connection with and control over the contents of the paper. The defendant does not appear to have held any position whereby personal liability attached under those principles. Being the secretary and treasurer of the association necessarily gave him no authority, and imposed upon him no duty, to supervise the printed matter, or charged him with any action relative thereto. Neither does the law impose a liability for the libelous imprint solely from owning stock, even if a majority of the shares. There is no needful legal connection between that status and publishing the paper or control of its contents. The defendant's testimony does not place him in a situation of either proprietor, publisher, editor or printer, or where he would be liable as the principal of those directly connected in having to do with the publication. In *Blackwell* v. *Wiswall* (14 How. Pr. 257), the court say, "The only principle upon which one man can be made liable for the wrongful acts of another is, that such a relation exists between them that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant." Certainly no such relationship is shown to have existed, or may be inferred, from the offices in the joint stock corporation held by the defendant, or from his ownership of a majority of its shares. The company is the proprietor and publisher, and may sue and be sued in the manner provided by statute, while the editor

and printer, by virtue of their employment, are its servants, and not those of an individual owner of stock.

The exception to the denial of motion to dismiss the complaint was well taken, and there should be a judgment for defendant, with costs.

Van Hoesen, J.—The defendant said he had a kind of supervision of the articles which appeared in the New York *Times*. What the nature and extent of that supervision were, he did not say. I think that it devolved on him, after he had admitted that he had a kind of supervision, to show that it was not of that kind which enabled him to say authoritatively what should or what should not appear in the columns of the paper. If he had control of the columns, and the power to reject and exclude anything which met with his disapproval, he must be held to the liability of a publisher of the libel, though he was only a shareholder in a joint stock company. It is true that a shareholder of a joint stock company was not, at the time this action was tried, liable for any obligation of the company, until a judgment against the company had been obtained, and its property exhausted (*Robbins* v. *Wells*, 1 Robt. 666); but this immunity did not extend to the stockholder, who himself incurred a liability for the wrongful act which made the company also liable.

I think the judgment should be affirmed, with costs.

Charles P. Daly, Chief Justice.—I agree in what is above stated except that it devolved on the defendant to show that the kind of supervision or controlling influence which he had, and could, but did not exercise, was not of the kind that enabled him to say authoritatively what should or should not appear in the paper. It was for the plaintiff to show this, as it was for him to make out his case and prove the personal liability of the defendant for what appeared in the paper. I am therefore of opinion, with Judge Beach, that the judgment will have to be reversed.

Exceptions sustained.

CLINTON FOSTER *et al.*, Appellants, *against* CHARLES W. DAYTON *et al.*, Respondents.

(Decided June 6th, 1881.)

The defendants, attorneys for Mrs. W., were conducting legal proceedings on her behalf, in which expenses had been incurred, to pay which, the plaintiffs, at the request of the defendants, made advances of money to the defendants. The proceedings resulted in a settlement, by the terms of which a sum of money was to be paid to the defendants for Mrs. W.; but one of the plaintiffs, who was a necessary party to the settlement, assented to it only upon condition that out of that sum the amounts so loaned by the plaintiffs should be repaid, with interest, to which the defendants agreed if Mrs. W. would sign the plaintiffs' account. Their account, made out as against the defendants, was presented to the latter, and afterwards to Mrs. W., who wrote below it "Please pay the above amount and charge to my account," and signed and returned it to the plaintiffs; the settlement was then carried out, and the defendants received under it the money thereby agreed to be paid to them. *Held*, that the written order of Mrs. W. operated as an equitable assignment of so much of the funds in the defendants' hands, which, in the absence of fraud or misrepresentation, she could not recall; and that an action might be maintained upon such order, against the defendants, even without a written acceptance by them, upon their refusal to pay the amount of it.

APPEAL from a judgment of this court entered upon the dismissal of a complaint.

The facts are stated in the opinion.

Benj. T. Kissam, for appellants.

L. A. Gould, for respondents.

CHARLES P. DALY, Chief Justice.—The money advanced in this case by the plaintiffs was at the defendants' request to enable them to pay the expenses incident to the proceeding they were conducting, to recover from the executrix of the trustee of Mrs. Whittelsey money left in trust for Mrs. W. The money was loaned by Mr. Town, as agent of the plaintiffs, and for the benefit of Mrs. W., who was without means. It

was loaned upon the personal solicitation of the defendants, and might, upon the evidence, if it were necessary, be treated as a loan to them. They were successful in the proceedings, and it was finally arranged that the executrix should, in settlement, pay $22,500—$15,000 to Mrs. W.'s trustees, Messrs. Town & Kissam, and $7,500 to the defendants. To this final settlement or arrangement Mr. Town was a necessary party as one of Mrs. Whittelsey's trustees, and certain instruments were to be signed by him upon which the money was to be paid by Mr. H. L. Hoguet on behalf of the executrix of Mrs. W.'s former trustee. Mr. Town, however, refused to sign the papers unless it was agreed that out of the $7,500 that was to be paid to the defendants for Mrs. W. the amount loaned by him as agent of the plaintiff should be paid, which, with interest, amounted to $1,301.80. The defendants objected to the payment of the interest on this amount, and after some discussion between the parties, the defendants, Mr. Town, and Judge Van Cott, it was finally agreed that the amount should be paid to Mr. Town, if Mrs. W. would sign the account, to which Mr. Town was not favorable at first, but to which he ultimately assented, saying that he would submit the account to Mrs. W.

Town's account was made out against the defendants, whom he seems to have regarded as the debtors. He took it first to the defendants, and then to Mrs. W., and she signed it in the form of an order in these words: "Please pay the above amount and charge to my account.—Mary E. Whittelsey." The settlement was thus carried through, the $22,500 was paid over as above stated, and the account with Mrs. W.'s order was sent by Town to the defendants' office for the payment of it, with a young man, who called several times without seeing them; and who finally presented it to Mr. Dayton, about three days after the order was signed, or about the 19th of May, 1879, and demanded payment, which was not made, Mrs. W. in the meanwhile, on the 17th of May, 1879, having written a letter to the defendants, saying that she signed the order under a misapprehension, and that, upon reflection, she considered the charge unjust, forbidding them to pay the

amount for which she signed, and requesting them to retain it in their hands.

In a later letter to the defendants she declares it outrageous that she should be required to pay the whole of the amount and interest, when others as well as she were to be benefited; referring, I suppose, to the fact that the husband of one of the plaintiffs and the other plaintiff, who were her brothers, had a remote contingent interest in the $15,000 which was in trust for her for life, and which, upon her death without issue, was to go to them. She and the defendants, her attorneys, probably thought that, in view of this contingent possible interest in the trust fund, the plaintiffs should bear some part of the expense of the legal proceeding which had resulted in securing it, or should at least relinquish the interest on the loan, which may or may not have been a reasonable expectation. However that may be, Mr. Town, who had become one of Mrs. W.'s trustees, desired that what had been advanced to enable the defendants to go on with the proceedings, with interest, should be paid out of the $7,500 that was to be paid to the defendants for Mrs. W. on the settlement, before he would assent to the settlement, which was reasonable on his part, as the money had been advanced by him, as the plaintiffs' agent, to enable Mrs. W. to prosecute proceedings which had resulted in the settlement.

There is nothing in the evidence that would warrant the court below in assuming that the money advanced by Town was a contribution by the plaintiffs toward the expense of a proceeding in which one of them, and the husband of the other, had a remote contingent interest. Neither Mrs. W. nor the defendants, as her attorneys, entertained any such view of it, for they, with her approval, repaid Town the principal, $800. The only dispute or point of difference was the payment of the interest, which, if it were a loan either to the defendants or Mrs. W., was necessarily payable from the time of the making of the loan. As the settlement was made, the instrument signed by Town, and the $7,500 paid over to the defendants, with the distinct understanding, on the part of Town, acting for the plaintiffs, and of the defendants, acting

either for themselves or for Mrs. W., that this amount was to be paid to Town out of the $7,500 if Mrs. W. would do what she did—so order the amount to be paid—her subsequent written order, which she wrote and signed at the bottom of the account and delivered to Town, was a full and complete ratification, on her part, of the agreement. It operated as an assignment of so much of the funds in the defendants' hands for the plaintiffs' benefit, and after the signing and delivery of the order to Town, she could not recall it, there being no evidence that any fraud was practiced upon her or any misrepresentation made to her by Town (*Morton* v. *Naylor*, 1 Hill, 583). It was founded upon a good consideration moving from her—the existence of a debt which she recognized, by her signing the order, that she was bound to pay—and was a complete and final disposition of so much of the funds in the defendants' hands; and they, after a knowledge of the fact that she had made this order, were bound to pay the amount to the plaintiffs, for the order was not in the nature of a bill of exchange, requiring, under the statute, a written acceptance by them to charge them with the payment (*Morton* v. *Naylor*, 1 Hill, 583), but a direction for the payment of a specific sum out of a specific fund in their hands belonging to Mrs. W., which sum, by the operation of the order, became equitably assigned to the plaintiffs, and was thereafter payable by the defendants to the plaintiffs, and upon their refusal thereafter to pay it, an action would lie at the suit of the plaintiffs to compel them to do so (*Barker* v. *Bradley*, 42 N. Y. 316; *Parker* v. *City of Syracuse*, 31 N. Y. 376; *Berry* v. *Mayhew*, 1 Daly, 54).

In my opinion, the judgment should be reversed and a new trial ordered, costs to abide event.

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

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

HENRY L. LEVISON, Respondent, *against* CHARLES L. STIX *et al.*, Appellants.

(Decided June 6th, 1881.)

An oral agreement, made on the 31st of December, for services to be rendered for a period of one year which is to terminate on the 31st of December of the following year, is void under the Statute of Frauds.

APPEAL from a judgment of the district court in the city of New York for the seventh judicial district.

The action was brought to recover damages sustained by an alleged wrongful dismissal from employment of a clerk. The evidence showed that on the 31st of December, 1879, the plaintiff was orally engaged to serve for one year, which year should terminate on the 31st of December, 1880. It was claimed upon the part of the defendants, that the agreement was void, because it was within the Statute of Frauds, and no memorandum thereof in writing was ever signed by the parties sought to be charged thereon. Judgment was rendered for the plaintiff. From the judgment the defendants appealed to this court.

William Strauss, for appellants.

Morris S. Wise, for respondent.

PER CURIAM.—In support of the position claimed upon the part of the respondent, is cited the cases of *Marvin* v. *Marvin* (75 N. Y. 242); *Kent* v. *Kent* (62 N. Y. 560); *Smith* v. *Conlin* (19 Hun, 236), and certain other cases, holding that, where an act is not to be done until a certain length of time has elapsed, the day upon which the time is set running is to be excluded in the computation of time.

The case of *Marvin* v. *Marvin* simply decides that where an act is to be done after the expiration of four days

from the filing of a decision, the day of the filing of the decision must be excluded, because four full calendar days must elapse, after the filing of the decision, before the act contemplated can be done; and that was all that was decided in that case.

In the case of *Kent* v. *Kent*, the principle is recognized which was asserted in the case of *Boydell* v. *Drummond* (11 East, 141), that a contract which may by its terms be performed within a year is not within the Statute of Frauds, but where the agreement by its terms is not to be performed within one year, it is within the Statute of Frauds.

To the same effect is the case of *Smith* v. *Conlin*, and in that case the various decisions of this state seem to be carefully collated which established the proposition above mentioned.

It is clear that the employment in the case in question was not to commence until the 1st of January, 1881, and upon precisely such a state of facts in the case of *Cawthorne* v. *Cordrey* (13 C. B. N. S. 406), it was decided that the contract was within the statute.

In that case it was held that a contract entered into on the 24th to serve for twelve months commencing on the 25th is within the statute; and the case of *Bracegirdle* v. *Heald* (1 Barn. & Ald. 722) is there cited, in which it was held that a contract for a year's service to commence at a subsequent day, being a contract not to be performed within a year, is within the Statute of Frauds.

In fact, it is impossible to see, if the term of service is to commence at any time subsequent to the time of making the contract, and the contract is for a full year, how it is possible that it should be performed *within* a year.

It is undoubtedly the intention of the statute to require that all contracts which are not to be performed *within* one year from the time of making, shall be in writing, and in order that they shall be completed *within* the year, it is absolutely necessary that the time of making and the year of performance must be within the *same* year; and if the time of making is to be excluded and the time of performance is to be a full year, the

contract cannot be performed *within* the year *within* which it was made.

The judgment in this case must be reversed.

At the general term, November, 1881, a motion for a re-argument was made by the plaintiff, upon which the following opinion was rendered December 5th, 1881.

J. F. Daly, J.—The question in this appeal, argued before the last general term, was whether a hiring on December 31st for one year, to commence the next day, was within the Statute of Frauds, as being a contract which was not to be performed within one year from the making thereof. This court held the agreement to be within the statute, and cited *Cawthorne* v. *Cordrey* (13 C. B. N. S. 406). Respondent on this motion claims that the court fell into error in quoting that case as authority for the decision, and states that it was there decided that such a contract is not within the statute, and that the decision was so understood by the Supreme Court of Alabama in *Dickson* v. *Frisbee* (52 Ala. 165; 25 Am. Rep. 565).

The general term did not fall into error in reading the case of *Cawthorne* v. *Cordrey*. In that case the doctrine of Lord Ellenborough in *Braceyirdle* v. *Heald* (1 Barn. & Ald. 722), that "if one were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop; for in point of reason an excess of twenty years will equally not be within the act"—was not overruled, but on the contrary was impliedly sanctioned, for the court, Earle, C. J., discharged the rule, not because a contract for a year, made on one day to commence on the next, was not within the statute, but because there was sufficient evidence in the case to show that the contract was to commence on the very day it was made. It should be premised that the head-note of the case is misleading, for it announces a decision that was not made by the court. The facts were that on March 24th the plaintiff made a contract for a year's service with defendant and received part payment in advance, giving a receipt declaring

that the service was to be from Lady Day to Lady Day (March 25th). EARLE, C. J., said: "There clearly was evidence upon which the jury were at liberty to find that there was a contract on Monday the 24th, for a year's service, and it is no objection that the receipt which the plaintiff gave for the £20 advanced, describes the contract as being from Lady Day to Lady Day." It will thus be seen that the contract was upheld because it was to commence on the day it was made and not the day after.

In *Dickson* v. *Frisbee*, the court cited *Cawthorne* v. *Cordrey*, as authority for the proposition contained in the head-note, but which was not decided in the case, having been evidently misled by the syllabus as given in the report; and upon that supposed authority and from the court's own view that in construing the meaning of the statute, fractions of a day should be disregarded, and that a full year *from* the day the contract is made was intended, held that a contract for a year's service to begin the day after the contract is made is not within the statute.

I think that view contrary to the authorities, and that the decision of the general term in this case is correct.

I am in favor, however, of having the case go to the Court of Appeals that the profession may have the benefit of a controlling decision on a question frequently arising.

VAN HOESEN, J., concurred.

Motion denied *

ISAAC NEBENZAHL, Appellant, *against* EDWARD M. TOWNSEND *et al.*, Respondents.

(Decided June 6th, 1881.)

The proceedings upon a warrant issued under the act of 1831, to abolish imprisonment for debt, &c., were dismissed, and the debtor discharged from arrest thereunder, on the ground that he had been arrested pre-

* No appeal to the Court of Appeals was taken from the above decision.

viously upon substantially the same facts in an action brought against him by the same party. *Held*, that this did not render the warrant void, so as to entitle the debtor to maintain an action for false imprisonment for the arrest under it.

Where a complaint sets forth a cause of action for false imprisonment and another for malicious prosecution, both for the same arrest and imprisonment, *it seems*, that the plaintiff should be required to elect between them at the trial. If however, without so electing, the plaintiff gives no proof of want of probable cause, and evidence offered on the part of the defendant tending to prove probable cause is rejected upon the plaintiff's objection, the count for malicious prosecution may properly be dismissed.

An action for malicious prosecution cannot be maintained, even after the proceedings alleged to be malicious have been dismissed, so long as an appeal from such dismissal is pending.

Appeal from a judgment of this court entered upon the verdict of a jury, and from orders denying motions for a new trial.

The action was brought to recover damages for the arrest and imprisonment of the plaintiff. A previous action had been brought by the defendants, Edward M. Townsend and Henry C. Yale, against Isaac Nebenzahl, the plaintiff in this action and Montague S. Marks, in which an order of arrest against Nebenzahl and Marks was granted and they were arrested and held to bail. A judgment was recovered against them in the action, upon which execution was issued against their property; but no execution against the person was issued, and the order of arrest was never vacated, nor were the defendants discharged or their bail exonerated. Subsequently, Townsend and Yale, upon affidavits stating substantially the same facts as those upon which the order of arrest was granted, procured from a justice of the Supreme Court a warrant for the arrest of Nebenzahl and Marks under the act to abolish imprisonment for debt and to punish fraudulent debtors (L. 1831, c. 300, known as the Stilwell Act). Under this warrant Nebenzahl and Marks were arrested, but after taking testimony, they were discharged and the proceedings dismissed, on the ground, as stated in the opinion of Lawrence, J., that as the plaintiffs had elected to proceed under the provisions of the Code relating to arrests, they could not take proceedings under

the Stilwell Act based upon substantially the same facts as those which were disclosed in the affidavits on which the order of arrest was granted. From the order dismissing their proceedings, Townsend and Yale appealed to the general term of the Supreme Court, which affirmed the order; and from this decision they appealed to the Court of Appeals, by which their appeal was eventually dismissed; but while the appeal was still pending, this action was brought by Nebenzahl against Townsend and Yale to recover damages for his arrest and prosecution under the warrant.

The complaint set forth three alleged causes of action: the first, in the nature of an action for false imprisonment; the second and third, in the nature of actions for malicious prosecution, the third containing, however, no allegation of want of probable cause. At the trial, the defendants moved that the plaintiff be required to elect upon which cause of action he would proceed, which was denied. Motions by the defendants to dismiss the complaint, and to dismiss the first cause of action, were denied; but their motions to dismiss the second and third causes of action were granted. Upon the first cause of action, the jury found a verdict for the plaintiff. Motions by the defendants and by the plaintiff for a new trial were refused, and judgment in favor of the plaintiff was entered upon the verdict. Both parties appealed from the judgment, and they also respectively appealed from the respective orders denying their motions for a new trial.

Blumenstiel & Hirsch and *A. J. Requier*, for plaintiff.

North, Ward & Wagstaff, for defendants.

Charles P. Daly, Chief Justice.—The warrant granted under the act to abolish imprisonment for debt, was not absolutely void, because the defendant had been arrested substantially upon the same state of facts in an action previously brought by the plaintiff, in which the defendant had given bail, and in which judgment had been recovered against him and another. It may be a good reason for discharging the war-

rant, as was done in this case, upon the ground that the plaintiff should not be allowed to resort to both remedies; that having elected to pursue one, he should be precluded from resorting to the other, (*People* v. *Goodwin*, 50 Barb. 564; *People* v. *O'Brien*, 6 Abb. Pr. N. S. 66; *People* v. *Kelly*, 1 Abb. N. S. 431). But this does not render the warrant and the proceedings under it void. If granted by the proper officer, upon affidavits establishing any one of the grounds of arrest specified in the statute, it is valid, and is a protection to the officer, and to all acting under it (*Steward* v. *Biddlecum*, 2 N. Y. 105; *Rockford, &c. R. R. Co.* v. *Boody*, 56 N. Y. 460, 461; *People* v. *Tweed*, 63 N. Y. 205; 5 Hun, 392; *Brown* v. *Crowl*, 5 Wend. 298; *Wright* v. *Ritterman*, 4 Rob. 710, 711; *Cooper* v. *Harding*, 7 Ad. & El. N. S. 939, 940).

The warrant is not void, but can be vacated upon application to the court upon the ground that it is vexatious, being instituted merely to harass and annoy, as has frequently been adjudged in cases where, after a defendant has been sued and arrested, a second suit is brought for the same cause, in which he is arrested; which application to discharge the defendant from the second arrest, is not, however, a matter of right, but rests in the discretion of the court (*Imlay* v. *Ellefsen*, 2 East, 453; *People* v. *Tweed*, 63 N. Y. 205); as there may be cases where it is allowable to do so. Thus, in *Olmion* v. *Delany* (2 Str. 1216), it was, under the circumstances of that case, held that the defendant might be arrested in a second action, before the former action, in which he had been arrested for the same cause, had been discontinued.

The warrant having, in this case, been granted by the proper officer, upon affidavits showing affirmatively a case within the statute, an action for false imprisonment could not be maintained for an arrest under it, the only action that lies where the arrest and imprisonment are by lawful process, being an action for malicious prosecution, which is maintainable if the prosecution was instituted by the one against whom action is brought maliciously, and without probable cause.

The complaint was for false imprisonment and malicious prosecution, which was uniting two causes of action that were

inconsistent with each other, for, if the arrest was without lawful authority, it was not a case of malicious prosecution (*Bourden* v. *Alloway*, 11 Mod. 180); and if under lawful process, there was no false imprisonment, the imprisonment being by lawful authority. Each cause of action is distinct from the other. Thus, formerly, for false imprisonment, the remedy was trespass, and for a malicious prosecution it was case (*Elsee* v. *Smith*, 2 Chitty, 304). Both cannot exist upon the same state of facts, or, to put it more clearly, if one lies upon the facts, the other does not. The complaint contains a good count for malicious prosecution, averring that defendants caused to be made affidavits, upon which they obtained from Judge Lawrence a warrant for the arrest of the plaintiff, upon which he was arrested and held to bail; which proceeding, prosecution and arrest, it is averred, was instituted by the defendants maliciously and without probable cause; and a count for false imprisonment, which averred that the defendants, wrongfully and by force, caused the plaintiff to be taken into custody, and imprisoned without any right or authority; and that the imprisonment was *under a warrant* wrongfully and irregularly issued at the instance of the defendants; which count might possibly be sustained, if the warrant, process, or other proceeding, by or under which he was imprisoned, was void, being without authority in law. When the plaintiff had opened the case, the defendant moved that the plaintiff be required to elect under which count or cause of action in the complaint he would proceed, which was denied, and the defendants excepted. As the plaintiff could not maintain an action for false imprisonment, and one also for malicious prosecution, for the same arrest and imprisonment, I think he was bound to elect under which he would proceed; but the point is not material, from what subsequently occurred.

The plaintiff then put in evidence all the proceedings under which he was arrested, in pursuance of the act to abolish imprisonment for debt. He was examined as a witness on his own behalf; and upon his cross-examination, the defendant put several questions to him, for the purpose of showing that there was probable cause for the granting of the warrant,

such as asking him if there was anything in the affidavits upon which the warrant was granted, which he thought was not correctly stated, to which the plaintiff objected; and the judge sustained the objection; the defendants excepting. As there were counts for malicious prosecution, the defendants had a right to show the existence of probable cause, unless the plaintiff had abandoned or meant to abandon that cause of action and that he had, is inferrable from his objecting to any evidence of the existence of probable cause. To make out such a cause of action, it is incumbent upon the plaintiff (*Lovell* v. *Roberts*, 1 Salk. 15) to show that there was a want of probable cause for the warrant, and as the plaintiff had given no evidence on his part, to establish any such cause of action, and objected to the defendants giving any to prove the existence of probable cause, the judge, on the defendants' motion, after the plaintiff had rested, dismissed the complaint, as to this cause of action, or, as it appears in the case, the second and third causes of action in the complaint, the third cause of action amounting to nothing more than an averment of the granting of the warrant, the arrest of the plaintiff, the entering into by him, of a recognizance, and a decision of Judge LAWRENCE discharging the plaintiff from the arrest and dismissing the warrant and complaint, and the affirmance of that decision by the general term of the Supreme Court, and by the Court of Appeals; which, containing no averment of the essential ingredient of a want of probable cause, was no averment of any cause of action whatever. To this decision, the plaintiff excepted, and has also brought an appeal to review it; the answer to which appeal has already been stated in part, that plaintiff rested without giving any evidence establishing a want of probable cause, and after a ruling by the court upon his objection, that the defendants had no right to offer any on the subject.

From the plaintiff's points on this appeal, I infer that he regards the discharge of the arrest and the dismissal of the proceedings by Judge LAWRENCE upon the ground that the plaintiff had previously been arrested in another action for substantially the same cause, as establishing, as a conclusion of law, the want of probable cause. It is not necessary, however,

to pass upon this point, there being another reason why the complaint for a malicious prosecution should have been dismissed, which is, that when the action was brought, the proceedings under which the arrest had been ordered were not terminated, as an appeal was then pending from the decision of the general term of the Supreme Court, affirming the decision of Judge LAWRENCE, to the Court of Appeals; and until the determination of that appeal, it could not be known whether the plaintiff would be discharged from the proceedings against him or not; for if the decision of the court below were reversed upon appeal, the plaintiff would have to be recommitted. The pendency of such an appeal is in its effect somewhat analogous to a discharge by *nolle prosequi*, in which case it has been adjudged an action for a malicious prosecution will not lie, because new process may issue upon the indictment (*Goddard* v. *Smith*, 6 Mod. 261; *Hughes* v. *French*, Willes, 520, note a). No action for a malicious prosecution is maintainable, until the proceeding or suit in which the party has been prosecuted and imprisoned, has been finally terminated by his acquittal and discharge, or by a verdict or judgment in his favor, or where there has been an abandonment of the proceeding or suit by the party that instituted it; thereby establishing conclusively and beyond further question that there was no ground for his arrest; the reason originally given for the rule being, that until the proceeding is finally determined it does not appear that the prosecution or suit in which the party was arrested was unjust (*Waterer* v. *Freeman*, Hob. 266; and Williams' note to the case in 1 Am. ed.); and because "it ought to be shown that it was false and *hopeless;*" Per PARKER, Ch. J., in *Parker* v. *Langley* (10 Mod. 209; *Id.* Gilbert's Cases, 163). It is essential, therefore, to a cause of action, for the plaintiff to aver and prove that the suit or prosecution was determined in his favor (*Hunter* v. *French*, Willes, 517; *Fisher* v. *Bristow*, Doug. 215; *Morgan* v. *Hughes*, 2 T. R. 223; *Skinner* v. *Gunton*, 1 Saund. 229; *Id.* T. Raym. 176; *Arundell* v. *Tregono*, Yelv. 117; *Beauchamp* v. *Croft*, Dyer, 285a; *Robins* v. *Robins*, 1 Salk. 15; *Bird* v. *Line*, Com. 190; *Goddard* v. *Smith*, 6 Mod. 262). "It is," says

the court in *Parker* v. *Langley* (supra), "a proper answer to show that it is pending," which it certainly is, when there has been an appeal from the judgment, which has not yet been decided; and it must also be shown that the suit was determined, or the plaintiff acquitted or discharged before the action was brought (*Purcell* v. *McNamara*, 9 East, 157; *Woolford* v. *Ashley*, 2 Camp. 194; *Phillips* v. *Shaw*, 4 Barn. & Ald. 435; *Stoddart* v. *Palmer*, 3 Barn. & C. 2).

The case was then left to rest upon the simple count for false imprisonment; and, at the close of the trial, the defendants moved for a dismissal of the complaint, as it then stood, upon the ground that an action for false imprisonment had not been established, the process under which the plaintiff had been arrested, being regular, valid, and the arrest under it, lawful; which was denied; and the defendants excepted.

I think, for the reasons already given, that this motion ought to have been granted; and that the defendants are entitled to have the judgment reversed, and a new trial ordered, costs to abide event.

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

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

Louis Oppenheimer, Appellant, *against* Hugh O'Reilly *et al.*, Respondents.

(Decided June 6th, 1881.)

At the trial of an action to recover damages for personal injuries to a boy four years of age, by being run over in a public street, by defendants' wagon, the plaintiff requested the court to charge that if the jury found that the plaintiff was *non sui juris* and escaped into the street without negligence on the part of the parents or custodians, the plaintiff could recover, if they believed the defendant was guilty of negligence. *Held*, that as there was conflicting evidence as to whether the plaintiff escaped into the street or was left there by his custodian at the time, a refusal to so charge was not erroneous.

APPEAL from a judgment of this court entered upon the verdict of a jury, and from an order denying a motion for a new trial.

The facts are stated in the opinion.

James Henderson, for appellant.

Albert Mathews, for respondent.

PER CURIAM.—The only question involved in this appeal arises from the refusal of the court to charge a request made by the plaintiff's counsel, that: "If the jury find that the plaintiff was *non sui juris* and escaped into the street without negligence upon the part of the parents or custodians, the plaintiff can recover if they believe the defendant was guilty of negligence."

It is a familiar principle of law that if the request is in such form that the court cannot properly charge it in the very terms of the request, without qualification, an exception to a refusal to charge the request is not well taken.

The difficulty with the proposition asked to be charged in this case, although abstractly true, seems to be that it would have conveyed an erroneous impression to the jury in view of the evidence which had been offered upon the part of the defendants as to one of the main questions involved in the case, and that was as to whether the boy had escaped (as was testified to by the aunt) into the street, or whether he had been negligently left in the street, as it is claimed that the testimony of the witness Brennan showed. The reasonable construction of this testimony would seem to indicate, that the boy was in the street in his uncle's company, and was left in the street by him, and if he was *non sui juris* this was clearly negligence upon the part of the uncle, who, according to the testimony of the witness Brennan, was then his custodian. The jury might well have inferred if the request had been charged in the precise way demanded by the plaintiff's attorney, that they were instructed that the child had escaped into the street, and the only question in reference to such

escape was as to whether he had escaped without negligence on the part of his parents or custodians, thus calling their attention exclusively to the testimony given upon the part of the aunt, entirely excluding from their consideration the feature of the case introduced by the testimony of the witness Brennan.

Under these circumstances, it appearing that an erroneous impression would have been conveyed to the jury by a charge of the proposition in question in the very terms proposed, it was not error for the judge to have refused to charge the same.

We are of the opinion, therefore, that the judgment must be affirmed with costs.

Judgment affirmed, with costs.

MARGARET ROONEY, as Administratrix of the Goods, Chattels and Credits of EDWARD ROONEY, Deceased, Appellant, *against* THE COMPAGNIE GENERALE TRANSATLANTIQUE, Respondent.

(Decided June 6th, 1881.)

On the trial of an action brought by an administratrix to recover damages for negligently causing the death of her intestate, it appeared that his death was the result of injuries received while discharging cargo from the defendants' steamship, by the fall upon him of a portion of the cargo from the sling in which it was being hoisted out of the vessel, the rope forming the sling having broken, though with less than the ordinary weight of such a draught, owing to defects in the rope which were observable upon inspection. There was evidence that this sling was obtained by one of the laborers from the quartermaster of the steamer, and was one of many which belonged to the vessel, and were carried in her back and forwards across the ocean, usually stowed away, but brought out by the quartermaster when they were wanted for the discharge of cargo, in convenient numbers, the laborers taking the first that came to hand, as was done on this occasion. *Held*, that upon this evidence it was a question for the jury, whether the defendants undertook to supply the men engaged on their vessel in hoisting out the cargo with the necessary slings for the purpose, and if they did, whether they fulfilled the obligation or duty they owed to the men so engaged by providing the sling used in this instance.

Rooney *v.* Compagnie Generale Transatlantique.

APPEAL from a judgment of this court entered upon the dismissal of a complaint.

The facts are stated in the opinion.

Christopher Fine, for appellant.

F. R. Coudert, for respondent.

CHARLES P. DALY, Chief Justice.—I think this was a case for the jury, and not for the court. It was averred in the complaint that Shaw, the stevedore, had contracted to discharge the cargo of the steamship, and it was shown in evidence that he employed and paid the men engaged in discharging it, but this was all that appeared. It may have been consistently with this statement that the slings used in discharging the cargo were to be supplied by the defendants; and there was evidence showing that the slings were supplied by them, and sufficient evidence, prima facie, in my judgment, to entitle the jury to pass upon the question, whether they had not undertaken to furnish that portion of the hoisting apparatus, and to render the verdict of the jury conclusive on that point; for it was for the jury, and not for the court, to draw whatever inferences may be legitimately deduced from the evidence. If the defendants undertook to furnish the slings used in discharging the cargo from their vessel, they owed a duty to those who were engaged in the hoisting on board the vessel, to furnish slings suitable for the purpose, and capable of sustaining the weight ordinarily put upon them in discharging such a cargo, and if they failed to do so and furnished a sling, the rope of which was so weakened by injuries or defects that were observable as to be unsafe and wholly unfit for the work to which it was put, they would be answerable for the consequences of its breaking while in use, and for injury to any of the men engaged in discharging the cargo who were injured by its breaking without any negligence on their part (*Cook* v. *President, &c. of New York Floating Dry Dock Co.*, 1 Hilt. 436; on appeal, 18 N. Y. 229, and affirmed, but not reported; *Coughtry* v. *Globe Woolen Co.*, 56 N. Y. 126, 127, 128; *Derr-*

enbacher v. *Lehigh Valley R. R. Co.*, 10 N. Y. W. Dig. 347; *Thomas* v. *Winchester*, 6 N. Y. 397; *Godley* v. *Haggerty*, 20 Pa. St. 387).

The sling in this case was subjected to what was ordinarily deemed a light weight. The evidence was that the rope of such a sling, if in good condition, was capable of sustaining a weight of 2,600 pounds, and that the weight to which this rope was subjected was about 900 pounds, whereas, 1,600 pounds is not a heavy but a fair draught. Upon the examination of the rope, after the accident, it was declared to be, by the witnesses who examined it, "very brittle, bad, seemingly burnt," that is, "part seemingly burnt out of the rope." A sailor who had used a great many ropes of all kinds, testified that it was not fit for use at all for hoisting; that it looked pretty bad; looked as if it was mildewed from long lying up —a kind of white grey. A painter accustomed to use ropes in putting up scaffoldings, who was on the coroner's jury and saw this sling, testified, that it looked bad; that from its general appearance, in his opinion, it was very poor; that in his business he would not use it; that he would not use it to sustain a scaffold of five or six hundred pounds weight. The evidence further was, that one of the laborers employed by the stevedore got this sling from the quartermaster of the steamer; that the slings used in discharging the cargo belonged to the vessel and were carried backward and forward in her across the ocean; that the quartermaster had them generally tied up and stowed away, but sometimes, if the deck was not full, and they were wanted for the discharge of the cargo, they were thrown upon deck, six or seven pairs of slings on a pile, from which the laborers would take a sling as they wanted one; the first man that was ready to take hold of a sling would take the first one he could get. In this particular instance the laborer Brennan testified that they went to the quartermaster of the ship for a sling and he tossed out a bundle to them, from which the witness took the one next at hand, without examining it, which, as far as he saw, was a good looking rope, with which they worked for about two hours, when it broke. Brennan testified that, when the slings were not on the deck of the steamer,

they had always to ask the quartermaster for them, as they did on this occasion, when he showed them where they were in the closet. On this testimony, it was, in my opinion, a question for the jury, whether the defendants undertook to supply the men engaged on their vessel, in hoisting out the cargo, with the necessary slings for the purpose, and if they did, whether they fulfilled the obligation or duty they owed to the men engaged in discharging the cargo by the kind of sling that was provided for them and used in this instance.

A new trial should therefore be granted.

Van Brunt and Beach, JJ., concurred.

Judgment reversed and new trial ordered.

Isaac F. Tysen, Respondent, *against* Charles H. Tompkins, Appellant.

(Decided June 6th, 1881.)

In an action before a justice of the peace to recover rent for two months, under a lease of certain premises for a year at a yearly rent payable monthly, the defendant's answer alleged an agreement between the plaintiff and the defendant that, as a condition of the defendant's leasing the premises, the plaintiff should make certain repairs, and that he had failed to make them. *Held*, that the judgment of the justice in favor of the plaintiff was conclusive against the defendant in another action previously brought against him by the same plaintiff for installments of rent due for previous months under the same lease, in which the defendant had set up the same agreement as a defense, with a counter-claim for damages to him from the alleged breach by the plaintiff; the justice's judgment having been pleaded by the plaintiff by way of supplemental reply, and established by proof at the trial.

The failure of a plaintiff who relies upon a former judgment in his favor by a justice of the peace, to show the authority of the attorney who appeared before the justice for the defendant against whom judgment was rendered, does not invalidate the judgment as a former adjudication, if the defendant does not disclaim such authority.

Tysen *v.* Tompkins.

Appeal from a judgment of the general term of the Marine Court of the City of New York, affirming a judgment of that court entered upon the verdict of a jury rendered by direction of the court.

The action was brought in October, 1879, to recover from the defendant, rent for the months of May, June, July, August and September, 1879, of certain premises situated at New Brighton, Staten Island, which he alleged that he had rented to the defendant for a period of one year from the 1st of May, 1879, at the yearly rent of $1,200. The defendant answered the complaint of the plaintiff, alleging that in or about the month of March, 1879, the defendant made an agreement with the plaintiff whereby it was *mutually* agreed that upon the condition that the plaintiff would paint the house upon the premises described in the complaint, and do certain other repairs, the defendant would lease the said premises for a year from the 1st of May, 1879, at the yearly rent of $1,200 to be paid monthly, and that relying upon said agreement, the defendant entered into occupancy of said premises on or about the 1st of May, 1879. That the plaintiff in accordance with his agreement did certain repairs, but that, although repeatedly requested to do certain other repairs, he had failed to do so. The defendant then set up as a counter-claim, that because of his failure to repair the premises as he had agreed to do, the defendant was damaged to the amount of $500, for which amount he prayed judgment.

On the 18th day of February, 1880, a summons was issued by John Seaton, a justice of the peace of the town of Castleton, Richmond County, summoning the defendant in this action to answer the complaint of the plaintiff in this action on the 28th of February. This summons was personally served upon the defendant on the 21st of February. Upon the return day of the summons the plaintiff and defendant appeared in court, and the plaintiff claimed for two months' rent of the premises mentioned in the complaint in this action, namely, the rent for the months of November and December, at $100 per month, under a lease of the premises at $1,200 a year.

The defendant filed his answer in writing, whereby he denied each and every allegation of the complaint, and alleged that it was expressly agreed by and between the parties to the action at the time of the alleged letting of the premises in question that there was not to be and there was not any agreement to let or take said premises or to pay any sum as rent for them, unless as a condition precedent to the said letting, the plaintiff should make certain repairs to said premises, which said plaintiff neglected and refused to make, and still refuses so to do, and that the reasonable use and occupation of said premises during the time in question was not worth more than $50 a month, and that the defendant suffered damages by reason of the plaintiff's aforesaid failure in the sum of $50. The case was thereupon adjourned to the 12th of March. Upon said day the plaintiff appeared in court and a Mr. Rawson appeared as attorney for the defendant and asked for an adjournment, which motion was denied. The plaintiff was thereupon examined as a witness and proved his complaint. Upon being cross-examined by the attorney for the defendant as to the facts set up in the answer as a defense, he denied the agreement, and judgment was thereupon rendered in favor of the plaintiff for the amount claimed.

In April, 1880, the plaintiff, for a supplemental reply to the counter-claim set forth in the answer, set up the judgment obtained in the justice's court above mentioned.

This cause coming on for trial before the court and jury, and the above mentioned justice's judgment having been established by evidence, the court held that that judgment was a bar to any defense which the defendant in this action had set out in his answer, and directed judgment for the plaintiff. An appeal having been taken by the defendant from such judgment to the general term of the Marine Court, it was affirmed. From the judgment entered upon such affirmance the defendant appealed to this court.

George G. Munger, for appellant.—I. The well settled rule that the judgment of a court of competent jurisdiction directly upon the point is, as a plea in bar or avoidance, conclu-

sive between the same parties upon the same matter directly in question in another court (*Duchess of Kingston's Case*, 20 How. St. Tr. 355, 537; *Gardner* v. *Buckbee*, 3 Cow. 120), is not only not controverted by the appellant, but admitted to the fullest extent. A proper and intelligent application of the rule only is demanded.

As the term *res adjudicata* itself implies, the "matter" must have been passed upon and adjudicated, either expressly, that is, as matter of fact, or inferentially, as matter of law. It is not enough that there was an opportunity for adjudication, or that it might have been passed upon. This alone does not make an adjudication.

Where the defense to a claim is of a dependent character, like conditions precedent in a contract, or is so interwoven with the claim that an adjudication of such claim necessarily involves a declaration, express or implied, upon the defendant's charge or claim, as where an action is brought for the value of services, and there may be a claim that the services were unskillfully performed, by which damage has resulted, the claims and defenses, or antagonistic claims, cannot be separated or split up and made the subject of different actions within this rule of *res adjudicata*. Of such a character were the cases of *Gates* v. *Preston* (41 N. Y. 113); *Blair* v. *Bartlett* (75 N. Y. 150); and *Dunham* v. *Bower* (77 N. Y. 76). If, on the other hand, the "matter" was independent matter, not inherently connected with the matter which was passed upon, or a part of it in nature and substance, the fact that it was properly pleaded, and could have been duly brought to the attention of the prior court, does not make it *res adjudicata*, if the party who might have availed himself of this privilege did not choose to profit by his right to this extent (*Smith* v. *Weeks*, 26 Barb. 463; *Burwell* v. *Knight*, 51 Barb. 267; *Colwell* v. *Bleakley*, 1 Abb. Ct. App. Dec. 400; *Campbell* v. *Consalus*, 25 N. Y. 613; *Sweet* v. *Tuttle*, 14 N. Y. 465; *People* v. *Johnson*, 38 N. Y. 63; *Slauson* v. *Englehart*, 34 Barb. 198; *Campbell* v. *Butts*, 3 N. Y. 173; *Thompson* v. *Wood*, 1 Hilt. 93; *Jones* v. *Underwood*, 13 Abb. Pr. 393;

Hughes v. *Alexander*, 5 Duer, 488; *Cromwell* v. *County of Sac*, 94 U. S. 351; Wells Res Adjudicata, 4, 8, 9, 333).

The defense set forth in the present action is an agreement consisting of independent promises or conditions subsequent. For breach of it the plaintiff did not lose his right of action for rent entirely, but is only liable to the defendant for the amount of damages sustained thereby, which might be recovered in an action brought by the defendant against the plaintiff, or be counter-claimed or recouped in any action for rent which should be instituted by the plaintiff against the defendant.

The case is no different in principle or in substance from what it would have been been if the whole transaction had been put into a written lease, instead of resting entirely in parol. In such a case there would be, on the one hand, the covenant to pay rent by the defendant, and on the other hand, the covenants by the plaintiff to make the said repairs, which last-named covenants most clearly would be independent covenants or conditions subsequent (*Myers* v. *Burns*, 35 N. Y. 269; *Cook* v. *Soule*, 56 N. Y. 420).

This is a defense, therefore, which the appellant might have produced, but which he was not bound to produce; and it is not *res adjudicata* by the suit before Justice Seaton, for the reason that no such question was in any manner inquired into or examined in that suit.

The proceedings before the justice are not *res adjudicata* upon this defense, for the reason that the appellant was not present thereat in any manner either in person or by proxy.

The law does not recognize in justices' courts any attorneys in the technical sense of the word (*Cohen* v. *Dupont*, 1 Sandf. 260). Consequently the authority of any person who appears in behalf of an absent party, plaintiff or defendant, in those courts, must be proved, and proved clearly (*Gaul* v. *Groat*, 1 Cow. 113; *Tullock* v. *Cunningham*, Id. 256; *Fanning* v. *Trowbridge*, 5 Hill, 428; *Hirshfield* v. *Landman*, 3 E. D. Smith, 208). This authority may be by parol, and is provable by the attorney himself (*Caniff* v. *Myers*, 15 Johns. 246; *Tullock* v. *Cunningham*, 1 Cow. 256; *Pixley* v. *Butts*, 2 Cow. 421).

But the justice has no right to decide from his own knowledge or act upon information which he has received out of court (*Beaver* v. *Van Every*, 2 Cow. 429; *Fanning* v. *Trowbridge*, 5 Hill, 428; *Timmerman* v. *Morrison*, 14 Johns. 369; *Wilcox* v. *Clement*, 4 Den. 160). The party in whose pretended behalf an unauthorized person has acted may repudiate his interference (*Miller* v. *Larmon*, 38 How. Pr. 417). The doctrine of some of the older authorities that the appearance of an attorney for a party in a court of record is conclusive evidence of his authority to appear, is now thoroughly exploded (*Porter* v. *Bronson*, 19 Abb. Pr. 236; *Bean* v. *Mather*, 1 Daly, 440).

A. Prentice, for respondent.—The plaintiff was compelled to prove his case on the trial before the justice of the peace, and he did so. The defendant's counsel relied upon the cross-examination of the plaintiff; and on such cross-examination, the plaintiff denied making any agreement to repair the grapery. It thus appeared that the alleged agreement to repair the grapery, upon which the counter claim is placed, was not, in fact, made. It further appeared that the letting was not conditional upon any such repairs. That disposed of all there is in the answer in this case, and having once been tried, and final judgment rendered and paid, it was an end to the defense interposed in this case (*Gates* v. *Preston*, 41 N. Y. 113; *Blair* v. *Bartlett*, 75 N. Y. 150; *Newton* v. *Hook*, 48 N. Y. 676). The judgment before the justice was final as to all matters which might have been tried, as well as to those which were in fact tried (*Bloomer* v. *Sturges*, 58 N. Y. 176; *Smith* v. *Smith*, 79 N. Y. 634).

Van Brunt, J.—[After stating the facts as above.]—The objections which were made to the ruling of the court below are these:—

First. That it was error to hold that the proceedings before the justice upon Staten Island were a bar to the defense interposed in this action; and

Secondly. Because the proceedings before said justice could not be considered on this trial, for the reason that the appellant was not present there either in person or by proxy.

The counsel for appellant has discussed with great ability and has examined the authorities with great diligence relating to the question as to what makes a question *res adjudicata*, and when it is not, and has called our attention to the opinion of Mr. Justice FIELD, as delivered in the case of *Cromwell* v. *The County of Sac* (94 U. S. 351), as containing an epitome of the whole law on this particular subject; and he quotes as follows:—

"There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties, upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to every other admissible matter which might have been offered for that purpose. . . . The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy.

"But where the second action between the same parties is based upon a different claim or demand, the judgment in the prior action operates as an estoppel, only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

"In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit from a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

"It is not believed that there are any cases going to the extent that, because in the prior action a different question from

that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions.

"On principle, a point not in litigation in one action, cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations other than the actual merits may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount, or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these, ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit. It does not make the allegations of the declaration or complaint, evidence in an action upon a different claim."

This decision is entirely in harmony with the decisions of the courts in this state as contained in the cases of *Davis* v. *Tallcot* (12 N. Y. 184), *Gates* v. *Preston* (41 N. Y. 113), *Blair* v. *Bartlett* (75 N. Y. 150).

For the decision of the questions involved upon this appeal, it seems to me entirely unnecessary to discuss whether Mr. Rawson had or had not the authority to appear upon the trial of that action. Even if no answer had been made by the defendant to the complaint of the plaintiff before the justice, the judgment of the justice would have been final as to the defense set up in the answer of the defendant in this action, for the reason that the judgment in the justice's court was an adjudication that the premises had been rented by the plaintiff to the defendant at the rate of $1,200 a year, and that the plaintiff had performed all the conditions of such letting upon his own part, if any there were.

The answer of the defendant in this case alleges that it was *mutually* agreed that the plaintiff should do certain repairs as the condition of the defendant's leasing the premises. It would have been necessary, if that agreement had been established, for the plaintiff to have proved, before he could have recovered a dollar of rent, that he had complied with the terms of the agreement as far as the conditions were concerned which he had agreed to fulfill, and upon the failure of such compliance his complaint must necessarily have been dismissed.

Now the result of the justice's judgment was either an adjudication that there were no conditions upon his part to be performed, or that, if such conditions formed part and parcel of the contract, he had performed them. In other words, it was an adjudication that, as the parties then stood, the plaintiff was entitled to recover upon that lease.

This brings the case precisely within the language of Mr. Justice Field, who says, that "The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy." In the case at bar, as has already been stated, the adjudication of the justice's court, even if it had been by default, would have been an adjudication that the plaintiff had a right to recover rent upon that lease.

But it may be said that the allegations of the defendant in this action are set up in his answer, not only as a defense, but as a counter-claim. The answer to this suggestion is that those allegations are set up as establishing an agreement, and if the agreement was mutual, then the adjudication, as has already been said, was an adjudication that the plaintiff had complied with the terms of the agreement as far as he was concerned.

An examination of the case of *Davis* v. *Tallcot*, entirely sustains this view of the law. But we may go further and hold that the precise question involved in this case was litigated before the justice of the peace. The answer which the defendant makes to this suggestion is, that although by the

record it does appear that that defense was interposed, and that the plaintiff was cross-examined upon it, yet that there is no evidence that the attorney who appeared for the defendant in that action had any authority to put in such an appearance. Upon the return day of the summons the defendant appeared personally and his answer was filed. Upon the adjourned day this attorney appeared and asked for an adjournment, which was denied, and then the trial proceeded.

I have examined all the authorities which have been cited by the counsel for the appellant upon this appeal in reference to the authority of the attorney to appear, and I find no case in which an adjudication has ever been disturbed or a record has ever been discredited because of the want of the authority of the attorney to appear, unless the defendant has not only disclaimed such authority, but has satisfied the court that the attorney had no authority to appear. The record in this case contains nowhere any disclaimer upon the part of the defendant of the authority of Rawson to appear for him, and upon the contrary, the question put by the counsel for the defendant at the sixty-fifth folio of the case, seems to show conclusively that the defendant at that time had no idea but what the attorney who appeared for him in the justice's court had the right to appear for him; and it would seem that the point of the want of authority of the attorney to appear was not then even suggested or thought of.

Under these circumstances it would seem to be a great departure from the rule established by the authorities to invalidate a judgment because the plaintiff did not show a fact which was peculiarly within the knowledge of the defendant, that his attorney had the power to appear for him.

The judgment must be affirmed with costs.

Charles P. Daly, Ch. J., and Beach, J., concurred.

Judgment affirmed, with costs.

JAMES AIRD, Respondent, *against* THE FIREMAN'S JOURNAL COMPANY, Appellant.

(Decided December 5th, 1881.)

Where the defendant in an action for libel has pleaded a justification, unless there be circumstances from which a bad motive in interposing the plea can reasonably be deduced, it is erroneous to instruct the jury that they may increase the damages because the defendant has failed to prove the truth of the libel. The plea of justification is no aggravation of the wrong unless it be used by the defendant maliciously, with a knowledge of its falsity. Mere inability to establish a justification is no evidence of malice, and will not warrant the inference of malice by a jury.

APPEAL from a judgment of this court entered upon the verdict of a jury, and from an order denying a motion for a new trial.

The facts are stated in the opinion.

De B. Wilmot, for appellant.

Chas. P. Miller, for respondent.

VAN HOESEN, J.—In charging the jury, the court said, "You are then to determine whether the plaintiff has been damaged by the article, and, if so, whether there was any malice in the defendants' act of publishing the article complained of, and whether you regard their setting up in their answer these facts, and alleging the truth of the alleged libel—whether you regard that as tending to aggravate the damages which you may determine that the plaintiff has received, and on account of which he should receive greater compensation." At another part of the charge, the court said, "If the jury think that the verdict should be enhanced by exemplary damages by reason of the motive with which this libel was published, or the motive for setting up the allegation in the an-

swer that it was true, they may then add to their verdict what they consider proper as exemplary or punitory damages."

The counsel for the defendant asked the court to instruct the jury that the testimony offered by the defendant in justification should not be considered for the purpose of enhancing the damages. To this request, the court said, "They can only consider the answer in that respect." The counsel for the plaintiff then called the attention of the court to the observation just made, by saying, "Your Honor said that the jury might consider the allegations of the answer, and not the evidence, in coming to a conclusion. Your Honor does not intend by that in any way to vary what you said upon that point in your charge." The court said in reply, "I charged expressly as to what the defendant had spread upon the record in his answer as to the reiteration of the charge." The counsel for the plaintiff then said, "If they do not believe it is proved, they may take that into consideration in relation to their verdict." The court answered, "Yes."

The question is, Were the instructions of the court in accordance with the rule that prevails, at the present day, in this state?

The defendant had pleaded various matters as a justification, and also in mitigation of damages. The libel consisted in the publication of a statement that some harness makers had been discharged from the repair shop of the fire department for alleged thefts of leather belonging to the department, to which was added, by way of editorial comment, "The rascals ought to feel thankful for getting off without more severe punishment."

The answer alleged that the publication was true, and that the entire staff of harness makers had been discharged, as stated in the article complained of; it further alleged by way of mitigation that the plaintiff had, whilst in the employ of the fire department, stolen various supplies; that the plaintiff's reputation was, and for years had been bad; that the defendant, at the time of the publication, believed the article to be true, and that it was copied from a newspaper called the Daily News, and published as matter of current news, and without malice.

The matters pleaded as a justification were pleaded also by way of mitigation.

On the trial, the defendant offered evidence for the purpose of proving all the allegations of its answer, but it failed to satisfy the jury that the article was true, and that its statements were not libelous. It is fair to say, however, that a different jury might have come to a different conclusion.

I have given the substance of the pleadings, and the material parts of the charge, in order that the question as to the correctness of the court's instructions may be fairly presented.

The law used to be that if a defendant in a libel suit pleaded the truth in justification, and failed to establish the allegations of his plea, he became liable to exemplary damages if the plea was interposed from bad motives, and he was precluded from asking any mitigation of damages, even if the plea were put in in good faith, and with an honest belief that it was true (*Bush* v. *Prosser*, 11 N. Y. 366).

Since the Code of Procedure went into operation, a different rule has prevailed, and it is not the law of this state, at this day, that the damages are necessarily affected by a failure to prove a justification that has been pleaded. Where a plea of justification has been interposed in bad faith, and there is reason to believe that the object of the defendant, in pleading it, was to reiterate, in a solemn and public proceeding, a libel which he knew to be groundless, he may still be punished by exemplary damages. But, where there is no evidence of bad faith on his part, and all that can fairly be said, is, that he has failed to make out a complete defense, he is not liable to exemplary damages on account of such failure, nor is he precluded from asking that the damages be mitigated, where it appears that he was free from malice, and had good reason to believe the libel he published to be true. I repeat, that a mere inability to establish a justification, is no evidence at all of malice, and will not warrant the inference of malice by a jury. This is the result of the decisions of the Court of Appeals, including the cases of *Bush* v. *Prosser* (11 N. Y. 366); *Bisbey* v. *Shaw* (12 N. Y. 67); *Klinck* v. *Colby* (46 N. Y. 427); and *Distin* v. *Rose* (69 N. Y. 122).

Unless there be circumstances from which a bad motive in interposing a plea in justification can reasonably be deduced, it is erroneous, therefore, to instruct the jury that they may increase the damages because the defendant has failed to prove the truth of the libel. The proper instruction is, that punitory damages may be given where the defendant was guilty of bad faith in setting up the plea, that is to say, that he either knew, when using the plea in his defense, that it was not true, or had no reason to believe it true. It matters not that on the trial he offers not a scintilla of testimony to prove his plea; it may be that after filing his answer he has discovered the plaintiff to be innocent of the matters which formed the subject of the libel; the plea of justification is no aggravation of the wrong, unless it be used by the defendant maliciously, with a knowledge of its falsity (*Distin* v. *Rose*, 69 N. Y. 128).

The instructions of the learned judge to the jury in this case were, as I understand them, very different. The jury were first told to say whether they regarded the setting up in the answer of the facts, and alleging the truth of the libel, as tending to aggravate the damages. What was this but to instruct the jury that they were at liberty to increase the damages, because the defendant had pleaded a plea of justification? This was not modified by the instruction that they might give exemplary damages, if they thought that the defendant's *motive* in pleading the truth in justification made such damages proper. That gave the jury no rule for their guidance. It left them at liberty to give exemplary damages if they did not approve the defendant's *motive* in putting in his plea. The question was, not whether the jury approved of the defendant's motive in interposing such an answer, but whether that motive was, in the eye of the law, a bad one. But all doubt as to error in the instructions is removed by the colloquy which took place between the judge and the plaintiff's counsel. The latter said, "If the jury do not believe it (the answer) is proved, they may take that fact into consideration in relation to their verdict." The judge answered, "Yes." This, it will be seen, was going back to the old rule, happily not now in

force in this state, that the failure to prove a plea in justification was an aggravation of the wrong.

I think that this instruction was incorrect, and prejudicial to the defendant, and that there should be a new trial.

Beach, J., concurred.

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

Chester S. Cole, as Captain of the Port, Respondent, *against* Darius H. Johnson, Appellant.

(Decided December 5th, 1881.)

The acts of the legislature which provide that the captain of the port shall collect each year from the masters, owners, and consignees of certain specified classes of vessels "which shall be used or employed in the port of New York, or which shall arrive at and load and unload therein, the sum of one and one half of one cent per ton, to be computed on the tonnage," &c. (L. 1867, c. 256), and that "the collector of tolls for the City of New York shall not give permits or clearances to any canal boats navigating the waters of this state until the captain or master has paid or satisfied the annual fee of one dollar and a quarter due the harbor-masters, &c. (L. 1871, c. 205), are within the prohibition, in the constitution of the United States, that "no state shall, without the consent of Congress, lay any duty of tonnage."

Appeal from a judgment of a district court in the City of New York.

The facts are stated in the opinion.

Carpenter & Mosher, for appellant.

Charles S. Berry, for respondent.

Van Hoesen, J.—This action is brought by the captain of the port to recover from the defendant certain fees which it is

alleged are due to the plaintiff under the statutes of the State of New York.

The first statute on which the plaintiff relies is chapter 256 of the Laws of 1867, which provides that for the purpose of securing just compensation to the captain of the port and the harbor-masters, for the various services which the law requires them to perform, the captain of the port shall be entitled to collect and receive, once in each year, from the masters, owners and consignees of the following mentioned vessels which, prior to the passage of the act, were exempt from the payment of fees, namely; all sound and river steamboats, ferry-boats, lighters, tugs, canal-boats and barges, or other vessels of the United States, which shall be used or employed in the port of New York, or which shall arrive at and load or unload therein; the sum of one and one half of one cent per ton, to be computed on the tonnage expressed in the register or enrollment of such boat, ship or vessel. The other statute relied on by the plaintiff is chapter 205 of the Laws of 1871, which provides that the collector of tolls for the City of New York shall not give permits or clearances to any canal boats navigating the waters of this State, until the captain or master has paid or satisfied the annual *fee of one dollar and a quarter due the harbor-masters and now imposed by law.*

The defense is that the sum claimed is a tonnage tax, which the State of New York is prohibited by the constitution of the United States from imposing, and that the acts of the legislature, under the authority of which this action is brought, are invalid, because unconstitutional.

The Supreme Court of the United States has, I think, decided every question upon which this case turns.

It is said that the canal-boat, for the fee on which this suit was brought, is not a vessel of the United States, because she is employed in commerce between ports and places in the State of New York. As matter of fact, she is frequently employed in commerce between this state and New Jersey and Pennsylvania. The law of Congress formerly required that a canal-boat should be registered or enrolled and licensed; and, said

Mr. Justice CLIFFORD, in delivering the opinion of the court in the *State Tonnage Tax Cases* (12 Wall. 225), "Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of the United States, entitled to the privileges secured to such vessels by the act for enrolling or licensing ships or vessels to be employed in the coasting trade." Though it is no longer necessary that a canal-boat should be enrolled and licensed, it is nevertheless entitled to the immunity from tonnage duty enjoyed by a vessel of the United States.

The law is, that vessels owned by the citizens of a state, and exclusively engaged in trade between places in the state, are protected by the provision that "no state shall, without the consent of Congress, lay any duty of tonnage" (12 Wall. 225; *Peete* v. *Morgan*, 19 Wall. 584). In the case of the *Steamship Company* v. *Portwardens* (6 Wall. 31), Chief Justice CHASE, delivering the opinion of the court, said, "In the most obvious and general sense, the words, *a duty of tonnage*, describe a duty proportioned to the tonnage; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the states against levying duties upon imports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty of tonnage. It was not only a pro rata tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."

The Supreme Court of the United States, in *Cannon* v. *New Orleans* (20 Wall. 577), has expressly re-affirmed the doctrine of the opinion of Chief Justice CHASE, in the case of the Portwardens. Mr. Justice MILLER said, in the Cannon case, that any duty or tax or burden imposed by the authority of a state, which is in its essence a contribution claimed for the privilege of arriving and departing from any port of the

United States, and which is assessed on a vessel according to its carrying capacity, is a violation of the constitution unless the consent of Congress be obtained.

Any act of the legislature of a state which lays a duty upon tonnage is void and of no effect unless consent to its enforcement be obtained from Congress. This is so, because the constitution expressly forbids the state to impose such a duty without the consent of Congress; and that consent cannot be implied, or regarded as having been granted, because Congress has not seen fit to legislate on the subject, or to impose such a duty for the benefit of the United States.

The acts of the legislature, which are before us for examination, give the captain of the port and the harbor-masters a right to the fee, although they render no service whatever to the vessel, and though she never touches at a wharf in the District of New York. This is in effect, claiming a contribution from the owners of the vessel for the privilege of arriving and departing from this port. Such a claim has been decided again and again, by the Supreme Court, to be illegal and unconstitutional (*Cannon* v. *New Orleans*, 20 Wall. 577; *Inman Steamship Co.* v. *Tinker*, 4 Otto, 243).

In the language of the court, in the case last cited, such a tax is exacted where nothing is to be paid for, and has no reference to any circumstances in this connection but the tonnage of the vessel and the class to which it belongs.

If the boat "shall be used and employed in the port of New York," or "shall arrive and load or unload therein," whether the harbor-masters render her any service or not, the act provides that the fee shall be paid. It is idle, therefore, to contend that the harbor-masters are only claiming compensation for their services.

If it had been the intent of the legislature to provide that the harbor-masters should be compensated for their labor, it would have been proper and constitutional to fix a fee for the work actually performed; but not even for the purpose of paying officials, could a tonnage duty be imposed, without the leave of Congress.

The judgment should be reversed.

J. F. Daly, J., concurred.

Judgment reversed.

Bridget Downing, as Administratrix of the Goods, Chattels and Credits of John W. Downing, Appellant, *against* St. Columba's R. C. T. A. B. Society, Respondent.

(Decided December 5th, 1881.)

A member of a beneficial society can only be expelled after notice of the charges against him, and an opportunity to be heard; and such notice is not sufficiently proved by the testimony of a witness that he served on the accused member a written notice to appear at a particular time, where he also testifies that he cannot say what the notice was, as he handed it to the accused without reading it to him, and it was written by an officer of the society who is not examined. Nor does the accused waive his right to notice of the charges by attending a meeting and entering on his defense.

Appeal from a judgment of a district court in the City of New York.

The facts are stated in the opinion.

Edmund E. Price, for appellant.

Strahan & Findlay, for respondent.

Van Hoesen, J.—Section 1 of article XI. of the by-laws of the defendant, provides that any member of the society receiving benefits from it, who may be found imposing on the society, by feigning sickness, shall be cited before the Council, and on proof thereof, shall be fined or expelled as the Council shall determine. The Council is appointed by the president, *ex officio*, who is the priest of the parish, and it consists of nine members, six of whom constitute a quorum

for the transaction of business. Section 4 of article 7 provides that "members accused shall be specially notified to attend the Council meeting, by the secretary, setting forth the charges made against him" (sic).

It appears by certain minutes introduced in evidence that John W. Downing, the plaintiff's intestate, was expelled on the 4th of August, 1880, and this expulsion was the defense interposed by the defendant to the claim made by the plaintiff for sick benefits due to the husband, and for the allowance for the expenses of the funeral. The by-laws are in conformity with the law, as settled by this court in a series of cases, and by repeated adjudications in both America and England, that a member of a society cannot be expelled until after he has been notified of the charges against him, and has had an opportunity to be heard. The first observation to be made respecting the minutes is that the meeting which expelled Mr. Downing was a meeting of the society. The minutes read as follows: "At a regular business meeting of Saint Columba's R. C. T. A. B. Society, held on this evening in their hall in West Twenty-fifth Street between Eighth and Ninth Avenues, a meeting of the council was held, the president, Mr. Thomas Condon, Jr., in the chair."

The fact appears to be that some members of the council having been in attendance at the meeting of the society, the proceedings for Mr. Downing's expulsion took place whilst the meeting was in progress.

Without further comment on that fact, I need only call attention to one fact, which is decisive as to the insufficiency of the defense. The defendant, in order to prove that Mr. Downing had been notified of the charges against him, called as a witness James Flannagan, who swore that he served a written notice on Mr. Downing to appear on the 14th of August before the council. When asked what the notice was, Flannagan answered, "I could not say." He further said that he did not read it to Mr. Downing, but handed it to him; that the notice delivered to Downing was the only one the witness had; that it was written by the recording secretary, who signed the name of the witness to it, though it was the duty

of the witness to have signed it himself. The recording secretary was not examined.

Now, this testimony utterly fails to show that Downing was notified of the charge against him. The notice may have been a mere notice to attend a meeting of the society, for the recollection of the witness Flannagan as to the purport of it is so vague that no reliance can be placed upon his description of its nature. We are not to assume anything in order to support a forfeiture; and this expulsion of Downing appears by the testimony to have been a forfeiture of a peculiarly odious character.

It does not mend the matter that Mr. Downing was present at the meeting. If he were not apprised of the charges, he had no opportunity of bringing witnesses to prove that he was no malingerer, but a severe sufferer from a painful malady that was hurrying him to the grave. It has been decided that though a member attends, and enters upon his defense, he does not waive his right to a notice of the charges. Fair dealing requires that notice shall be given, and that the charges shall be clearly stated (*Marsh* v. *Huron College*, 27 Grant [U. C.] Ch. 605, 628; *Labouchere* v. *Wharncliffe*, L. R. 13 Ch. D. 346; *Fisher* v. *Keane*, L. R. 11 Ch. D. 353).

The defense was insufficient, and the plaintiff should have had judgment in her favor, upon the evidence, as it stood at the close of the trial.

J. F. Daly, J., concurred.

Judgment reversed, with costs.

CHARLES GASTENHOFER, Respondent, *against* HENRY CLAIR, Appellant.

(Decided December 5th, 1881.)

The plaintiff, a resident of the City of New York, was invited by his uncle, who was a guest at the defendant's hotel in the same city, to dine with him and his family at the hotel. On going to the hotel accordingly, the plaintiff, not finding his uncle either in his room or in an upper dining room of the hotel, went into a lower dining room, and there ordered and took dinner. When he came out, he met his uncle, and was taken by the latter to dinner in the upper dining room; on going into which he left his overcoat on a chair near a rack in which such clothing was placed, in an outside room, where there was no attendant. He did not find his overcoat there on leaving the room; and, although search was made, it was never recovered. The dinner was charged to the plaintiff, but subsequently to his uncle, and paid for by the latter. *Held*, that the defendant was not responsible for the loss of the plaintiff's coat, as the relation of inn-keeper and guest did not exist between them.

APPEAL from a judgment of the district court in the City of New York for the Sixth Judicial District.

The action was brought to recover damages for the loss of the plaintiff's overcoat at the defendant's hotel. The plaintiff's uncle was a guest at the Park Avenue Hotel, corner of 32d Street and 4th Avenue, in the City of New York. The plaintiff lived at No. 31 West 20th Street, New York. He was invited by his uncle to dine with him and his family at the hotel and go afterwards to the Charity Ball. Pursuant to the invitation plaintiff went to the hotel about half-past-six o'clock on the evening of February 3d, 1881, looked in the register, found his uncle's name, inquired for his room of the clerk, sent up his card, and on being informed he was not in, went up with a servant to his uncle's room to seek for him, but did not find him, after a while went into the dining room and walked through, and looked for him, did not see him, went into the lower dining room and ordered his dinner, dined and came out, and then met his uncle and was taken by him into the upper

dining room to dine. On going into the lower dining room he left his coat and hat with a boy in attendance and received them back when he came out. Before going into the upper dining room with his uncle, he placed his coat on a chair alongside a rack on which there was clothing, in a room outside the upper dining room, there being no attendant. On leaving the said dining room he could not find his coat, but found his hat and "arctics." He went to the office of the hotel, and search was made for the coat, but it could not be found. He borrowed his uncle's coat to go out and procure another coat, then returned to the hotel and went with the party to the ball, came back to the hotel afterwards but did not stay all night. The dinner was afterwards charged to plaintiff but subsequently to the uncle and paid for by him.

The justice rendered judgment in favor of the plaintiff. From the judgment the defendant appealed to this court.

Henry H. Rice, for appellant.

Edward H. Moeran, for respondent.

J. F. Daly, J.—[After stating the facts as above.]—The rule that makes the landlord of an inn responsible for the goods of his guest is a severe one, and can only be applied where the conventional relation of inn-keeper and guest exists. It cannot be extended so as to protect one who is not a guest, but a mere caller on a guest, or a transient visitor upon the invitation of a guest. Such was the status of the plaintiff in this case. He claims to have become a guest himself by ordering and taking dinner while waiting for his uncle. This put him in no different position from that he would have occupied had he sat down with his uncle as he had been invited to do. He was there upon invitation of that gentleman, and with no intent to sojourn at the hotel as a guest for even the briefest period. This distinguishes the case from *Kopper* v. *Willis* (9 Daly, 460), and from *Bennet* v. *Mellor* (5 T. R. 273), where the parties came to the inn to partake of its entertainment or accommodation, and for no other purpose. In the former case, plaintiff went,

with a friend, on the invitation of the latter, into the defendant's restaurant, frequented by transient parties, to get a meal. Plaintiff was just as much a guest as his friend was, for the latter was not stopping at the place, and the invitation merely involved the paying for the entertainment of both. In the other case, one of the strictest applications of the rule in the books, plaintiff's servant went to defendant's inn to leave the goods he was carrying until the next market day. He was refused that accommodation, but on asking refreshment it was furnished him. The entertainment of the house had thus been extended to him as a guest, and the landlord was held liable. It is not the fact that a person does or does not take lodgings or partake of refreshments in the inn that makes him a guest. It is the motive with which he visits the place: whether to use it even for the briefest period or the most trifling purpose as a public house or not: and I think it will be long before the courts will be disposed to hold landlords liable for the property of persons who call to visit their guests, and incidentally enjoy the hospitality of the house. The taking of the dinner without notice to the proprietor or the clerk no more constituted plaintiff a guest than his sitting in the parlor, using the reading-room or writing-room, etc., for any period, while waiting for his host to appear.

The judgment should be reversed, with costs.

Van Hoesen, J.—There must be at least two parties to every contract, and when it is attempted to charge an inn-keeper with liability for the loss of goods belonging to a person who asserts that he was a guest, the inquiry is, how was the relation of guest and inn-keeper created? No person can make himself a guest without the inn-keeper's assent. Of course, that assent may be given by an agent or a servant, entrusted with the duty of receiving and rejecting travelers. There need be no formal bargain, for the acceptance of a person as a guest will be implied, where he calls for refreshment which is furnished to him by a servant who has the discretion either to give or to withhold it. But a man cannot make himself a guest by slipping into the dining room of a hotel and

ordering a dinner of a waiter who has no discretion whatever, and who brings what is ordered, under the belief that the person who gives the order is in the dining room by permission of the inn-keeper. Permission to enter the dining room can not be implied. A man can no more enter the dining room without permission, than he can enter a sleeping-room, and go to bed without permission. He must first give the inn-keeper an opportunity to receive or to reject him. If he be accepted as a guest, he is, of course, entitled to the usual privileges of a guest, and if the inn-keeper refuse, without reason, to receive him, an indictment, and a civil action for damages, will lie against him. Neither Clair, the inn-keeper, nor any of his clerks, nor any person who had the slightest control over any branch of the business of the inn, knew that Gastenhofer wished to become a guest. He went, uninvited, into the dining room, and without the consent, express or implied, of any one in authority, ordered a dinner, which a waiter brought to him. This dining room was not a public restaurant, and, therefore, the Kopper case, which is relied on by the plaintiff, does not apply. In that case Kopper went into an eating-house, by general invitation of the proprietor to the public, and with the understanding that all who came should be served without any previous arrangement with, or application to, the landlord. We held that he was a guest, as it appeared that the place was licensed as an inn, and that he had received refreshments in the usual way. No one had a right to enter the dining-room of the Park Avenue Hotel until he had received the permission of Clair, the inn-keeper. There appears to be no doubt that the plaintiff, being a man of respectability, would have been received, but it is of no moment whether that be so or not; so long as it takes two to make a bargain, he could not become a guest without making an application to be received as such to Clair, or to some person authorized to act for him in such a matter.

It is on this ground alone, that I place my decision, though I concur with Judge Daly in reversing the judgment.

Judgment reversed, with costs.

EDWARD B. HARPER, Appellant, *against* ALBERT G. GOODALL, Respondent.

(Decided December 5th, 1881.)

The employment of a broker to rent the premises in which the family lives is not within the scope of the ordinary agency of a wife; and an action cannot be maintained by a broker for commissions for such services rendered at the request of the wife and daughter of the defendant, where no special authority from or ratification by him is shown.

APPEAL from a judgment of the district court in the City of New York for the Sixth Judicial District.

The action was brought to recover commissions claimed by the plaintiff, as broker, for procuring tenants for No. 339 West 34th Street, New York. The justice dismissed the complaint and rendered judgment in favor of the defendant. From the judgment the plaintiff appealed to this court.

Henry T. Dewey and *George W. Brush*, for appellant.

D. M. Porter, for respondent.

J. F. DALY, J.—The plaintiff had no personal transaction with defendant, neither had his clerks and agents. The latter acted upon the assumption that defendant's wife and daughter had authority to employ them. No authority can be assumed in a case like the present. The employment of a real estate broker to rent the premises in which the family lives is not within the scope of the ordinary agency of the wife, and special authority or ratification must be shown. There was no ratification, for defendant is not shown to have accepted the fruits of plaintiff's efforts with full knowledge of the facts.

The proper course for plaintiff would have been to secure a direct employment from defendant, or direct authority from him to treat with the latter's wife or daughter on the subject. It would be too severe to hold the head of the family respon-

sible for such admissions and declarations as a shrewd broker, or his active clerk, who is "working up the case," may be able to extort from a wife and daughter or other members of the family.

The judgment should be affirmed.

Van Hoesen, J., concurred.

Judgment affirmed.

Francis H. Leggett *et al.*, Respondents, *against* Annie E. Cochrane *et al.*, Appellants.

(Decided December 5th, 1881.)

The payee of a promissory note cannot sustain an action on the note against an indorser who stands apparently in the place of a second indorser, where it does not appear that the latter indorsed the note before its delivery to the payee, nor that he indorsed it at the request of the maker, and there is no other evidence that the indorsement was made to give the maker credit with the payee.

Appeal from a judgment of the district court in the City of New York for the Sixth Judicial District.

The action was brought to recover the amount of three promissory notes, made by the defendant Cochrane to the order of the plaintiffs, and indorsed by the defendant Walker. Judgment was rendered in favor of the plaintiffs against both the defendants. From the judgment the defendant Walker appealed to this court.

H. Hoyt, for appellant.

J. B. Lord, for respondent.

J. F. Daly, J.—The action was by the payees of the notes against one who stood apparently in the place of a second in-

dorser, but no evidence was given to show that he indorsed the notes to give the maker credit with the payee, which alone would entitle the latter to recover against him (*Moore* v. *Cross*, 19 N. Y. 227). The notes in this case were not indorsed by the payees, and when the defendant Walker indorsed them he saw and knew that fact of course; but that does not in itself show any right in the payees to recover against Walker. It does not appear that the latter indorsed the notes before they were delivered to the payees; nor that he indorsed them at the request of the maker. The case is barren, in fact, of any proof of the transaction.

Respondent contends, under *Hall* v. *Newcomb* (7 Hill, 420), that the payee may indorse "without recourse," and the note being thus payable to bearer, he may, as such, recover upon it like any other holder, against all the parties. But the authority cited states that the payee may so indorse "without recourse" and recover against the other indorser, in two cases, viz.: "Where such a note is presented to the *accommodation indorser* and is indorsed by him without having been previously indorsed by the person to whose order the same is made payable," and where "the object of the second indorser was to enable the drawer to obtain money from the payee of the note." It will be seen that even when the note is not indorsed by the payee when presented to the other indorser, the latter must be shown to be an accommodation indorser. It is not to be presumed from the indorsement. As the payee claims the right to make the restrictive indorsement now, or to have the court regard it as having been made, he is bound to support his right by proof that Walker is an accommodation indorser. In the language of the learned court in *Moore* v. *Cross*, such indorsement may be made "if a right to so indorse appears" (p. 230).

The judgment must be reversed, with costs.

Van Hoesen, J., concurred.

Judgment reversed, with costs.

J. William Lore, Appellant, *against* Henry R. Pierson, Respondent.

(Decided December 5th, 1881.)

The defendant, on the expiration of the term for which he had hired certain premises, left on them furniture and other property, which was taken and used by the tenant succeeding him, under an agreement that it should be returned at the defendant's pleasure. After a few months the defendant's successor also removed, leaving the property in the possession of the plaintiff, a subtenant of his own, who then hired the premises from the owner. The plaintiff continued to use the defendant's property for several months, but then, in March, 1881, gave notice to the defendant to remove the property or he would charge $20 per month storage on it; and upon the defendant, in April, 1881, offering to take it away, the plaintiff refused to permit its removal, unless $180 was paid him. On April 18th, 1881, the plaintiff wrote to the defendant that unless the property was removed within three days, he would consider that the defendant had leased the premises for one year at the rate of $1,200 per annum. *Held*, that there was no possession of any part of the premises by the defendant, and therefore no holding over by him under the plaintiff's notice from which a contract to pay the rent demanded could be implied.

Appeal from a judgment of the district court in the City of New York for the First Judicial District.

The action was brought to recover rent for one month, from April 26th to May 26th, 1881, for premises at No. 252 Broadway, in the city of New York. The facts were, that the defendant, who was receiver of several corporations, occupied the premises in question as a tenant of the Trinity Church corporation until May 1st, 1880, when he removed to Albany, leaving in the premises four large iron safes and some office furniture. The Trinity Church corporation let the premises to one Lockwood, from May 1st, 1880, and the latter went into possession and used the property left by defendant under the following written agreement signed by him. "List of furniture left with Mr. Lockwood, the same to be returned at pleasure of H. R. Pierson, Receiver." (A list of the articles follows.) Lock-

wood continued in possession of the premises until August, 1880. The plaintiff was a subtenant of his, but in August, 1880, the plaintiff hired the premises from the Trinity corporation and went into possession and used the articles above-mentioned, they having been left in his possession by Lockwood. On March 23rd, 1881, plaintiff notified defendant to remove the articles, or he (plaintiff) would charge storage of $20 a month for them. In April, 1881, defendant offered to take the safes away, but as they could only be removed through the front window, plaintiff refused to permit them to be so removed unless $180 were paid him, which defendant declined. On April 18th, plaintiff wrote to defendant that unless he removed his property then occupying a portion of plaintiff's premises within three days, plaintiff would consider that defendant had leased the premises for one year, at the rate of $1,200 per annum. On April 20th, defendant wrote to plaintiff calling his attention to the latter's refusal to deliver the safes, and demanding the return of them.

Judgment was rendered in favor of the defendant. From the judgment the plaintiff appealed to this court.

G. A. C. Barnett, for appellant.

William C. Trull, for respondent.

J. F. Daly, J.—[After stating the facts as above.]—The plaintiff contends that the relation of landlord and tenant under a lease for a year at the rate of $1,200 per annum, from April 26th, 1881, is created by his letter to defendant of April 18th, under the authority of *Despard* v. *Walbridge*, 15 N. Y. 374. It was there held, that where a party who was the owner by assignment from the original lessee of the residue of an unexpired term of three years, gave notice to a person who was a subtenant holding under such original lessee, and whose term was then expiring, that in case such person should hold over the plaintiff would consider the premises to be taken for the term of one year at a fixed rent, and such person made no reply but held over and continued to occupy the premises; this was

a virtual assent to the terms prescribed in the notice and created a privity of contract between the parties.

The facts of this case do not bring it within the rule thus established. Defendant was not a tenant or subtenant of the premises when plaintiff gave him the notice in proof, nor had he been since May, 1880. His property was in the premises, and had been used by his successors as his bailees under the agreement on which he left it there. This could not be construed into a possession of any part of the premises by defendant. This was correctly understood by plaintiff; for, in his letter to defendant of March 24th, 1881, he says, "Last August I rented of Trinity Church the offices formerly occupied by you. The safes and desks left here have not been in my way until recently. I have spoken to Trinity Church to have them removed, and they refer me to you. Please have the safes, &c., removed by April 1st, as they are in the way of my renting offices to tenants. If they are not removed by that time, I shall charge you a storage upon them of twenty dollars per month, as they occupy space I can easily rent for that amount." And in his letter of April 21st, 1881, in answer to defendant's demand for the safes, plaintiff says: "As they were left with me to be returned when called for, I am ready to deliver constructive possession of the same."

The justice was right in holding that defendant was not in possession of any part of the premises, and that there was no holding over under the notice of plaintiff, and no contract to pay the rent here demanded could be implied.

The judgment should be affirmed.

Van Hoesen, J., concurred.

Judgment affirmed.

JOSEPH E. NEWBURGER, Respondent, *against* THE MANNECK MANUFACTURING COMPANY, Appellant.

(Decided December 5th, 1881.)

Where, upon dissolving an injunction, a specific amount is awarded by the court as damages to a party against whom the injunction was granted, and the award is assigned by him, and an action brought thereon by the assignee, any counter-claim will be valid against the latter that would have been valid against the assignor, if it belonged to the defendant before he received notice of the assignment.

APPEAL from a judgment of a district court in the City of New York.

The facts are stated in the opinion.

A. W. Otis, for appellant.

Joseph E. Newburger, respondent, in person.

VAN HOESEN, J.—The Manneck Manufacturing Company obtained an injunction against Manneck, which was afterwards dissolved, and Manneck was awarded by the court fifty dollars as the damages which he had sustained by the wrongful suing out of the injunction. This award of damages Manneck assigned to the plaintiff, who brought this action to recover the amount of it. The defendant had, at the time of the assignment to Newburger, and still has, a claim against Manneck for more than fifty dollars, for money lent to him, and it attempted to counter-claim, or set-off, that claim against the plaintiff's demand. The justice refused to consider the counter-claim, and gave judgment for the plaintiff.

The action of the plaintiff on the undertaking was an action on contract. The damages were liquidated, having been fixed by the court. The claim was only an ordinary money demand, and the fact that it had its origin in a legal proceeding nowise altered the rights of the parties to this action. If any other money demand would be subject to set-off, then the claim in

suit would be. Section 502 expressly provides that there may be a counter-claim where an assignee sues on a demand founded upon contract, and that any counter-claim that would be valid against the assignor will be valid against the assignee if it belonged to the defendant before he received notice of the assignment. Section 1909 is to the same effect, though the last sentence of that section is couched in terms that are ambiguous and infelicitous to a degree uncommon even in the Code of Civil Procedure. That sentence provides that there shall be no counter-claim "where the rights or liabilities of a party to a claim or demand, which is transferred, are regulated by special provisions of law." What these demands are, the right to which is regulated by special provisions of law, the learned codifier does not enable us to say with certainty, but as he states in his note that the last sentence of section 1909 is to be read in connection with section 502, I suppose he meant simply this, that in determining whether the right of a transferree of a claim is to be affected by a counter-claim or set-off, we are to be guided by the special provisions of law contained in section 502. I can not bring myself to the conclusion that it was the intention to say that where an action was brought upon an undertaking an off-set should not be allowed, if the plaintiff were an assignee of the claim sued upon.

I think that the judgment should be reversed.

J. F. Daly, J.—I cannot see that this action is within the exception of section 1909 of the Code. What the rights and liabilities may be, which are therein described as regulated by special provisions of law, does not readily appear.

Judgment reversed, with costs.

STEPHEN A. PEARCE, Appellant, *against* HENRY L. BOGERT *et al.*, Respondents.

(Decided December 5th, 1881.)

To authorize a justice of a district court in the City of New York to dismiss a complaint on the ground that, one of the defendants being a non-resident, the action should have been commenced by a short summons instead of the ordinary summons, proof of the fact of such non-residence is requisite; and if such proof is not given until after answering, the objection is waived.

APPEAL from a judgment of the district court in the City of New York for the Third Judicial District.

The facts are stated in the opinion.

C. J. G. Hall, for appellant.

Henry L. Bogert, for respondents.

J. F. DALY, J.—On the return day of the summons certain of the defendants appeared and objected to the jurisdiction of the justice, on the ground that the action had been commenced by long summons, and that this was improper because three certain other defendants (who did not put in an appearance) were not residents of the City of New York. No affidavit of such non-residence was produced by the parties making the objection, and the fact of non-residence did not appear. The justice therefore properly overruled the objection. The objecting defendants thereupon filed answers in which the objection of non-residence was not taken, and an adjournment was had. On the adjourned day the objecting defendants came into court with an affidavit that Mr. Kenyon was a non-resident, and moved to dismiss on that ground. The motion was granted. This was error. It was too late after pleading to take the objection in question. It had not been regularly taken before answer, because it was not then

based on any proof of the fact of non-residence, and defendants having pleaded, waived the defect. It was not a question of jurisdiction of the cause of action, which could have been raised at any time, but of irregularity in the form of summons, objections as to which are always waived by pleading before objecting. If a defendant wishes to avail himself of irregularities in the form of summons, he must object before pleading (*Andrews* v. *Thorp*, 1 E. D. Smith, 615), and must also make the fact of non-residence appear. To warrant the justice in dismissing a complaint on that objection, he must have proof, just as he would require in the first place to authorize him to issue a short summons to an alleged non-resident (*Sperry* v. *Major*, 1 E. D. Smith, 361).

The judgment should be reversed with costs.

Van Hoesen, J., concurred.

Judgment reversed, with costs.

Manuel N. Phillips, Plaintiff, *against* The Mayor, Aldermen and Commonalty of the City of New York, Respondent.

(Decided December 5th, 1881.)

The provision of the city charter of New York (L. 1873, c. 335, § 28), that no regular clerk or head of bureau shall be removed until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of making an explanation, does not apply to the discharge of a regular clerk of a department of the municipal government, made in order to decrease the regular clerical force and so conform the expenses of the department to a reduced appropriation therefor.

Exceptions taken by the plaintiff at a trial term of this court, ordered to be heard, in the first instance, at the general term.

The plaintiff was appointed a clerk in the Fire Department, June, 1874, and employed in the Bureau of the Fire Marshal. He continued in the position until December 31st, 1875, when he was discharged without being informed of the cause of removal, or called upon for any explanation. The reason of his removal, appearing upon the books of the Department, was to conform its expenses to a reduced appropriation for the year 1876, and not for any cause personal to the plaintiff. The plaintiff unsuccessfully sought other employment until April 5th, 1880. This action was brought to recover damages to an amount equal to his salary from January 1st, 1876, to April 5th, 1880. The complaint was dismissed in the court below, and the exceptions ordered to be heard in the first instance at general term.

Roswell D. Hatch, for plaintiff.

Wm. C. Whitney, *D. J. Dean*, and *E. Henry Lacombe*, for defendant.

Beach, J.—The plaintiff was a regular clerk, and the principal point urged by his counsel arises under section 28 of the City Charter, which enacts in substance, that no regular clerk or head of bureau shall be removed until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of making an explanation. In my opinion, the intention of the legislature was to give the officers named the right to a hearing, when the removal was for reasons susceptible of explanation and personal to the incumbent, such as those suggesting incompetency, dereliction of duty, or misbehavior. The departments of the municipal government are obliged to conform their expenses to the amount appropriated by the Board of Estimate and Apportionment, and if, to accomplish that end, it is needful to decrease the regular clerical force, I do not think, in so doing, any hearing need be given to those discharged from public service for that reason. This view receives support from the opinions of the court in *People ex rel. Munday* v. *Fire Com-*

missioners (72 N. Y. 445); *People ex rel. Evans* v. *Park Commissioners* (60 How. 130).

The chief difficulty in the way of plaintiff's recovery, is the absence of any principle to support an action to recover damages against the city. There was no contract between the plaintiff and the corporation, broken by the defendant, giving a cause of action for damages (*Wood* v. *Mayor, &c. of New York*, 44 N. Y. Super. Ct. 325; *People ex rel. Ryan* v. *French*, 24 Hun, 263; *Smith* v. *Mayor, &c. of New York*, 37 N. Y. 518). If the plaintiff was illegally removed, his only remedy was by certiorari to review the action producing that result, and seeking his reinstatement, or an action against those officials personally who did the wrong, and for whose torts the city is not liable. The case of *Swift* v. *Mayor, &c. of New York* (83 N. Y. 528), has no application. The action was brought upon a contract, and the only question presented related to the legal liability of either the Police Department or the municipal corporation. The Police Department was relieved by the final judgment, and the latter held liable, because funds originally applicable to the payment of plaintiff's claim had been covered into the city treasury, and the corporation thereby became the real debtor, taking the money with notice of a trust impressed upon it by law for plaintiff's payment, and of his claim.

The exceptions must be overruled and the judgment dismissing the complaint affirmed, with costs.

J. F. Daly, J., concurred.

Exceptions overruled.*

* The judgment entered upon this decision was affirmed by the Court of Appeals, February 28th, 1882 (see 88 N. Y. 245).

ESTHER PITT, Appellant, *against* THE PHENIX INSURANCE COMPANY, Respondent.

(Decided December 5th, 1881.)

By a policy of marine insurance the vessel was insured for a specified time for a particular voyage outward. After making the voyage, but before the expiration of the time, the same underwriter insured the vessel for the return voyage by a certificate of insurance which by its terms was made "under and subject to the conditions" of the existing policy. *Held*, that the underwriter was not liable for a loss occurring after the time specified in the original policy.

APPEAL from a judgment of this court entered upon dismissal of a complaint at the trial.

The action was brought upon a policy of insurance issued by the defendant to Thomas Pitt, the plaintiff's husband, and a certificate of insurance issued by the defendant to the plaintiff herself, to recover the amount of the insurance thereby effected on the tug Corinne, as upon a total loss. The policy (No. 14015) purported to insure the vessel "at and from the 25th day of January, 1877, at noon, until the 25th day of February, 1877, at noon;" and gave her "the privilege to make one trip from New York to Norfolk, to be employed in her trade in loading and towing vessels in the Harbor of Norfolk, Va." On or about February 21st, 1877, the tug being then at Norfolk, Va., the defendant, upon the application of the plaintiff "to have the tug-boat Corinne insured for the return trip to New York," and on payment by her of one-half per cent. additional premium therefor, issued to her the following certificate:

CERTIFICATE OF INSURANCE.

No. 959. $4,500.

THE PHENIX INSURANCE COMPANY, NEW YORK.

NEW YORK, February 21st, 1877.

This certifies, that Esther Pitts, insured under and subject to the conditions of Special Policy No. 14,015 of the Phenix

Insurance Company in the sum of forty-five hundred dollars, on tug "Corinne," valued at forty-five hundred dollars, at and from Norfolk to New York. Loss payable to Esther Pitts or order hereon, and return of this certificate.

(Signed) WM. R. CROWELL,
Sec'ty.

The vessel sailed from Norfolk for New York on February 22d, 1877, and was lost on the voyage. At the trial, evidence offered by the plaintiff that the loss occurred after the 25th of February, 1877, was objected to by the defendant on the ground that the insurance terminated on that day, and was excluded; and a motion by the defendant for the dismissal of the complaint was granted, and judgment was entered for the defendant. From the judgment the plaintiff appealed.

William G. Wilson, for appellant.

William Allen Butler, for respondent.

J. F. DALY, J.—The plaintiff sues upon the policy issued to Thomas Pitt on January 25th, 1877, and upon the certificate issued to herself on February 21st, 1877, as constituting her contract with defendant to insure the tug "Corinne." Whatever may be the validity of the original policy to Thomas Pitt above mentioned (he not being owner and not having an insurable interest), the conditions of that policy were accepted by her as the basis of her insurance, according to the tenor of the certificate. The term "conditions" used in such certificate is equivalent to "provisions," there being in the original policy no special *conditions* to which the new contract might be construed to refer. The original policy provided for the insurance of the tug from January 25th, 1877, to February 25th, 1877, with the privilege of making one trip from New York to Norfolk. The certificate insured Mrs. Pitt "at and from Norfolk to New York." The effect was the same as if the original policy had included this return trip, and as the time was limited to February 25th, 1877, the insurance would

expire on that day notwithstanding the return voyage had not been accomplished. In a time policy, the risk insured is independent of the voyage; and in a policy which partakes of the nature both of a time policy and a voyage policy, the underwriter is not liable for a loss unless it occur within the time specified (Arnould Marine Ins., 4th ed. 349–353).

The appellant contends that the contract with Mrs. Pitt was a voyage policy; but this is argued on the theory that the time limit in Mr. Pitt's policy is to be ignored. Not being inconsistent with any provision of the new contract, it cannot be deemed to be abrogated, but must stand with the other conditions preserved and continued by the terms of the certificate issued to plaintiff.

Judgment should be affirmed, with costs.

Van Hoesen, J., concurred.

Judgment affirmed, with costs.

Bernard Reilly, Sheriff of the City and County of New York, Respondent, *against* William B. Tullis, Appellant.

(Decided December 5th, 1881.)

Under the provision of 2 R. S. 645, § 38, allowing calendar fees to the sheriff, the attorney placing a cause on the calendar for trial by a jury became liable to the sheriff for the calendar fees therein.

Appeal from a judgment of a district court in the City of New York.

The facts are stated in the opinion.

William B. Tullis, appellant, in person.

Vanderpoel, Green & Cumming, for respondent.

Van Hoesen, J.—The principal, I may say, the only question is, is the attorney liable to the sheriff for what is now called "calendar fees?"

The sheriff's right to calendar fees is created by 2nd Revised Statutes, p. 645, § 38, which reads thus: "for summoning the jury to attend any court, fifty cents in each cause noticed for trial at such court, or placed on the calendar for trial." Some one is to pay that fee, and the rule in this state has always been that the attorney is liable to the sheriff for his fees. An attempt was made, at the argument, to draw a distinction between fees for executing process, either mesne or final, and fees for other services rendered by the sheriff, but the cases do not warrant any such discrimination. In the leading case of *Adams* v. *Hopkins* (5 Johns. 252), the sheriff sued for poundage on a ca. sa., and in *Ousterhout* v. *Day* (9 Johns. 114), the fees sued for were for serving several writs of cap. ad resp., but the language of the court did not limit the sheriff's claim against the attorney to services rendered in the service of writs. In the Ousterhout case, the court said, "the sheriff was entitled to look to the attorney for his fees." The reasons for giving such a right to the sheriff were stated by the court in *Adams* v. *Hopkins*. Those reasons were that the attorney is the sheriff's immediate employer, and the sheriff can not be considered as giving credit to the client, with whose residence and responsibility he can not be supposed to be acquainted. The sheriff is obliged to execute every legal process delivered to him, and all reasonable security ought to be given to him for his compensation. From the time of the decision in the 5th Johnson, which was delivered in 1810, to the present time, the courts of New York have uniformly adhered to the principle then enounced. Some of the reasons given by the court in that case are not so cogent now as they were at that time, for, in many cases, the sheriff may demand his fees in advance, but the courts have not made any exceptions to the rule, and they have regarded the attorney, as most attorneys have considered themselves, as liable to the sheriff for all his fees of every character chargeable to a suitor in a civil action. In the case of *Judson* v. *Gray* (11 N. Y. 408),

the case relied on by the defendant, Judge SELDEN, delivering the unanimous judgment of the court, said, "it is not intended, by this decision, to interfere with the doctrine advanced in the case of *Adams* v. *Hopkins*. There is an apparent equity in holding the attorney liable in a case of that description, which goes very far to justify the departure from principle involved in the decision; and if the rule be confined to those cases to which the reason given by Judge THOMPSON applies, we have, at least, a clear line of distinction between the cases where the liability attaches and where it does not." Again, Judge SELDEN said, in that case, that the attorney was not liable for the fees of a referee, because a referee did not belong to "the classes of officers to whom the rule in question had been held to apply." It will be observed that the learned judge treats the liability as depending, not on the nature of the services, but on the official character of the officer by whom they were rendered. In *The Trustees of Watertown* v. *Cowen* (5 Paige, 510), Chancellor WALWORTH said, "it appears to have been the uniform practice for the sheriffs. . . . . to charge their fees to the attorney of the party for whose benefit the services are performed;" and from the uniform practice, there is an implied assumpsit by the attorney to pay for the services done for his client, by his express or implied request.

Applying the most rigid rule suggested by Judge SELDEN, the plaintiff would be entitled to look to the defendant for his fees. The statute makes it the duty of the sheriff to summon a jury, and gives him a prescribed fee for the service. The sheriff does not know, and cannot ascertain who the suitors are whose cases will be on the calendar, nor is it possible for him to know who and where the attorneys are, by whom the notes of issue will be filed. The sheriff can not go round to the attorneys, and demand the fee in advance. Such a proceeding is out of the question, as every lawyer knows. He must, therefore, do the work, without knowing, at the time, for whom it is done, or how he is to get his pay, if the attorney be not responsible for it. The calendar fee is, therefore, peculiarly and especially within the reason of the rule which Judge THOMPSON first announced, and which Judge SELDEN said was

too well established to be disturbed, even if it were desirable to disturb a rule founded on such equitable considerations.

There can be no doubt that the sheriff is entitled to the calendar fee for every term that the case is on the calendar for trial. For every such term a jury must be summoned, and the calendar fee is the compensation prescribed by statute for the labor of serving the summonses. The language of the statute does not admit of two constructions, and the subject requires no further discussion.

None of the defendant's exceptions seems to us to be tenable.

The judgment should be affirmed.

J. F. Daly, J., concurred.

Judgment affirmed, with costs.

Emil A. Ritzler *et al.*, Respondents, *against* Emil Raether, Appellant.

(Decided December 5th, 1881.)

A lessee sub-let part of the demised premises, and the sub-lessee assigned his sub-lease to the plaintiffs, who entered into possession. Immediately afterwards the original lessee surrendered his lease to the chief landlord, who accepted the surrender, and leased the entire premises to new tenants. They, assuming to be the landlords of the plaintiffs, demanded an increased rent for the portion of the premises occupied by the latter, which, in order to keep possession, the plaintiffs paid. *Held*, that this gave no right of action to the plaintiffs against the original lessee.

Appeal from a judgment of a district court in the City of New York.

The facts are stated in the opinion.

Rose & Putzel, for appellant.

Charles D. Metz, for respondents.

Van Hoesen, J.—Raether was the tenant of Ryder, the owner of the land. He sub-let a portion of the premises to one Kohlhepp, who assigned his sub-lease to the plaintiffs. There is a conflict in the testimony as to whether Raether consented to the assignment by Kohlhepp to the plaintiffs, but the justice found, and I think correctly, that he did consent in the course of a day or two after the plaintiffs had entered into possession of the premises which they acquired by the assignment made to them by Kohlhepp; Raether went to his landlord, Ryder, surrendered his lease to him, and Ryder, accepting the surrender, made a lease to Pratt & Herrick of the premises which Raether surrendered. Pratt & Herrick came to the plaintiffs, and told them that they could not remain unless they paid them thirty-five dollars per month instead of twenty-five, which was the rent mentioned in the sub-lease from Raether to Kohlhepp. The plaintiffs said that they were not prepared to do that, but that, in order to keep possession, they would pay the extra ten dollars until they ascertained what their rights were. The plaintiffs paid Pratt & Herrick, who assumed to be their landlords, rent at the rate of thirty-five dollars per month, for several months, and they then brought this action against Raether for "a breach of the contract of letting," as their oral complaint describes their cause of action. The justice found in favor of the plaintiffs, and awarded them $120 damages, intending, I suppose, to give them the sum which they will in the course of a year pay to Pratt & Herrick in excess of the rent which the sub-lease, assigned to them, obliged them to pay.

Exactly what the pleader meant by calling his supposed claim against Raether "a breach of the contract of letting," I am unable to conjecture. Was it that he supposed that there was a breach of the covenant for quiet enjoyment? Possibly. But, when was it held that a landlord—and such was Raether's position—broke the covenant for quiet enjoyment when he sold

an estate which was demised to a tenant? A landlord may, without offense, sell his land, even though it be in the hands of a lessee; for it does not follow that the tenant will suffer because the reversion becomes the property of a stranger. If the landlord be himself a lessee, how does it prejudice his under-tenant, if he assigns the original lease to a third party, or surrenders it to the chief landlord? Why is it the duty of the lessee to remain the tenant of his landlord during the entire term of any under-lease that he may make? If there be no such duty, then on what is the plaintiff's right of action founded? This action has grown out of a misconception of the relative rights of the parties. The first inquiry that presents itself, is, had Raether a right to sub-let? Though the lease under which he held from Ryder is not attached to the return, it must be assumed that he had such a right, for no question of it was made in the court below. If he could sub-let, what were the rights of the under-tenant? Such as the sub-lease conferred upon him, provided that the sub-lease did not diminish the rights of the original landlord, or conflict with the original lease. If, then, an under-tenant acquires an interest in the land by virtue of the sub-lease, how can he be deprived of it by any act or omission of his lessor that does not derogate from the rights of the chief landlord? If the tenant fails to pay rent, the chief landlord may dispossess him, and the under-tenant with him, unless the under-tenant, to protect his possession, pays the rent. There may be other breaches of duty on the part of the lessee that will warrant the landlord in evicting him, and his under-tenants also, but, unless it be necessary or proper for the protection of his own rights, the original landlord cannot lawfully interfere with the possession of the under-tenant, or disregard the rights conferred upon him by the sub-lease. If there be a sub-lease, and the landlord is aware of it, why should he be permitted to disregard it? In this case, it is shown that the plaintiffs were in possession and occupation when Raether made, and Ryder accepted, the surrender. It was Ryder's duty, therefore, to ascertain exactly what the rights of the plaintiffs were; for it is now, as it long has been, the law, that the purchaser of an estate in possession

of tenants, is chargeable with notice of the extent of their interests as tenants; for having knowledge of the tenancy, he is bound to inform himself of the conditions of the lease (4 Kent marg. p. 179). Ryder, in accepting the surrender, occupied the position of any stranger making a purchase of the premises, and what would be notice to a stranger, is notice to him. Pratt & Herrick also had notice that the plaintiffs were in the actual occupancy of the premises, and they, like Ryder, are bound to regard the rights which the plaintiffs possessed under their sub-lease. Neither Ryder nor Pratt & Herrick were justified in disturbing the plaintiffs in their possession, or in demanding any greater rent than was stipulated for in the sub-lease. Ryder may well be regarded as the assignee of Raether, and Pratt & Herrick as the assignees of Ryder, but in any event, the obligations and duties of the plaintiffs were not increased by the transfers (*Benson* v. *Bolles*, 8 Wend. 180, 181). The plaintiffs, without due consideration, recognized the unfounded claim of Pratt & Herrick, and needlessly threw their money away in paying them the ten dollars extra per month. But this gave them no right of action against Raether.

It is somewhat singular that until within the past few years there were no authorities on this question to be found in the books. When Taylor published the third edition of his work on Landlord and Tenant, the text of section III. read, "It is said that the interest of an under-lessee cannot be defeated by the mesne lessee surrendering his estate in the premises to his lessor." For this he refers to no authority. Since the date of that edition, the decisions have been numerous on the point, and among them are the following cases: *Eten* v. *Luyster* (60 N. Y. 252); *Allen* v. *Brown* (5 Lans. 280); *Mellor* v. *Watkins* (L. R. 9 Q. B. 400); and *Great Western R. R. Co.* v. *Smith* (L. R. 2 Ch. D. 235).

By way of compensation to the plaintiff, I call the attention of his counsel to some authorities which may mitigate the regret that he may feel at the reversal of this judgment; the authorities are Smith's Landlord and Tenant, citing Shepherd's

Touchstone, 301; *Webb* v. *Russell* (3 T. R. 393), and *Burton* v. *Barclay* (7 Bing. 751).

The judgment must be reversed.

J. F. Daly, J., concurred.

Judgment reversed, with costs.

Charles J. Schmitt *et al.*, Appellants, *against* Phillip Howell, Respondent.

(Decided December 5th, 1881.)

The plaintiffs having demanded from the defendant payment of the price of goods sold, the latter claimed a deduction of the amount of a wager lost by one of the plaintiffs to a third party, who had assigned his claim to the defendant. The plaintiffs allowed the deduction. *Held*, that they could not afterwards, on the ground of illegality of the wager, sustain an action for the amount as for a balance of the price of the goods remaining unpaid.

Appeal from a judgment of the district court in the City of New York for the Sixth Judicial District.

The action was brought to recover a balance claimed to be due for poultry sold by the plaintiffs to the defendant. The defense was payment and satisfaction.

The facts disclosed were that defendant owed plaintiffs $332.48 for poultry. Charles J. Schmitt, one of the plaintiffs, called on defendant to collect the bill. The latter refused to pay unless Mr. Schmitt allowed him $54, being the amount of a wager Schmitt had lost to another party in the market, who had assigned the claim to defendant. Schmitt agreed, received from defendant a check for $278.48, and gave a receipt in full for $332.48.

The complaint was dismissed, and judgment entered for the defendant. From the judgment the plaintiffs appealed.

J. J. Brady, for appellants.

Traitel, Platzek & Otterbourg, for respondent.

J. F. Daly, J.—[After stating the facts as above.]—Had the allowance of $54 been upon an unobjectionable claim, it is quite certain that we could not disturb the agreement on which plaintiff, Schmitt, gave the receipt in full. The question is whether in this form of action plaintiffs can undo the transaction. I think not. The effect of the agreement between the parties was the payment of the wager Schmitt had lost. At common law no action to recover back the money so paid would lie (*Yates* v. *Foot*, 12 Johns. 1). The action to recover back money lost in gambling and paid over, is given by statute, and must be brought under the statute. This is not such an action.

The plaintiff who settled with defendant might have refused to allow the wager debt, and to take less than the face of his demand, and could have sued then, as well as now, for the amount of his bill. If his anxiety to get $278.48 was so great as to induce him to settle his gambling debt, he must resort to any remedy which the statutes may afford, to re-open the transaction in respect to the latter, which, to use the language of the court in the case first cited, has been executed and ought not to be disturbed.

The judgment should be affirmed.

Van Hoesen, J., concurred.

Judgment affirmed.

JOHN F. BRIGG *et al.*, Respondents, *against* HENRY HILTON *et al.*, Appellants.

(Decided January 3rd, 1882.)

Where, before the delivery by the seller to the purchaser, of goods under an executory contract of sale, without an express warranty, samples, represented by the seller to be actually taken from the articles afterwards delivered, are sent by him to the purchaser with the invoices of the goods, and the latter, relying upon such samples as representing the quality of the goods delivered, is thereby induced to accept defective goods without making a laborious and minute examination which would be necessary to disclose the defects, he may, nevertheless, subsequently, upon discovering the defects, return the goods to the seller and recover back the price.

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

The facts are stated in the opinion.

Henry H. Anderson, for appellants.

Blumenstiel & Hirsch, for respondents.

J. F. DALY, J.—The questions to be examined in this appeal arise upon the defendants' counter-claim for damages on the sale to them, by plaintiffs, of six bales of cloakings. The goods were ordered in March, 1880, from samples of sound merchantable goods exhibited by plaintiffs, and were to be manufactured in Europe. They were delivered in August and September, 1880, in six bales containing fifty-seven pieces. Prior to the delivery, the plaintiffs sent to the defendants invoices of the goods and six sample books, one representing each bale, and giving a piece of the goods in the bale, and supposed to be cut therefrom. Defendants examined the first bale received (No. 300), and found it substantially like the sample, and perfectly sound. All the samples in the books corresponded with each other in quality, and corresponded with the samples from which the purchase was originally made. The goods were put on sale by defendants, the bale

first received (No. 300), being sold first. In November following the delivery defendants discovered that the cloakings in the other bales were, in places, thin, tender and rotten. Out of 47 pieces only three were all right. They were not merchantable; had tender streaks all through, and were thin from being over-worked. Defendants sold about 707 yards out of 2,877 delivered, the balance being worthless.

These defects could only be discovered by unfolding all the goods, and looking over them as they were run off on a reel.

The defendants at the close of the trial asked leave to go to the jury on several questions, among which were the following:—"The defendants were under no obligation to make an examination of the goods," and "if the plaintiffs in advance of the delivery of the goods, sent samples purporting to represent the character of the goods which they were to deliver, the defendants had a right to suppose that the goods afterwards delivered were equal to such samples."

I think these requests should have been granted. Although the contract of sale was executory, without an express warranty, and defendants would ordinarily be bound to examine the goods within a reasonable time after delivery and return them if defective, yet where, by a false representation of the seller, the vendee is induced to accept the goods, he may return them whenever the defects are discovered.

The proof shows that books of samples purporting to be actually cut from the goods in each case, and therefore to represent the articles delivered, were sent with the invoices before delivery. These samples represented sound merchantable cloakings. The goods delivered, were, on the contrary, unmerchantable from being over-worked. Here was a specific representation that was unquestionably false. It was such a representation as might well induce a purchaser to dispense with a laborious and minute examination, yard by yard, of 2,877 yards of cloth. The sending of the samples could have no meaning except as an assurance of the kind and quality of the goods. Defendants would have been justified in selling to their customers from such samples, and were justified in

themselves retaining the goods without a thorough examination on the faith of such a representation.

The express point was decided in *Dutchess Company* v. *Harding* (49 N. Y. 321). That was an executory sale of "1400 bags of sumac (Triangle R. sumac), quality to be like sample in every respect." The vendor caused this brand to be put upon bags containing sumac of another and inferior quality. The purchaser sampled ten or twelve bags, which were found to correspond nearly in quality with that contracted for, and the whole was thereupon accepted in reliance on the brand. The sumac was sent to the purchaser's works, and upon being tested was found to be of an inferior quality. It was held that the vendee could recover his damages, the jury having found that the acceptance of the delivery was induced in consequence of defendant having caused the article to be falsely branded: that while under such a contract there was no warranty, and the rule is that the vendee must immediately rescind and return or offer to return the goods, yet where the acceptance is induced by any fraud or artifice of the vendor the reason and foundation of the rule fails—the express or implied assent is wanting; and that in that case the assent given was invalidated by the false brand on the bags, the vendees being misled and deceived thereby; and that there being no binding acceptance, the latter were only bound to use diligence in notifying the vendors *after the discovery* that the article was inferior.

The case before us seems to be much stronger: the furnishing of a sample purporting to be actually taken from the goods in the bale being a higher and more positive representation of quality than a brand or other exterior mark.

I think it should have been left to the jury to say whether the acceptance was in any way influenced by the receipt of these samples, and that the judgment should be reversed and a new trial ordered, the costs to abide event

Beach, J., concurred.

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

LEVI S. CHATFIELD, Appellant, *against* ALFRED L. SIMONSON *et al.*, Executors of the last Will and Testament of SAMUEL WOOD, Deceased, Respondents.

(Decided January 3d, 1882.)

An attorney for one party to a litigation, in consideration of a sum of money to be paid him, a portion of which he received, without the knowledge or consent of his client, released part of the subject-matter of the litigation to his client's adversary. *Held*, that he thereby forfeited all claim to compensation for his services in that particular litigation, even though it did not appear that the client had suffered actual damage from the breach of duty of the attorney.

The liability of an attorney to indictment and to a civil action for treble damages, for misconduct, is additional to his liability to the loss of his stipulated reward thereby.

EXCEPTIONS taken at a trial term of this court, ordered to be heard, in the first instance, at the general term.

The action was brought for the recovery of $7,500 for services rendered by the plaintiff as attorney and counsel, under an agreement with Samuel Wood, deceased, in an action pending in the Supreme Court, wherein Abraham Hewlett was plaintiff and Samuel Wood, Samuel A. Wood, and others were defendants. On January 7th, 1878, Mr. Chatfield was substituted as attorney for Abraham Hewlett, the plaintiff in that action, at the request of Samuel Wood, for whose benefit the action was instituted, the latter being a nominal defendant only, and being opposed in interest to the other defendant, Samuel A. Wood. The case was then pending on appeal to the General Term of the Supreme Court, from a judgment rendered therein in favor of Samuel A. Wood, and against the plaintiff and Samuel Wood; and Mr. Chatfield agreed with the latter to prosecute the appeal and the action for $7,500. The case was finally settled. The action involved the validity of the will of one Abraham Wood, and the title of Samuel A. Wood to one moiety of several parcels of real property, among which were Nos. 510 Broadway and 49 Warren street.

The defense made to the present action by the executors of Samuel Wood, deceased, set up, among other things, that while the said appeal was pending and a stay of judgment in said action had been perfected, Mr. Chatfield, in violation of his duty and obligation as attorney aforesaid, and without the knowledge or consent of his clients, Hewlett or Samuel Wood, and in consideration of $1,500 agreed to be paid him by Samuel A. Wood, released from the operation of said appeal, two valuable pieces of property, to wit, 510 Broadway and 49 Warren street aforesaid; and defendants say in their answer "that they will set off said $1,500 or whatever sum was received by plaintiff against any demand which he may establish, and claim judgment for the balance."

The facts alleged were substantially proven, and the judge at special term dismissed the complaint on the merits and ordered the exceptions to be heard in the first instance at the general term; judgment meanwhile to be suspended.

A. J. Vanderpoel, for plaintiff.—I. If the execution of the stipulations releasing the property was misconduct, the defendants misconceived their remedy for such misconduct. An attorney is an officer of the court, whose tenure of office and the penalty for any misconduct in the discharge of his duties, is fixed by statute (*Richardson* v. *Brooklyn, &c. R. R. Co.*, 22 How. Pr. 368; *Waters* v. *Whittemore*, 22 Barb. 593; *Ray* v. *Birdseye*, 5 Den. 627; *Seymour* v. *Ellison*, 2 Cow. 28, 29; 1 R. S. 98, § 1, subd. 3; Id. 6th ed. 403, § 97; 3 R. S. 6th ed. 449, §§ 56–63). An examination of the statute will show that the punishment for misconduct may be either of the following, and no other: (1) Fine or imprisonment, or both; (2) Removal or suspension from office; (3) Forfeiture of treble damages to the party injured, to be recovered in a civil action; (4) Forfeiture of a specific penalty for the particular act, which penalty is fixed at the sum of fifty dollars. If, therefore, an attorney is an officer whose liability for misconduct in office is limited by statute, it was error for the court to attempt to impose a penalty not authorized by law. A pen-

alty cannot be raised by implication, but must be expressly created and imposed (*Jones* v. *Estis*, 3 Johns. 379).

II. If the alleged misconduct is to be construed to be simply the receipt of money properly belonging to the plaintiff's client, which he has hitherto neglected to pay over, that fact is not sufficient to justify the action of the court in dismissing the complaint. An attorney is not liable to an action for money collected until after demand made or a direction to remit (*Beardsley* v. *Root*, 11 Johns. 464; *Rathbun* v. *Ingals*, 7 Wend. 320; *Stafford* v. *Richardson*, 15 Wend. 302; *People* v. *Brotherson*, 36 Barb. 662; *Ex parte Ferguson*, 6 Cow. 596).

III. If the alleged misconduct is to be construed to have been negligence in executing the stipulations of release, then it must appear affirmatively that the client was in some way injured by his attorney's negligence, or he cannot maintain an action, even for nominal damages (*Harter* v. *Morris*, 18 Ohio St. 492; *Suydam* v. *Vance*, 2 McLean, 99; *Grayson* v. *Wilkinson*, 13 Miss. 268; *Rhines* v. *Evans*, 66 Pa. St. 192; *Reece* v. *Rigley*, 4 Barn. & Ad. 202).

IV. The stipulations purporting to release the real estate were wholly ineffectual for that purpose; the requirements of the Code as to the manner in which property may be relieved from the lien of a judgment, pending an appeal, not having been complied with in this case (Code of Civ. Pro. § 1256).

E. Schenck, for defendants.—The acts of the plaintiff were such a corrupt breach of professional duty and obligation to Samuel Wood and Hewlett as to constitute an utter violation of his alleged agreement with Wood, and forfeit any claim or right to recover compensation for services rendered by him in the conduct of that case under the contract or otherwise (*Hatch* v. *Fogarty*, 33 N. Y. Super Ct. 166; 40 How. Pr. 492; *Herrick* v. *Catley*, 1 Daly, 512; *Von Wellhoffen* v. *Newcombe*, 10 Hun, 236; *Pitt* v. *Yalden*, 4 Burr. 2061; *Wilcox* v. *Plummer*, 4 Pet. 172; 1 Wait's Actions and Defenses, 448, § 6, & pp. 245, 249; 2 Greenleaf's Evid. 10th Ed. 124, § 144, & p. 127, § 147; *Case* v. *Carroll*, 35 N. Y. 385; Willard's Eq. Juris. 170, 172; *Ford* v. *Harrington*, 16 N. Y. 285; *Dutton* v.

Wilner, 52 N. Y. 312; *Brotherson* v. *Consalus*, 26 How. Pr. 213; *Brock* v. *Barnes*, 40 Barb. 528; *Howell* v. *Ramsen*, 11 Paige, 538).

J. F. Daly, J.—[After stating the facts as above.]—The learned judge at special term disposed of this case properly. The plaintiff, while employed as attorney for one party to the litigation, in consideration of a sum of money to be paid himself, bargained with his client's adversary to release part of the subject matter of the claim in suit to the latter, and actually did so release it without the knowledge or consent of his client, and did receive a portion of the price of his act. He thereby forfeited all claim to compensation in that particular litigation (*Herrick* v. *Catley*, 1 Daly, 512; *Currie* v. *Cowles*, 6 Bosw. 452–460).

The principle on which this decision rests applies although there is no proof that the client has suffered actual damage from the breach of duty of the attorney; the law will not stop to inquire whether the benefit which the attorney reaped by accepting pay from the other side was accompanied by any material injury to the rights of his client. It will assume that the advantage which the adversary values so much as to be willing to pay for, is of equal importance to the client to retain.

If any other rule were adopted, an attorney might bargain at every stage of an action to allow privileges and advantages to the other side for pay, and, unless his client could show that he was ultimately injured by such acts, could yet recover as for a proper discharge of his duty. The obligation of an attorney to his client is not less than that of a broker to his employer, and as to the latter it has been long established that he cannot take pay from both sides, and that he forfeits all right to compensation from his employer if he accept compensation from the other party.

The attorney's right to compensation depends upon full performance of his duty, and such performance is conclusively disproved by showing that he corruptly bargained with his client's adversary to relinquish any right or grant any advantage.

The attorney is liable to indictment and to a civil action for treble damages for misconduct, but this is in addition to the loss of his stipulated reward. A surgeon or other professional man is liable for damages for malpractice, as well as to the loss of compensation for his services. Recovery for the services, and liability for unfaithful performance of such services, are wholly inconsistent.

The effort was made to show that Samuel Wood knew of this transaction. He was informed that Samuel A. Wood desired the release, but did not assent to it, or make any answer. He was not informed that his attorney was offered and was to receive $1,500 for giving the release. This was the important feature in the transaction.

It is said that the act in question is ratified by defendants setting it up as a counter-claim in their answer. The facts are set forth, and defendants are entitled to any relief which those facts warrant, irrespective of their demand. They ask to set off this money against any demand which plaintiff may establish, and for judgment in their favor for the balance, but this does not prevent their using the facts as a defense to the claim.

The exceptions should be overruled, and judgment entered for defendants, with costs.

Beach, J., concurred.

Exceptions overruled, and judgment ordered for defendants, with costs.

SAMUEL B. DURYEA, Appellant, *against* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Decided January 3rd, 1882.)

An old and unoccupied wooden house in the City of New York was attacked in the day time on the day of a general election by boys of from eight to seventeen years of age, who, numbering at first only three or four, began tearing down and carrying away the stoop, and, increasing in number to more than fifty, continued for an hour or longer to demolish the building, until it was substantially wrecked, so that the owner was subsequently compelled to take it down. They dispersed at the coming of a policeman, and there was no indication of any intent to resist opposition by the public authorities or private citizens, nor was anything done "to the terror of the people," the injury appearing to have been accomplished not with any common purpose, but rather to gratify individual propensity. *Held*, that the city was not liable for the damages in an action by the owner, under L. 1855, c. 428, giving such a right of action "whenever any building," &c., "shall be destroyed or injured in consequence of any mob or riot."

EXCEPTIONS taken at a trial term of this court, ordered to be heard, in the first instance, at the general term.

On November 2nd, 1880, about ten o'clock in the morning, three or four boys began tearing down the stoop of an old, unoccupied, wooden building, No. 171 Mercer Street, belonging to the plaintiff. The number gradually increased to from fifty to seventy-five, ranging in age from eight to seventeen years. The house was substantially wrecked, and subsequently taken down. This action was brought to recover damages, under the Act of 1855, upon the claim that the property was destroyed by a mob or riot, and the defendant therefore liable. The court below dismissed the complaint, directing the exceptions to be heard, in the first instance, at the general terms.

Edward J. F. Werder, for plaintiff.—The law of 1855 is a remedial statute meant for the benefit of the owners of prop-

erty injured or destroyed by riotous gatherings, and is to be construed liberally, and to effect the object. Compensation rather than penalty is its motive, and the motive determines the rule of interpretation. If three or more persons do an unlawful act of violence it is a riot. The facts that the persons who may be witnesses were not alarmed, and that those engaged in the riot were in good humor, do not change the legal effect of the acts committed (*Turpin* v. *State*, 4 Blackf. [Ind.] 72; *Kiphart* v. *State*, 42 Ind. 273; *State* v. *Boies*, 34 Me. 236; *State* v. *Snow*, 18 Me. 345). The owner was under no duty to call upon the peace authorities, for he had no knowledge that his property was about to be assailed (*Fly* v. *Niagara County*, 36 N. Y. 297; *Schiellein* v. *Supervisors*, 43 Barb. 490; 47 Barb. 447).

William C. Whitney, *E. Henry Lacombe*, and *Arthur H. Masten*, for respondent.—I. The court, in determining whether or not the present case is one in which the city should be held liable, should give to the words "mob or riot" the meaning which it deems to have been intended by the legislature, rather than apply to them the technical definitions of the common law. Those definitions were framed by writers on criminal law, and the adjudications which follow them were made with reference solely to the punishment of the persons engaged in riotous proceedings. The statute relates in no way to the criminal aspect of riots, but has for its object compensation for property destroyed thereby—its theory being that the municipality should respond in damages for neglect to provide secure protection of the property of its citizens (*Underhill* v. *Manchester*, 45 N. H. 214). It will be urged that the statute, being remedial, should be most liberally construed; it may be said with equal force, however, that as it imposed upon municipal corporations a liability unknown at the common law, it should receive a strict construction. Except in two contingencies, the statute makes the city an insurer against loss; hence the courts should be cautious in extending the statute to cases not clearly within its provisions. In determining the cases intended by the legislature, it is

proper to consider probable consequences (*People* v. *Laimber*, 5 Denio, 9; *McKeen* v. *Delancey*, 5 Cranch, 32; *Haentze* v. *Howe*, 28 Wis. 293). Statutes are to be construed according to the intent of the legislature, even in the face of their language (*People* v. *Utica Ins. Co.*, 15 Johns. 380; *Jackson* v. *Collins*, 3 Cow. 96; *Tonele* v. *Hall*, 4 N. Y. 144). The legislature of 1855 did not contemplate making the city insurers against loss by riot, according to the old common law definition, nor according to the definition in the Penal Code (§ 449); its intention is to be found from the act itself, the word riot being thus interpreted to mean the concerted action of individuals defying authority in such a manner as to create general alarm.

II. The damage was not caused by a "mob or riot," as defined at common law. The acts held to constitute a riot at common law were such as were calculated to create terror in the minds of persons other than the rioters (Hawkins P. C. c. 65, § 1; 2 Colby's Crim. L. [1868], 94; Stephen's Comm. [7th ed., 1874], 254; Roscoe Crim. Evid. [7th Am. Ed., 1874], 901; Harris' Princ. Com. L. [1877], 101; Alison Princ. Crim. L. Scotland, c. 23; Russell Crimes [9th Ed., 1877], 376; 2 Benedict N. Y. Civ. & Crim. Justice [1878], 866; Wharton Crim. L. [1880], §§ 1537, 1539; May Crim. L. [1881], § 203; 2 Bishop Crim. L. [6th ed. 1877], 636; Stephen Dig. Crim. L. [1877], 41). Few cases can be found in which the question was directly presented as to whether or not the acts complained of were actually to the terror of the people. Whenever this point has been raised, however, the courts have held that this element was essential to the existence of a riot (*Reg.* v. *Langford*, Carr. & M. 602; *S. C. sub nom. Reg.* v. *Phillips*, 2 Moody Cr. Cas. 252). It has long been held in England that it was necessary in an indictment for riot to aver that it was *in terrorem populi* (*Rex* v. *Hughes*, 4 Carr. & P. 373; *Rex* v. *Cox*, Id. 530; *Reg.* v. *Soley*, 11 Mod. 115; Bishop Crim. L. § 1147). In most of the reported cases, however, the acts of the rioters were such that from their very nature the court could infer that terror could be caused (such were *Ratcliffe* v. *Eden*, Cowp. 485; *Greasley* v. *Higginbottom*, 1 East, 636;

Reg. v. *Harris*, Carr. & M. 661; *Reg.* v. *Simpson*, Id. 669). It was necessary, in order to constitute a riot at the common law, that the persons assembled should have an unlawful intent, or intent to resist authority (*U. S.* v. *Peaco*, 1 Cranch C. Ct. 601). But where, as in this case, there was direct evidence to show that it was not the intention of the assemblage to resist interference, their acts cannot be deemed to be a riot (*Reg.* v. *Jenkins*, 1 Cox Crim. Cas. 177).

III. These rules of the common law have not been qualified by any of the decisions of this state. An examination of the cases found in the New York reports shows that the question, as to whether the acts complained of were actually to the terror of the people, has not been directly raised. The facts in all of them, however, show that this element was unquestionably present in each instance (*Newberry* v. *Mayor*, 1 Sweeney, 369; *Levy* v. *Mayor*, 3 Robt. 194; *Sarles* v. *Mayor*, 47 Barb. 447; *Ross* v. *Mayor*, 4 Robt. 49; *Orr* v. *Brooklyn*, 36 N. Y. 661; *Darlington* v. *Mayor*, 2 Robt. 230; *Ely* v. *Supervisors*, 36 N. Y. 297; *Schiellein* v. *Supervisors*, 43 Barb. 490; *Solomon* v. *Kingston*, 24 Hun, 564).

IV. The plaintiff did not use reasonable diligence to prevent the damage of which he complains. In leaving a ruinous building unguarded and insufficiently secured on election day, he did not act as a man of ordinary prudence would have done (*Eastman* v. *Mayor*, 5 Robt. 398; *Blodgett* v. *Syracuse*, 36 Barb. 526).

V. The withdrawal of the case from the jury was not error. A case should always be taken from the jury when the evidence is so preponderating that a verdict would be set aside (*Davis* v. *Third Ave. R. R. Co.*, 41 N. Y. Super. Ct. 35; *People* v. *Police*, 14 Abb. Pr. 158; *Goelet* v. *Ross*, 15 Abb. Pr. 251; *Dickerson* v. *Wason*, 48 Barb. 414; *Besson* v. *Southard*, 10 N. Y. 236; *Godin* v. *Bank of the Commonwealth*, 6 Duer, 76; *Herring* v. *Hoppock*, 15 N. Y. 409; *Porter* v. *Havens*, 37 Barb. 343); especially where the defendant is a corporation (*Thrings* v. *Central Park R. R. Co.*, 7 Robt. 616; *Toomey* v. *London, &c. R. Co.*, 3 C. B. N. S. 146; see also Cooley Torts, 666; *Metropolitan R. Co.* v. *Jackson*, L. R. 3

App. Cas. 193; *Ebersole* v. *Northern Central R. R. Co.*, 23 Hun, 118; *Clapp* v. *Hudson River R. R. Co.*, 19 Barb. 464; *Collins* v. *Albany, &c. R. R. Co.*, 12 Barb. 494). The judge might properly have withdrawn the case from the jury, if there had been merely an absence of proof of the existence of the two elements necessary to constitute a riot under the principles stated above. *A fortiori*, it was proper for him to do so when there was direct evidence showing their non-existence. (1) It was clear from the testimony of the plaintiff's witnesses that the persons constituting the assemblage in question had no mutual intent to resist any one who should oppose them in carrying out their designs; (2) their acts were not "such as to strike terror into the public mind."

Beach, J.—[After stating the facts as above.]—I am of opinion that the correct solution of the question presented on this appeal, is found in the generally accepted legal definition of the terms mob or riot. Should the assemblage described in the evidence be rightfully designated by those terms, the liability of the defendants would necessarily result, and the disposition of the case by the court below be erroneous. In Hawkins' Pleas of the Crown, c. 65, § 1, a riot is defined to be "a tumultuous disturbance of the peace by three or more persons assembling together of their own authority, *with an intent mutually to assist one another against any who shall oppose them*, in the execution of some enterprise of a private nature, and afterwards actually executing the same, in a violent and turbulent manner *to the terror of the people*, whether the act be itself lawful or unlawful."

There is nothing in the proofs from which this court can conclude that the gathering was possessed of any intent to resist opposition by the public authorities, or private citizens. The only fact bearing at all upon the question, is that the assemblage dispersed upon sight of a single police officer, strongly indicating an entire submission to constituted authority. In the words of one witness, "they were occupied for an hour to an hour and a half before the officer came and ran them off." In addition there was nothing done to the "ter-

ror of the people," although a witness for the plaintiff testifies to having been put in fear, which consisted of seeing the boys and going inside his own house.

But considering the question upon a broader basis than is afforded by technical definition, it would be impossible to characterize the occurrence as anything but a piece of malicious mischief, accomplished not with any common purpose, but rather to gratify individual propensity. The legislature cannot have intended to impose liability in such cases, thus making the city an insurer of perfect quiet, and answerable for all damage from any breach of the peace by three or more persons. The law-making power does not inflict punishment of this character, that no vigilance can avoid or power prevent. If so, a practical impossibility is called for, and the necessity created of lining every street with policemen, so that three or more boys cannot break the windows of an unoccupied building, or indulge in any similar proceeding inflicting damage. There is no rule of construction which would warrant or uphold such an interpretation of the act. As said by Chief Justice Denio in *Darlington* v. *Mayor, &c. of New York* (31 N. Y. 164), "the policy on which the act is framed may be supposed to be, to make good at the public expense, the losses of those who may be so unfortunate as, without their own fault, to be injured in their property by acts of lawless violence of a particular kind, which it is the general duty of the government to prevent."

In conclusion, I am of the opinion that the case at bar does not disclose acts of the kind contemplated by the legislature, or which it is the general duty of the government to prevent. The performance of such duty, would be impossible with regard to occurrences similar to the one described in this record. In this view consideration of the other exceptions is needless.

The dismissal of the complaint is affirmed, and judgment directed for the defendant with costs.

J. F. Daly, J., concurred.

Exceptions overruled, and judgment ordered for defendant, with costs.

SOLOMON ISAACS, Respondent, *against* JEANNE F. ISAACS, Appellant.

(Decided January 3rd, 1882.)

The provisions of sections 1769, 1772, 1773, of the Code of Civil Procedure, for the punishment of disobedience of judgments or orders requiring payment of alimony in matrimonial actions, are exclusive of the general provisions contained in section 2268 regulating punishment of contempts, and furnish the sole method of proceeding for that purpose in such actions. The intention of the legislature was to prevent the imprisonment of the party so disobeying until proceedings against property had failed, or the court was satisfied, from facts, of the inutility of a direction for such proceeding.

APPEAL from an order of this court setting aside an order of commitment.

This is an action for divorce. At a special term of this court, held in June, 1881, an order was granted directing payment of temporary alimony and a counsel fee by the plaintiff to the defendant or her attorneys. Such order not having been obeyed, after service and demand, a warrant of commitment was issued upon application, June 21st, 1881. This warrant was vacated upon motion, by an order of the court dated July 21st, 1881. From this order the defendant appealed.

McMahon & Munger, for appellant.

D. Calman and *Lewis Sanders*, for respondent.

BEACH, J.—Under the former practice, the enforcement of this order would undoubtedly have been by the course here taken. This would have been proper by virtue of title 13, chapter 8, part 3, section 4 of the Revised Statutes, under contempts, and was the only way then existing. By sections 1769, 1772, 1773 of the Code of Civil Procedure, under the head of Matrimonial Actions, the system contained in sections 58 and 60 of article 5, title 1, chapter 8, part 2 of the Revised Statutes, under Divorce, seems to have been substantially re-enacted. Section 4 of the Revised Statutes was also re-enacted

in section 2268 of the Code, under Punishment of Contempts. By the above provisions relating to matrimonial actions, is provided a manner of punishing disobedience of the order, by imprisonment, and the circumstances under which a resort thereto may be had. The question involved here, is whether such proceeding is the sole method, or whether resort may be had to the power given by section 2268. In my opinion, disobedience of the order can only be punished as provided in those sections. Enactments regulating proceedings in specified actions are exclusive, and remove them from the effect of general legislation, which under other circumstances would apply. The general provision of the Revised Statutes regarding contempts, formerly included the disobedience of orders for payment of alimony *pendente lite*, but when the legislature made specific provision regulating the imposition of like punishment under certain circumstances and in a specified manner in actions for divorce, the design is apparent to transfer that class of actions from under the general provisions regulating punishment of contempts, leaving them subject only to those specifically relating to them, in that regard. It would be difficult to imagine any sensible reason for the requirements necessitated by the sections governing matrimonial actions, before a disobedient party may be imprisoned, if, by section 2268, under a general head, the same result may be reached, without the pre-requisites made needful by the sections particularly applicable. The intention of the legislature was to prevent the imprisonment of a party disobeying an order directing payment of temporary alimony, until proceedings against property had failed, or the court was satisfied, from facts, of the inutility of a direction for such proceeding. I see nothing intricate, cumbrous, or likely to produce delay, in the system provided, and it commends itself, by preventing the harsh remedy of a prison, until after pursuit of property shall either prove useless, or be made to appear a futile undertaking.

The order is affirmed with costs.

J. F. Daly, J., concurred.

Order affirmed, with costs.

BENJAMIN B. JOHNSTON, Plaintiff, *against* AUGUSTUS MERRITT, Defendant.

(Decided January 3rd, 1882.)

Where an assignee for benefit of creditors enters upon premises leased to his assignor, merely to take possession of and remove the goods of the assignor, and remains no longer than is reasonably necessary for that purpose, without otherwise exercising his right to elect to take the term, he is not liable for the rent.

CASE submitted without action.

The submission was as follows:

"Benjamin B. Johnston claims to recover of Augustus Merritt, three hundred dollars, and Augustus Merritt resists said action.

"The following are the facts upon which the said controversy depends:

"Daniel Berrien, Theodore Berrien and Charles Reimer, composing the firm of D. Berrien & Co., on March 11th, 1880, hired and rented from D. Willis James, the building and premises known as No. 231 Pearl Street, in the City of New York, for the term of one year from May 1st, 1880, at the yearly rent of twelve hundred dollars, payable in equal quarterly payments on the first days of August, November, February and May, until the expiration of said term. In the month of February, 1881, the said D. Willis James duly sold and conveyed the said premises, No. 231 Pearl street, to this plaintiff, subject to said lease, and on May 1st, 1881, the plaintiff was the owner of said premises. That on April 11th, 1881, the said Daniel Berrien, Theodore Berrien and Charles Reimer, duly made a general assignment of all their property for the benefit of their creditors to the defendant, and the defendant thereupon duly qualified as assignee and entered into possession of the assigned property.

"That said assigned property consisted in part of a stock of

goods, and of goods in the process of manufacture, which were in the demised premises, and the defendant took and entered into possession of said demised premises as assignee as aforesaid, for the purpose of performing his duties as such assignee, and occupied said premises for such purpose from April 11th, 1881, to May 1st, 1881, the date of the expiration of said lease.

"That said lease is not mentioned in the inventory filed on the making of said assignment.

"That the defendant has refused to pay the sum of three hundred dollars for one quarter's rent of said premises, which became due and payable under said lease, on May 1st, 1881.

"That said defendant tendered to the plaintiff the sum of one hundred dollars as and for rent for said premises during the time of his occupancy, which the plaintiff refused to accept as such rent.

"The question submitted to the court upon this case is as follows:

"Is the defendant liable to the plaintiff for the sum of three hundred dollars for the rent which became due and payable under said lease, on May 1st, 1881, to be paid by him out of the assets in his hands as such assignee?

"If this question is answered in the affirmative, then judgment is to be rendered against the said Augustus Merritt for such sum with interest and costs.

"If it be answered in the negative, judgment is to be rendered in favor of said Augustus Merritt for his costs."

M. S. Thompson, for plaintiff.

Thornton, Earle & Kiendl, for defendant.

J. F. Daly, J.—Where an assignee under an assignment for the benefit of creditors enters upon premises leased by the assignor and occupies them for the purpose of possessing himself of the term as assignee thereof, an action may be maintained against him for the whole of the rent falling due while he is in possession (*Jones* v. *Hausmann*, 10 Bosw. 168). But

such an assignee who enters upon the demised premises merely to remove the goods and remains in occupation no longer than is reasonably necessary for such purpose, is not liable for the rent (*Lewis* v. *Burr*, 8 Bosw. 140). The assignee has the right to elect whether he will take the term as part of the assigned property. He will be allowed a reasonable time to ascertain whether the lease can be made valuable as an asset to creditors or not (*Journeay* v. *Brackley*, 1 Hilt. 447). He may reject the term, and is not liable unless he enters under the lease, or by some other act or omission to act determines his right to elect if he will take the lease (*Carter* v. *Hammett*, 12 Barb. 263).

In *Journeay* v. *Brackley*, the assignees took possession of the stock of the assignors, entering upon the demised premises to do so, with notice to the lessors that they would have nothing to do with the lease. They remained in possession of the premises 36 days, selling the stock partly at private sale and partly at auction.

The submission in this case shows that the term expired May 1st, 1881; that on April 11th, 1881, the assignee entered upon the demised premises, and remained there until the ensuing 1st of May, 19 days. The assignment did not mention the lease of the premises. The assigned stock of goods consisted partly of goods in the process of manufacture on the premises. The submission states that the defendant "took and entered into possession of said demised premises as assignee as aforesaid for the purpose of performing his duties as such assignee."

There is therefore nothing in the submission to show an election by the assignee to take the term, except his entry on the premises, but the statement that he took and entered into possession as assignee as aforesaid (*i. e.*, as general assignee for the benefit of creditors without a specific assignment of the lease) is qualified by the addition "for the purpose of performing his duties as such assignee, and occupied said premises for such purpose." His duty as assignee was to take possession of the goods on the premises, and to enter for that purpose, and to remove them, and we cannot say as matter of fact or

law that the period which elapsed from April 11th to May 1st was more than sufficient for the purpose.

I think judgment should be entered on the submission for the assignee with costs.

Van Hoesen, J., concurred.

Judgment for defendant, with costs.

James P. Merritt, Appellant, *against* James D. Reid, Respondent.

(Decided January 3rd, 1882.)

The right of action under the Manufacturing Companies Act (L. 1848, c. 40, § 24), against a stockholder of a company formed under the act, for a debt of the company, does not accrue until an action therefor has been brought against the company and judgment recovered, and an execution thereupon against the property of the company returned unsatisfied; hence the period limited by statute for bringing such action against a stockholder is to be computed from the time the remedy against the company is thus exhausted.

Appeal from a judgment of the general term of the Marine Court affirming a judgment of that court entered upon the dismissal of a complaint.

The action was brought against defendant as a stockholder of the "Manhattan Sewing Machine Company," to recover the amount of a promissory note of the company for $1,433.85 at six months, dated August 7th, 1872, payable to the Shaw & Lippencott Manufacturing Co. or order, which fell due February 10th, 1873. The payees recovered a judgment against the company on October 16th, 1873, and issued execution thereunder, which execution was returned wholly unsatisfied on October 23rd, 1873. The judgment was assigned on October 4th, 1879, to plaintiff, and this action was commenced by

him October 14th, 1879. The defense was a denial, and the Statute of Limitations.

The complaint was dismissed on the ground that more than six years had elapsed between the maturity of the note and the commencement of the action.

The plaintiff contends that the cause of action did not accrue until October 23rd, 1873, the date of the return unsatisfied of the execution issued against the company under the judgment obtained against it on the note.

J. F. Daly, J.—[After stating the facts as above.]—In respect of actions against one who has ceased to be a stockholder of a corporation, for the enforcement of a liability incurred while a stockholder, the statute expressly declares that suit shall not be brought, unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder, nor until an execution against the company shall have been returned unsatisfied in whole or in part.

As to continuing stockholders, the provision is simply that they shall not be personally liable unless a suit is brought for the collection of the debt against the company within one year after the debt shall become due (L. 1848, c. 40, § 24). The Supreme Court at special term in this district has held that the latter provision is to be construed as requiring not only that a suit be brought against the company, but judgment recovered therein and an execution returned unsatisfied before the right of action against a stockholder accrues. The argument advanced is that the object of the legislature in requiring suit to be brought against the company was to compel the creditor to collect his debt, if possible, from the latter, and that that object would not be obtained unless such suit were consummated by a judgment and execution (*Lindsley* v. *Simonds*, 2 Abb. Pr. N. S. 69). This construction receives some countenance in the opinion delivered in the Court of Appeals in *Kincaid* v. *Dwinelle* (59 N. Y. 548–551). In *Shellington* v. *Howland* (53 N. Y. 374), Allen, J., considered the question not free from difficulty. In *Agate* v. *Edgar*, in this court (Gen. T. May, 1877), it was decided that a cause of

action was not made out against the stockholder unless it was shown that an execution against the real and personal property of the corporation had been returned unsatisfied.

The weight of reasoning, as well as of authority, is with that construction of the statute which requires that the creditor's legal remedy against the company be exhausted (unless, as in the cases in the Court of Appeals last cited, this is rendered impossible by law) before the creditor has a right of action against a stockholder who has not parted with his stock.

I am satisfied that the statute does not commence to run until the remedy against the corporation is thus exhausted. The limitation of six years for the bringing of suit against the stockholder (Code Civ. Pro. § 382; *Knox* v. *Baldwin*, 80 N. Y. 613), is to be computed from the time of the accruing of the right to relief by action (Code Civ. Pro. § 415).

As the case was decided on this question alone, in the Marine Court, we should reverse the judgment and order a new trial. Respondent claims that there is no finding that the note offered in evidence is the note of the company. The note was admitted on the trial without objection and defendant cannot object to it now. If the defendant had objected for want of proof of authority of the president and treasurer to make the instrument, plaintiff might have supplied the proof before he rested his case.

Van Hoesen, J., concurred.

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

ELIZABETH C. ROSS, Appellant, *against* REUBEN ROSS, Defendant: ELIZABETH J. PARKINSON, Appellant.

(Decided January 3rd, 1882.)

Where, upon a sale under execution of real estate of a judgment debtor, a surplus remains in the hands of the sheriff after satisfying the execution, an application for the payment of such surplus moneys to a grantee, from the judgment debtor, of the premises sold, may be made by motion in the action in which the execution was issued, if such grantee is not a party to any action against the judgment debtor.

Such an application may be made without notice to the judgment debtor who has absconded and whose whereabouts are unknown, where it is not disputed that he actually conveyed the property to the applicant.

APPEAL from an order of this court made on motion of Elizabeth J. Parkinson, directing the sheriff to pay to her the surplus in his hands arising from a sale of certain premises under an execution in this action against the property of the defendant.

Mrs. Parkinson, to whom the surplus was awarded, was the grantee of the premises in question from the judgment debtor by deed recorded March 30th, 1881.

On the sale under the execution in this action, which took place June 1st, 1881, she bought the premises, paying $702 to the sheriff. He satisfied the execution in this action, and held a surplus of $149.07, which Mrs. Parkinson applied to have refunded to her on the ground that, as grantee of the premises from the judgment debtor, she was entitled to all the surplus after satisfying the execution.

Her application was opposed by the plaintiff herein, who had, in another action brought by her against this defendant, her husband, for divorce, procured an order awarding her alimony against him.

The application was also opposed by Marshall P. Stafford, plaintiff's attorney, who had issued an attachment against defendant's property on June 9th, 1881, in an action brought by

him against defendant for legal services performed at said defendant's request.

The plaintiff urged as ground of appeal: 1st. That Mrs. Parkinson's right could not be enforced by motion; 2d. At least not by motion in this action; 3d. That the order could not be made without notice to the judgment debtor, the defendant; 4th. That the court had no power to award motion costs against Mr. Stafford.

Marshall P. Stafford, for appellant.

L. M. Fulton, for respondent.

J. F. Daly, J.—[After stating the facts as above.]—A person having a lien on real property sold by virtue of an execution, and being entitled to the surplus arising on such sale, after satisfaction of the execution, may apply to the court from which the process issued for an order directing the sheriff to pay over such surplus. The application is by motion, and if there be a dispute as to the right to the surplus, it will be granted when the equity of the case can be accurately ascertained (*Williams* v. *Rogers*, 5 Johns. 163–7).

It seems proper that such a motion should be made in the action in which the execution is issued, since it must be made to the court from which the execution issued, as the avails of the sale while they remain in the hands of the sheriff are subject to the control of the court (*Van Nest* v. *Yeomans*, 1 Wend. 87–8). If the motion be made by a junior judgment creditor who claims the surplus by virtue of the lien of his execution, it will be made in his own action, as in the cases cited.

But where the application is by a grantee of the premises, who is entitled to the surplus moneys if his deed be not void (*Every* v. *Edgerton*, 7 Wend. 259), and who is not a party to any action against the judgment debtor, there seems to be no good reason why his motion should not be made in the action in which the sale was had and the surplus made.

The ordinary notice of this motion could not be given to

the defendant Reuben Ross, because he had absconded, and his whereabouts was unknown. The court might have required notice by publication, if the facts were doubtful: but the papers submitted by all the parties show beyond a doubt that he actually conveyed this property to Mrs. Parkinson, and the reasons in *McLaughlin* v. *Mayor* (8 Daly, 474), do not apply in this case. The deed from defendant to her, which is duly executed and recorded, is not denied.

The question of awarding costs against Mr. Stafford, who opposed the motion, does not come up on this appeal, which is not taken by him but by Mrs. Ross.

The order should be affirmed with $10 costs and disbursements.

Beach, J., concurred.

Order affirmed, with costs.

Benjamin S. Clark, as Receiver of the Property of Joseph L. Gilbert, Appellant, *against* Joseph L. Gilbert *et al.*, Respondents.

(Decided January 4th, 1882.)

A mortgage of chattels, which is not accompanied by immediate delivery and not followed by actual and continued change of possession of the things mortgaged, if not filed as required by L. 1833, c. 279, is void, as against the simple contract creditors of the mortgagor, as well as against judgment creditors.

An action to set aside such a mortgage may be maintained by a receiver of the property of the mortgagor appointed in proceedings supplementary to execution against him under Code of Civ. Pro. c. 17, tit. 12, art. 2, notwithstanding the mortgage was duly filed before the appointment of the receiver, if it was not so filed before the service upon the mortgagor of the order requiring him to appear and be examined as a judgment debtor in the proceeding in which the receiver was appointed; and even though the mortgage was executed and delivered before the enactment of the

provisions of the Code referred to, by which the title of such a receiver is made to relate back to the time of the service of such order.

Appeal from a judgment of this court entered upon the dismissal of a complaint.

The action was brought by the plaintiff, as the receiver of the property of the defendant Joseph L. Gilbert, appointed in proceedings supplementary to execution against the latter, to set aside the chattel mortgage made by him to his co-defendant, William R. Gilbert, and to recover possession of the mortgaged goods. At the trial the complaint was dismissed, and judgment was entered thereupon in favor of the defendants, adjudging the mortgage to be a valid lien, and for the costs of the action. From the judgment the plaintiff appealed.

Hull & Meyers, for appellant.

Charles H. Mundy, for respondents.

J. F. Daly, J.—The mortgage in question was executed April 1st, 1880. It was not accompanied by immediate delivery and was not followed by actual and continued change of possession of the things mortgaged, and was not filed until March 17th, 1881, a period of nearly twelve months after its execution. It was therefore absolutely void as against the creditors of the mortgagor (L. 1833, c. 279).

The creditors intended by the section are not only judgment creditors, but such as were simple contract creditors when the mortgage was executed, and such as became or continued to be creditors of the mortgagor during the period that the goods remained in his possession and before the mortgage was actually filed (*Thompson* v. *Van Vechten*, 27 N. Y. 568; *Parshall* v. *Eggert*, 54 N. Y. 18; *Dutcher* v. *Swartwood*, 15 Hun, 33; *Fraser* v. *Gilbert*, 11 Hun, 637).

The judgment creditor, Ralph J. Bush, had supplied the mortgagor with meat from May 31st, 1877, to April 30th, 1880,

on which date there was a balance due, and he recovered judgment for it on December 21st, 1880, in the sum of $327.15. He was, therefore, a creditor within the meaning of the act, and the mortgage, being unfiled, was void as to him; and when he obtained his judgment and issued his execution, he was in a position to attack its validity and became entitled to do so (*Thompson* v. *Van Vechten* and *Parshall* v. *Eggert*, supra).

The plaintiff in this action was appointed receiver of the goods and property of the mortgagor in proceedings taken by the judgment creditor Bush, under his said judgment, and may enforce for the latter's benefit all the provisions of the statute. It was held in *Gardner* v. *Smith* (29 Barb. 74), that where a mortgage was a valid lien (being duly filed) at the time of the appointment of the receiver, he could not take advantage of a subsequent failure to file a copy as provided by the statute, because he took, by virtue of his appointment, only the property which the mortgagor then had,—which was an equity of redemption,—and the subsequent failure of the mortgagee to renew the mortgage did not enlarge the receiver's interest nor the creditor's rights.

In this case, however, the receiver's title to the property vested before the mortgage was filed. The order for the examination of the judgment debtor was served on March 8th, 1881. The mortgage was not filed until March 17th. The receiver's title extends back for the benefit of the judgment creditor so as to include the personal property of the judgment debtor at the time of the service of the order (Code Civ. Pro. §§ 2468, 2469). At the date when the receiver's title thus vested, the mortgage was void as to the judgment creditor Bush, for want of filing, and so far as Bush was concerned, and the receiver, whose title extended back for his benefit, the mortgage was as if it had not existed.

The sections in question, being part of article 2, title 12, chapter 17 of the Code of Civil Procedure, were in force when the order for examination was served, and they governed the proceedings thereunder, including the appointment of the receiver, the extent of his title, and the rights obtained by

the judgment creditor by his appointment; and those sections necessarily apply in this case although the mortgage was executed prior to their enactment. They did not affect the validity of the mortgage, for that was void by the statute when the sections were enacted, and so continued long after they were in force.

The new Code, by providing that the title of the receiver should relate back to the commencement of the supplemental proceedings, enlarged the judgment creditor's remedy, but did not make that security void which would otherwise be valid, and therefore affected no right of the mortgagee. He could have filed his chattel mortgage in time and secured his debt.

The judgment should be reversed and a new trial ordered with costs to abide the event.

Van Hoesen, J., concurred.

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

The Shepherd's Fold, Respondent, *against* The Mayor, Aldermen and Commonalty of the City of New York, Appellant.

(Decided January 4th, 1882.)

By an act of the legislature of 1871 (L. 1871, c. 269), the City and County of New York was required to levy and collect, in that and in each and every following year, a tax of a specified amount, and pay the same over to the plaintiff, a charitable corporation, to be applied to its purposes and objects. *Held*, that the amendment of 1874 to the constitution of the state (art. 8, § 10), which prohibited giving or loaning the credit or money of the state to or in aid of any association, corporation or private undertaking, with some exceptions not including the plaintiff, annulled the act of 1871, and that, even although the city thereafter continued, without authority, to levy and collect the tax, the plaintiff could not maintain an action against the city to recover the amount.

APPEAL from a judgment of this court entered upon the verdict of a jury.

The facts are stated in the opinions.

Wm. C. Whitney and *Thomas Allison*, for appellant.

Charles M. Marsh, for respondent.

VAN HOESEN, J.—In 1871, the legislature passed an act which provided that the Board of Supervisors of the City and County of New York should, in the year 1871, and in each and every following year, levy and collect by a tax upon the taxable property of the City and County of New York, to be levied and collected at the same time and in the same manner as the contingent charges and expenses of the said city and county are levied and collected, the sum of five thousand dollars, and pay the same over to the Shepherd's Fold, to be applied to the purposes and objects of that institution.

This was a gift to the Shepherd's Fold, a gift made by the state. The City and County of New York had no interest in the matter, except that it was compelled to raise the money which the state gave away. Its officers were required to levy and collect the money at a certain time and in a certain way, but in so acting they were not performing any duty for the city, for the city had no right to the money, nor control over it. The question is raised, whose money was it that the state gave away? The money was raised in a certain political division of the state, called the City and County of New York, but, as I have already said, not for any of the uses or purposes of that political division; and the mere fact that some of its officers were directed to raise the money by taxation, and then pay it over, did not clothe the City and County of New York with any title to it. There were, of course, two parties to the gift, the donor and the donee; and the donor had the power, in this case, to bestow, and to compel the person charged with the duty of preparing and delivering the gift, to perform that duty. It matters not that the money was to be

paid over to the donee without ever coming into the actual possession of the donor. It was discretionary with the donor either to require the money to be paid to its treasurer, or to direct it to be paid by the collector immediately to the donee. Nor is it of any moment that only a small portion of the territory of the state was charged with the duty of raising the money. It is further to be observed that this is not a case in which the legislature directs a municipality to appropriate a part of the fund in its treasury to a particular purpose, but it is a case in which a particular territory is commanded to raise, at a designated time, and in a prescribed way, a certain sum for a purpose which, however commendable in itself, is quite distinct from those purposes for which the territory was organized as a political entity. The gift is, therefore, to be regarded as a gift by the state of its own money, raised in a particular locality.

The amendment to the state constitution, made in 1874, and known as section 10 of article 8, ordains that "neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper." This section annulled all acts of the legislature in conflict with it, and made illegal all appropriations to associations, corporations, or private undertakings, of the moneys of the state, except where the object of those appropriations was to support or to educate the blind, the deaf and dumb, and juvenile delinquents. The result is that the act of 1871 in favor of the Shepherd's Fold was not in force at the time this action was brought, unless the appropriation were for the support of some one of those classes for whose benefit the money of the state may still be given to private institutions. The purposes for which the Shepherd's Fold was instituted are shown by their charter to be, 1st. Receiving and adopting children and youth of both sexes between the ages of twelve months and fifteen years, who are orphans, or otherwise friendless; 2nd. To receive, for training and edu-

cation, such children of poor clergymen as may be eligible, and be approved by the trustees of the Shepherd's Fold; 3rd. To receive other children and youth for education and training, to such extent as, in the judgment of the trustees, may be expedient. It is said that the act of 1868 authorizes police magistrates to commit to the Shepherd's Fold "orphans and friendless children;" and upon that ground the counsel for the plaintiff contends that the appropriation is valid. But that argument will scarcely avail until the counsel has satisfied us that orphans and friendless children are always and necessarily juvenile delinquents, or blind, or deaf and dumb. The act of 1871 gave the money to the Shepherd's Fold for its "own purposes and objects;" and those purposes and objects are not such as the constitution excepts from its inhibition.

There has not been, therefore, any constitutional warrant for the imposition of this tax upon the City and County of New York since the amendment to the constitution, which took effect on the first of January, 1875. Since that time, nevertheless, the local authorities of the city and county have gone on, year after year, in 1875, in 1876, and in 1877, to levy and collect the tax in conformity with the requirements of the act of 1871; and the question to be decided, is, what is to become of the money so collected? If the Shepherd's Fold should attempt to compel the levying and collection of the tax, it would fail, because there is no valid law which gives it a right to the money, and of course there would be no remedy, if the supervisors should obey the constitution, and refuse to carry the act of 1871 into execution. But as the supervisors have levied and collected the tax, and as they have the money in their hands—money which they collected solely for the use and benefit of the Shepherd's Fold,—have they now the right to call in question the title of that institution to the money?

I think they have that right. The city authorities are not in the position of agents who have received money belonging to their principal with instructions to apply it to a particular purpose. If they were so situated, they could not question the right of the person, to whom the principal had ordered the

money to be paid. All the cases on which the Shepherd's Fold relies; *Ross* v. *Curtiss* (31 N. Y. 606); *Murdock* v. *Aikin* (29 Barb. 59); *People* v. *Brown* (55 N. Y. 180); and *First National Bank* v. *Wheeler* (72 N. Y. 201); were decided upon the principle that an agent or trustee receiving money to be paid over to a cestui que trust, is not to be permitted to dispute the right of the party for whose benefit he received it.

But those decisions are inapplicable to the facts of this case. The amendment to the constitution which took effect on the first of January, 1875, annulled, as I have said, the act of 1871. From that time, the state did not order the tax to be levied or collected. The tax was unlawful. The supervisors had no right to levy it. The state had no right to require the supervisors to collect it. The money, when collected, did not belong to the state. The Shepherd's Fold was no longer the beneficiary of the state, for the constitution forbade the state to be its benefactor. As there was no authority for the levying or the collection of the tax, so there was no way in which the Shepherd's Fold could acquire a right to the money. The statute which originally created its right was repealed before the tax for 1875, or for the following years, was levied. The Shepherd's Fold, therefore, was not the cestui que trust for whose benefit the city officers received the money.

The Shepherd's Fold claims the money because, under a statute which had been repealed before the money was collected, it would have had a right to the money. The argument is, that the city officers were agents of the state, in levying and collecting the money, and being such agents, they cannot question the orders of their principal. The answer is, that the state was not the principal, that it gave no orders to levy and collect this tax; that the city officers were acting unlawfully in making the levy; that the Shepherd's Fold was not, after January 1st, 1875, the beneficiary of the state; that the money did not belong to the state, having been collected without its authority; that the city's officers, or the city itself, did not occupy the position of a disbursing agent; and, therefore, the city is not estopped from disputing the right of the Shepherd's Fold to the money. The case is this; A. unlawfully

collects money for the avowed purpose of paying it to B., to whom it does not belong; can B. recover from A. the money so collected? The answer is, that B. cannot recover.

The judgment dismissing the complaint as to the claim for the years 1875, 1876, 1878, and 1879, is affirmed. The judgment in favor of the plaintiff for the tax of 1877 is reversed, with costs to the defendant. There must be a new trial as to the claim for the tax of 1877.

J. F. Daly, J.—When the moneys claimed in this action were raised by tax in this city in 1875 and subsequent years, the act of the Legislature, under which the city officers proceeded to levy such taxes (L. 1871, c. 269), had been, in effect, annulled by the new provision of the state constitution which took effect January 1st, 1875, and has been ever since in force. The provision in question declares that neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking; but the legislature is not prohibited from making provision for the education and support of the blind, the deaf and dumb and juvenile delinquents. The object of the Shepherd's Fold does not embrace any of the purposes enumerated, and the annual donation to that corporation of $5,000, under the above mentioned act of 1871, is a gift of state money which the new constitution expressly prohibited. The moneys for the purpose raised by the city officials in 1875, and afterwards, were not only levied and collected without authority of law, but in direct violation of it. This distinguishes the case from *First National Bank* v. *Wheeler* (72 N. Y. 201); *People ex rel. Martin* v. *Brown* (55 N. Y. 180) and *Ross* v. *Curtiss* (31 N. Y. 606); holding that town officers, who have collected and who hold moneys raised by tax under valid subsisting statutory enactments imperatively requiring them to collect and pay over such moneys to the holders of town securities or contracts, for interest or principal due thereon, cannot set up against such holders the invalidity of their securities or contracts. In this case the Shepherd's Fold has no contract to enforce, and no claim nor cause of action except that which grows directly out

of a statute which is abrogated and out of the levying and collecting of the tax by the municipal officers; and that proceeding being without authority, no legal demand accrues to plaintiff from it. The judgment in favor of plaintiffs should be reversed, and a new trial ordered with costs to abide event.

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

THE THIRD AVENUE RAILROAD COMPANY, Appellant, *against* JACOB EBLING *et al.*, Respondents.

(Decided January 4th, 1882.)

Upon trial by jury of an action in the Marine Court of the City of New York, at which exceptions were taken by both parties, the jury found a general verdict for the defendants; but the justice presiding subsequently, on motion of the plaintiff, ordered a verdict for the plaintiff, and that judgment be entered in favor of the plaintiff, and exceptions be heard in the first instance at the general term. *Held*, that such order and judgment were properly reversed by the general term of the Marine Court; but that a further direction of the general term that judgment be entered in favor of the defendants on the issues joined in the action, in accordance with the verdict of the jury, was erroneous, and that from the judgment so entered an appeal could be taken to this court, upon which such judgment and so much of the order of the general term as directed it must be reversed.

APPEAL from a judgment of the general term of the Marine Court of the City of New York, and from an order of said general term vacating an order of that court which directed a verdict and the entry of judgment thereon, and ordering the entry of the judgment also appealed from.

The facts are stated in the opinion.

H. Morrison, for appellant.

Hall & Blandy, for respondents.

J. F. Daly, J.—The trial of this action was had in the Marine Court on January 28th, 1881, and the jury on that day rendered a general verdict for defendants. The trial justice afterwards, on February 2d, 1881, entertained a motion on the part of the plaintiff for judgment in his favor, and on February 8th, 1881, made an order that there be a verdict for the plaintiff and a judgment be entered in his favor for $358.25 damages and costs, and that exceptions be heard in the first instance at the general term, and that all proceedings be stayed in the meantime except entry of judgment. Judgment was entered on this order by plaintiffs on February 9th, 1881, for $358.25.

The general term of the Marine Court held this order and the judgment entered thereon to be unauthorized and reversed them, but also ordered that judgment should be entered in the action in favor of defendants upon the issues formed in the action, in accordance with the verdict of the jury; and judgment was accordingly entered by defendants. From this order and judgment of the general term the plaintiff appeals to this court.

The action of the general term reversing the order of the trial justice directing a verdict for plaintiff, after the jury had rendered a general verdict for the defendants, and reversing the judgment entered on said order, was proper, but it was error to go further and direct a judgment for defendants upon the issues in the action, for this became in effect a decision of the general term upon the whole case, and the judgment entered in accordance with that order was a judgment of the general term. The plaintiff who was aggrieved by the verdict of the jury was thus cut off from obtaining a review of the facts, and of his exceptions, by the decision of the general term upon the case and exceptions made by the defendants, and as this judgment of the general term was final he had his appeal to this court. Had the general term merely reversed the order of the trial justice and the plaintiff's judgment entered thereon, the defendants could have entered their judgment on their verdict, and the plaintiff could have then appealed, but the general term went further and ordered judgment upon the issues against him.

We must reverse so much of the judgment of the general term and so much of its order as orders judgment for defendants, leaving defendants to enter their judgment on the verdict of the trial term, from which plaintiff may have an appeal and a review by the general term of the Marine Court. As plaintiffs appeal from the whole of the order and judgment of the general term, and the order is reversed in part only, no costs of this appeal will be allowed.

Van Hoesen, J., concurred.

Judgment in favor of the defendants reversed, with so much of the order of the general term of the Marine Court as directed final judgment for defendants; and so much of that order as reversed the order of the special term, affirmed.

Albert C. Thorne, Respondent, *against* Solomon Turck, Appellant.

(Decided January 4th, 1882.)

A complaint contained two causes of action, the first for false imprisonment and the second for malicious prosecution, both founded upon the same facts. At the trial, a motion to dismiss the second cause of action was denied, and both were submitted to the jury, who found for the plaintiff on the first and for the defendant on the second. *Held*, that there was no ground for complaint by the defendant for the denial of the motion to dismiss.

Money was obtained from the defendant, an officer of a company, by a person representing that the works of the company had been destroyed by an explosion, and that he had been sent as a messenger to defendant by the manager at the works, who had neglected to supply him with money for his expenses. Afterwards, the defendant, having learned that no such explosion had occurred, and being told by the manager that the description of the pretended messenger was exactly the plaintiff's, procured the arrest of the plaintiff therefor, without a warrant, by a police officer; but after the plaintiff had been imprisoned three days, doubt arising as to his identity with the person who obtained the money, the defendant consented that he be discharged, and he was discharged

accordingly. *Held*, that to an action for false imprisonment for such arrest of the plaintiff, reasonable grounds or probable cause therefor was not a defense; as the offense for which plaintiff was arrested was the obtaining of property by false pretenses, which is not a felony either at common law or by statute.

The jury found a verdict for plaintiff for $1,500 damages for such false imprisonment. *Held*, that, under the circumstances of the case, this amount was not so excessive as to require a reversal of the judgment.

Appeal from a judgment of this court entered upon the verdict of a jury, and from an order denying a motion for a new trial.

In the evening of October 29th, 1880, a person called at the defendant's residence in this city, stating that there had been an accidental explosion at the Repauno Chemical Works, in New Jersey, whereof the defendant was a director; that he had been sent as messenger by one Appollonio, the manager, who in the excitement of the moment had neglected to provide him with money for expenses; and upon his request defendant gave him five dollars. On November 1st, the defendant received a telegram from Appollonio, saying no accident had occurred. The following day, Appollonio came to New York, and informed defendant, after hearing a description of the person, that it was exactly the plaintiff's. On November 3rd, the plaintiff was arrested by a detective, without a warrant, and at defendant's request. He was confined at the police station, until November 6th, when he was discharged, without any examination. The Police Court record is "Dis. on the evidence as there was a mistake in the identity," which was signed by defendant. This result came from the statement of a fellow clerk of the plaintiff, in the employ of Williams, Black & Co., that at the time when the interview was had by defendant, at his residence, with the pretended messenger, the plaintiff was at work in the firm's office.

The action was brought for two causes, false imprisonment and malicious prosecution. On the trial, the jury found for the plaintiff for fifteen hundred dollars damages on the first cause of action, and found for the defendant on the second. The defendant moved for a new trial on the minutes, upon

the ground, among others, of excessive damages. The motion was denied, and judgment in favor of the plaintiff was entered on the verdict. From the judgment and the order denying his motion for a new trial the defendant appealed.

Chambers, Boughton & Prentiss, for appellant.

Hall & Blandy, for respondent.

Beach, J.—[After stating the facts as above.]—Under the circumstances, there is no ground for complaint by the defendant, from the refusal of the learned judge at trial term, to dismiss the complaint, as to the second cause of action. That was for malicious prosecution, and the jury found for the defendant. It was so distinct from and independent of the first ground of complaint, that the defendant could not have been prejudiced by its submission to the jury, if erroneous, or aided by its dismissal, had such course been proper. Under the ruling of the court, the jury were called upon only to assess the plaintiff's damages by reason of the false imprisonment, and could not have been affected in the performance of the simple duty, by any disposition made of the motion to dismiss the second cause of action.

The question presented by the other branch of the case is of more difficulty. The learned judge in the court below held the offense, from which the defendant suffered, and for which the plaintiff was arrested, not to have been a felony. By this disposition the issue of reasonable grounds existing for the defendant to have the plaintiff arrested was eliminated from the case, and the jury had but to assess the plaintiff's damages. To make reasonable grounds or probable cause a defense, it was needful a felony should have actually been committed.

I think the offense charged upon the plaintiff was the obtaining of property by false pretenses, and was not a larceny. The distinction between the two, is, in the first, the person intends to part with his title, and does not, in the second. The cases hold that where by trick or artifice the owner is induced to part with possession of property for a special

purpose, to one who receives the same *animo furandi*, the owner still intending to retain the right of property, its appropriation by him to his own use is larceny (*Weyman* v. *People*, 4 Hun, 511; *Macino* v. *People*, 12 Hun, 127; *Loomis* v. *People*, 62 N. Y. 322). In these cases, there was a mere parting with the temporary possession of property with clear intention for its specific return or that of its proceeds. This was wanting in the case at bar. The defendant had no idea of a return of the five dollar note, and nothing indicates a design on his part to give the party who received it a temporary possession, looking for its return after some specific purpose was accomplished, and such possession thereby ended. It is urged, the money was given for a specific purpose, to wit, the payment of expenses. This is true, yet still not the specific purpose meant by the adjudications. That is one which attaches to the disposition as indicative of the intention under which delivery is made, as, for instance, a deposit of money for safe keeping, to be returned, or the surrender of goods for exhibition by the receiver to a customer, with an understanding for their return if not sold, or of the proceeds if disposed of. The person to whom the defendant gave the five dollars received title, and could dispose of it as he saw fit. His statement of wishing it to pay expenses was part of the misrepresentation inducing the defendant to pay it over, and not a qualification of the delivery.

The plaintiff was therefore charged with having obtained the money by false pretenses. This offense is not a felony at common law or made so by statute. The statutory definition of that term is restricted in terms to its use in the statute. This question was distinctly passed upon by the court of last resort in *Fassett* v. *Smith* (23 N. Y. 252), and must be considered *res adjudicata*.

The jury rendered a verdict in plaintiff's favor for fifteen hundred dollars. The proof shows him to have been taken from his hotel and confined in the police station from the afternoon of November 3d to the morning of the 6th. At least three times he was taken to and from the court, and though formally discharged, the defendant on this trial testified

to an existing belief of his criminality, while his fellow clerk swore without qualification to his being in his employers' office, at the time the offense was committed. Even under these circumstances I am of opinion that the damages are liberal, but not excessive, in the light of having been awarded under an effect produced by passion, prejudice or other undue influence.

The judgment and order should be affirmed with costs.

Van Hoesen, J.—The defendant was not prompted by malice. He acted upon information on which he had a right to rely; and conceding that that information was incorrect, he should not have been mulcted in exemplary damages. Compensation should have been awarded to the plaintiff, but nothing more. I hardly think the damages were estimated on that principle. There is, I apprehend, some reason to believe that the jury were induced to punish Turck for what he did. As I am not able to say with certainty, however, that the verdict was *grossly* excessive, or the result of passion or prejudice, I shall concur in the conclusion stated by Judge Beach (*Leeman* v. *Allen*, 2 Wils. 160; *Edgell* v. *Francis*, 1 Mann. & G. 222; *Creed* v. *Fisher*, 9 Exch. 472).

Judgment and order affirmed, with costs.

John F. Wallace *et al.*, Respondents, *against* Michael Feely *et al.*: Daniel Daly, Appellant.

(Decided January 4th, 1882.)

Section 1678 of the Code of Civil Procedure, regulating foreclosure sales, prescribes only a rule of proceeding, to render available the judgment of foreclosure; and therefore the amendment of 1881 (L. 1881, c. 682) allowing two or more buildings situated on the same city lot to be sold together, is effectual, pursuant to its provisions, to render valid sales, previously made which would be lawful according to its terms.

Wallace *v.* Feely.

Appeal from an order of this court denying a motion by a purchaser at a foreclosure sale to be relieved from his purchase.

The facts are stated in the opinion.

David McClure, for appellant.

William B. Putney, for respondents.

Beach, J.—The petitioner moved in the court below to be relieved of his purchase, made at a foreclosure sale, of premises in this city, consisting of three distinct buildings on one city lot, because sold in one parcel. The relief was denied, and the petitioner appealed from the order. The minor objections to the title seem to have been readily cured, leaving only for consideration, the one relating to the sale of the premises in gross. Subsequent thereto, the legislature passed an act, approved July 26th, 1881, amending section 1678 of the Code of Civil Procedure, declaring valid any sales theretofore made, which would be lawful according to the terms of the act.

The question here may therefore be disposed of under this legislation, if effectual, without deciding upon the regularity of the sale. The section of the code prescribes only a rule of proceeding, to render available the judgment of foreclosure (*Cunningham* v. *Cassidy*, 17 N. Y. 276). Although this rule may have been violated by the mode of sale, I am of opinion the legislature had power to validate the proceeding. The principle has thus been stated: "where a court or its officers, in a case of which the court has full jurisdiction, have failed to observe strictly the rules of procedure, which are prescribed for the orderly conduct of affairs, and in consequence thereof, a party who was in no way injured by the irregularity, is nevertheless in position to take advantage of the error to avoid the proceedings, it is often not only just, but highly proper, that the legislature should interfere and cure the defect by validating the proceedings" (2 Story on the Constitution, 674; *Matter of Palmer*, 40 N. Y. 561; *Chandler* v. *Northrop*, 24 Barb. 129).

The order should be affirmed, with costs.

VAN HOESEN, J.—Section 1678 of the Code, as it now reads, expressly provides that "two or more buildings situated on the same city lot may be sold together." It further provides that any sale, made prior to the passage of the act amending section 1678, should be valid, if it would be lawful if it had been made subsequently to the passage of the act.

I agree with Judge BEACH, that the act referred to validated the sale from which the purchaser asks to be relieved.

The order should be affirmed with costs.

Order affirmed, with costs.

JOHN S. BEAUFORD, Respondent, *against* THOMAS A. PATTESON, Appellant.

(Decided February 6th, 1882.)

Where a promissory note is given in renewal of a previous note of the maker, held by the payee, on the agreement by the payee to return the previous note to the maker, cancelled, and such previous note is not in fact so returned, no action can be maintained by the payee against the maker upon the new note.

APPEAL from a judgment of the general term of the Marine Court of the City of New York affirming a judgment of that court entered upon a verdict rendered by direction of the court.

The facts are stated in the opinion.

John M. Bowers, for appellant.

L. Laflin Kellogg, for respondent.

VAN BRUNT, P. J.—In May, 1876, the plaintiff claimed to be the holder of an obligation made by the defendant for £125 sterling, which was then due, and obtained from the defendant his two promissory notes of the date of May 12th,

1876, in settlement of said obligation, and the contract between the parties was evidenced by the following receipt:—

"New York, May 12th, 1876.

Received of Thomas A. Patteson, his two notes of this date, at nine and ten months after date, for three hundred and forty-three $\frac{75}{100}$ each in settlement of his obligation for £125 (one hundred and twenty-five pounds sterling), which I hold in England, and which I agree to return to him cancelled.

[Signed,] J. S. Beauford & Co.,
In Liq."

The plaintiff failed to return the obligation for £125 to the defendant, and brought suit in the Marine Court upon one of the notes above mentioned, the same not having been paid at maturity. It appeared upon the trial of the cause that at the time the notes were given the plaintiff had reason to believe that the obligation for £125 was lost, or mislaid, or destroyed. Evidence was also received without objection upon the part of the plaintiff that the undertaking to return depended upon the finding of the original note by the plaintiff upon his return home. The court upon the trial directed a verdict for the plaintiff, and refused to submit any questions to the jury, to which direction an exception was duly taken by the defendant. Upon appeal to the general term of the Marine Court the judgment was affirmed, and from such judgment of affirmance an appeal was taken to this court.

The identical question involved in this appeal has been decided by the general term of this court in the case of *Miller* v. *Ritz* (3 E. D. Smith, 253); and in the opinion of the court in that case the question is discussed upon a basis which in our judgment shows that a recovery cannot be had under the circumstances in this case.

It is true that in the case of *Catlin* v. *Hansen* (1 Duer, 310), the same question was decided differently; but it is to be observed that the court in their opinion base their conclusion upon other questions, and other circumstances which in no way relate to this question, and in consequence of the conclusion which they arrived at upon the other questions this point was of no

importance in the determining of the case; and it appears from the opinions of the court in that case that the statement which is in contradiction to the decision of the general term of this court is a mere *dictum*, it not being considered by the other justices composing the general term, both of whom wrote opinions; and the opinion containing that *dictum* nowhere considers the points which are so ably presented by Judge Woodruff in support of the conclusion at which he had arrived in the case of *Miller* v. *Ritz*.

There is, however, another view of this case, which is not considered by either of the opinions above mentioned. The receipt was the contract between the parties, and although it is claimed that the agreements were not mutual or conditional, yet it is a familiar rule of law that one party to a contract can compel another to perform his part of the contract; but he must show that he has performed all its conditions upon his part. In this case the plaintiff by his contract having agreed to return this note, and although he failed so to do, seeks to call upon the defendant to do that which he promised to do as part and parcel of the same agreement.

It is urged that the loss of the note releases the plaintiff in this action from a performance. That might have been true if such loss had occurred subsequent to the making of his contract which is evidenced by the receipt of May 12th, 1876. But if, knowing that that note was lost, for the purpose of getting these new notes, he agreed to return the old, he was guilty of a fraud, and he should not be allowed to recover even if the contract contained in the receipt did not express the true intent of the parties; but the agreement was that the note should be returned if it could be found. That was a question which should have been submitted to the jury.

It is urged that the obligation for £125 is outlawed, and for that reason the failure to return that obligation cannot be a defense. It is true that such obligation is outlawed as long as the defendant remains in the City of New York, but if he is served with process in an action commenced in another state or country the Statute of Limitation of the state of New York will not aid him to defeat a recovery: and if that note should

turn up in the hands of some holder who had acquired it prior to the giving of these new notes, he would be required to pay it over again notwithstanding he should pay the amount of this judgment. Therefore, it would seem, both upon principle and authority, that no recovery could be had if the receipt expressed the contract between the parties; and consequently, that if it did not express the contract between the parties, the defendant had the right to go to the jury upon the evidence as to what the true contract between the parties was.

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

Beach, J., concurred.

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

Henry Brenstein, Respondent, *against* Morris Mattson, Appellant.

(Decided February 6th, 1882.)

In an action to recover damages for personal injuries sustained by the plaintiff, by falling down a hoistway in the building where he was employed by the defendant, it appeared on the trial that the hoistway was in an enclosure with doors opening outward on hinges, but without any railing around it; that the plaintiff knew of the existence of the hoistway, and that it was used daily for hoisting goods; that between twelve and one o'clock of the day he was injured he had seen that the hoistway was closed; and that at about four o'clock in the afternoon of that day, running, in the course of his employment, to answer, through the hoistway, a call from the loft above, not looking to see whether it was open or closed, but looking up instead of down, the doors being open, he slipped and fell through the opening, and so received the injuries for which the action was brought. *Held*, that there was no evidence of ordinary care and caution on the part of the plaintiff sufficient to sustain a verdict in his favor.

Appeal from a judgment of this court entered upon the verdict of a jury, and from an order denying a motion for a new trial.

In September, 1879, the plaintiff in this action was in the employ of the defendant at No. 8 College Place, and was at the time about 15 years of age. Several lofts of the building seem to have been occupied by the defendant.

The place at which the plaintiff usually worked was on the second loft; and on the day in question, very near four o'clock in the afternoon, he was sent down from the second loft to the first loft with some work, and there saw a Mr. Burton, another employe of the defendant. There was a hoistway upon these premises running through the various lofts, by which the defendant was accustomed to hoist goods in his business, which hoistway was used daily. After the plaintiff had delivered this work to Mr. Burton, he started to go up-stairs again, and just as he had gotten hold of the bannisters there was a ring from the floor above, and Mr. Burton said to him, "just run to the hoist and answer the bell; see what it is." He ran to the hoist, and he testifies that when he got there he looked up and slipped and fell down. The hoist appears to have been enclosed in an enclosure having doors which swung open upon hinges, but had no railing around it.

At the time of this accident the doors were open and they were bringing in certain goods upon the lower floor which were to be hoisted up through the hoistway. The plaintiff, however, testified that he did not know that the hoist was open and that he supposed it was closed because he had seen it closed between twelve and one o'clock of the day; and he further testified that he was accustomed to look down through the hoistway from the story which he occupied, and that that was the reason that he happened to see that it was closed. A verdict of the jury in favor of the plaintiff having been rendered, from the judgment thereupon entered this appeal is taken.

Wm. F. Macrae, for appellant.

Christopher Fine, for respondent.

Van Brunt, P. J.—[After stating the facts as above.]—The only question to be considered here is, has the plaintiff

shown, by a preponderance of evidence, that he was not guilty of any negligence which in the slightest degree contributed to the happening of the accident? for we must assume for the purpose of the decision of this appeal that the failure of the defendant to comply with the statute in reference to the protection of hoistways, is proof of his negligence. It is not sufficient that the plaintiff should prove facts from which either the conclusion of negligence, or the absence of negligence, may with equal fairness be drawn; but the burden is upon the plaintiff to prove that there was no contributory negligence upon his part. This proposition is sustained by the case of *Hart* v. *Hudson River Bridge Co.* (84 N. Y. 56), and is but a re-statement of the decisions of the Court of Appeals in previous cases upon this identical point.

In the case of *Hale* v. *Smith* (78 N. Y. 483), it is held that in cases where contributory negligence may be claimed, it is incumbent upon the plaintiff to satisfy the jury by a preponderance of proof, and it is said that the absence of contributory negligence is part of the plaintiff's case, and the burden of satisfying the jury upon that point rests upon him. Where there is no proof either way upon that subject, the jury cannot find that the plaintiff has established that he has not been guilty of contributory negligence; and the same is true where the evidence renders it uncertain in regard to that subject.

Now what evidence is there in the plaintiff's case going to show that he was not guilty of contributory negligence? What care or caution did he exercise in approaching this hoistway? He knew that the hoistway was there; he had been accustomed to see it; and although the proof is not positive upon that point, the fair inference to be drawn therefrom is that he knew that the hoistway was used for the hoisting of goods; and yet, because he had seen the hoistway closed, between twelve and one o'clock, at four o'clock he rushes to it without looking to see whether it is open or closed, and looking up instead of looking down to see where he was going, he walks right into the hoistway and falls down.

It is difficult to see where ordinary prudence or caution was exercised under such circumstances. We are not at all

left in doubt as to what the inference to be drawn from such circumstances is. In the case in 52 N. Y. (*Totten* v. *Phipps*), the party injured was the occupant of the upper lofts of the building, the first floor of which was occupied by the defendants, in the hall-way of which was a trap-door which went across almost the entire hall-way. This door the defendants had been accustomed to keep shut during the night. The party injured having had occasion to go after nine o'clock to his lofts, entered the hall-way in the dark, and the hoistway being opened he walked into it and fell. The court held in that case that, as matter of law, he was not guilty of negligence because, although he knew the hoistway was there, yet, knowing that it was the custom to close the hoistway at night, he had a right to assume that the hallway was in a fit condition for passage at the time at which he entered; and that if the deceased had walked into the opening in daylight, he would have been chargeable with negligence within the rule, because the ordinary use of his senses would have prevented it, and he would have been at fault. Applying this principle to the case now before the court, it is clear that if the plaintiff had used his senses and looked to see whether this hoistway was open, he could have avoided the accident, because the evidence shows that the accident occurred because of the assumption upon the part of the plaintiff that the hoistway was closed; and the counsel for the plaintiff seems to have laid great stress upon the establishment of the proposition that he had seen the hoistway closed between twelve and one o'clock of the day upon which he was injured.

I have been unable to find any evidence of ordinary care or caution upon the part of the plaintiff in approaching this hoistway; and as the jury had no right without evidence to infer that he had used ordinary care and prudence, their verdict for the want of such proof must necessarily be set aside.

We are of the opinion, therefore, that the case contains no preponderance of evidence going to show, but that if the plaintiff had exercised ordinary care and caution, and had not assumed that the hoistway was closed, instead of looking to

see whether it was open or not, no accident would have occurred. The judgment must therefore be reversed, and a new trial ordered, with costs to abide event.

J. F. Daly, J., concurred.

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

Wilson Burling, Respondent, *against* C. Godfrey Gunther, Appellant.

(Decided February 6th, 1882.)

At the trial, in the Marine Court of the City of New York, of an action for services rendered as a broker in procuring a loan of $35,000, the jury, under instructions that if they found for the plaintiff he would be entitled to recover $400, the amount alleged to have been agreed upon as compensation, found a verdict for him for that sum. *Held*, that, on appeal from the judgment entered on the verdict, it was error for the general term to affirm the judgment upon the plaintiff stipulating to reduce the verdict to $175; as, although the plaintiff's right to commissions was limited to that amount by statute (1 R. S. 709, § 1), the jury had power to award him less, had the question been submitted to them.

Appeal from a judgment of the general term of the Marine Court of the City of New York affirming a judgment of that court entered upon the verdict of a jury, upon a stipulation to reduce the amount of the verdict.

At some date in or prior to August, 1878, the defendant employed Harnett, a real estate broker, to procure a loan of $35,000 for him at six per cent. interest per annum to be secured upon certain real estate in the City of New York. In that month Earle, a clerk for Harnett, applied to the plaintiff's assignor, George H. Burling, to obtain the loan. He succeeded in doing so, and informed the defendant Sep-

tember 4th, 1878. On that date the defendant gave to plaintiff's assignor a writing in these words:

"Brooklyn, Sept. 5th, 1878.

"Mr. GEORGE H. BURLING.

"Dear Sir:

"I am ready to accept your loan on the 5th inst. at one P. M. provided the same has not been taken elsewhere. The commission to be four hundred dollars, and also provided the lawyer's fees can be agreed upon.

"Very truly yours,

"C. GODFREY GUNTHER."

From the evidence this was written September 4th, instead of the 5th, as dated.

The defendant afterwards did nothing. On September 6th, the parties who had accepted the loan withdrew their acceptance, because the papers were not delivered as promised on the 5th, and so notified George H. Burling. This action was brought by Burling's assignee to recover four hundred dollars commissions. There was a contention of fact, upon the trial, over the question of an original employment of George H. Burling by the defendant to procure the loan. The trial in the Marine Court resulted in a verdict for four hundred dollars in plaintiff's favor. The defendant's motion for a new trial upon the minutes was denied, and an appeal taken from the order and judgment entered upon the verdict to the general term of the Marine Court, where the judgment was affirmed upon the plaintiff stipulating to reduce the recovery from four hundred to one hundred and seventy-five dollars. From this decision the defendant appealed to this court.

C. Bainbridge Smith, for appellant.

Charles W. Dayton, for respondent.

BEACH, J.—[After stating the facts as above.]—The questions of fact affecting employment and service seem to

have been settled by the jury in favor of the plaintiff upon conflicting evidence, and the verdict is not against its weight. In such case it is without the province of this court to interfere with the action of the tribunal to which parties are remitted by law, for the settlement of those contentions.

The general term of the Marine Court, however, exceeded its authority by directing an affirmance, should the plaintiff stipulate to reduce the recovery to one hundred and seventy-five dollars. The statute limits the plaintiff's right to that amount, but the jury had power to award him less (2 R. S. 6th ed. p. 1005, § 1). The case was given to them under an absolute instruction to allow him four hundred dollars, in case they found in his favor upon other questions. In my opinion, the general term of the Marine Court by its action has usurped the functions of a jury in fixing absolutely the *quantum* of plaintiff's recovery at the statutory limit. No adjudication in the books upholds so broad a construction of the powers given an appellate court, to reverse, affirm or modify a judgment. In *Sears* v. *Conover* (3 Keyes, 113), the action was to recover damages for a breach of contract to sell and deliver potatoes at a certain price. The jury gave a verdict for five hundred dollars, which was reduced by the general term to three hundred dollars, and so affirmed by the Court of Appeals. There is nothing in the report of the case, to show what evidence was given upon the subject of damages, or indicating of what items the original sum consisted. The learned judge who wrote the opinion held the court possessed of power on a motion for a new trial to refuse to set aside the verdict, if the parties would consent to deduct any amount deemed excessive. The case may have been one, where the elements of damage established by the proofs, were such as to enable the court to reach a conclusion upon the sum to which the plaintiff had shown a clear or absolute right. In *Cook* v. *Phillips* (56 N. Y. 310), the judgment on the percentage agreed upon was wholly reversed by the general term, and the Court of Appeals held the limit of the statute applicable, and affirmed the reversal giving judgment absolute against plaintiff by virtue of his stipulation. The opinion

stated that the plaintiff was entitled to no more than fifty dollars upon a loan of ten thousand, and "*if he could have recovered that sum*," it was waived by the stipulation. Nothing in the case supports the action here. In *Moffet* v. *Sackett* (18 N. Y. 522), the general term reduced a judgment for goods sold and work done, by deducting $12 damages caused by unskillful work. The referee had refused its allowance, but found it to have been from $12 to $15. The court held there was no authority to determine the amount of unsettled damages, and where the amount was indefinite and uncertain, so doing was an assumption of the jury's province. In other cases either this principle is stated, or the facts show the reduction to have been made of amounts settled in the trial court, and in one, where interest was mistakenly computed (*Brownell* v. *Winnie*, 29 N. Y. 400; *Hayden* v. *Florence Sewing Machine Co.*, 54 N. Y. 221; *Cuff* v. *Dorland*, 57 N. Y. 560; *Whitehead* v. *Kennedy*, 69 N. Y. 462).

In the case at bar, neither the plaintiff's right, nor the defendant's liability, with reference to amount, has ever been passed upon by the tribunal wherein such issues are settled. It appears the jury were misled by an erroneous instruction, and the general term of the Marine Court endeavored, instead of ordering a new trial, to adjudicate what the plaintiff was entitled to. This was beyond their power, the needed facts not having been found on the trial.

The judgment should be reversed, and a new trial ordered with costs to abide event.

Van Brunt, P. J., concurred.

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

LEWIS S. CHASE, Respondent, *against* HENRY F. BEHRMAN, Appellant.

(Decided February 6th, 1882.)

An instrument in writing, made and delivered by the defendant to the plaintiff, by which the former promises to pay to the order of the latter "seven dollars monthly in the following manner, to wit, seven dollars five days after date, and seven dollars on the first day of each succeeding month for twelve months from date, for the privilege of advertising purposes" of a nature and extent particularly specified, "for the term of one year from date," is a promissory note; and may therefore be pleaded, in an action upon it, as "an instrument for the payment of money only" within section 534 of the Code of Civil Procedure.

APPEAL from a judgment of the general term of the Marine Court of the City of New York reversing a judgment of that court which sustained a demurrer to a complaint, and overruling the demurrer.

The defendant made and delivered to the plaintiff an instrument in these words:

"$84.00. "New York, Dec. 1st, 1879.

"I promise to pay to the order of L. S. Chase, manager, seven dollars monthly in the following manner, to wit, seven dollars five days after date, and seven dollars on the first day of each succeeding month for twelve months from date, for the privilege of advertising purposes of one panel each 7x22 inches in twenty cars of the Second Avenue Railroad Company in the City of New York for the term of one year from date.

[Signed] "H. F. BEHRMAN."

The plaintiff declared upon this writing as a promissory note, alleging eighty-four dollars with interest to be due thereon. The defendant demurred to the complaint for not stating facts sufficient to constitute a cause of action. Judgment was

given in defendant's favor upon the demurrer at the special term of the Marine Court, with leave to the plaintiff to amend. No amendment was made, the plaintiff appealing from the judgment to the general term of the Marine Court, wherein the judgment was reversed, with leave to the defendant to plead over. This not being done, judgment was entered in plaintiff's favor, from which the defendant appealed to this court.

James C. Sheffield, for appellant.

John B. Leavitt, for respondent.

Beach, J.—[After stating the facts as above.]—A promissory note is "a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money, at a time specified therein." The writing sued upon is certainly just that and nothing more. The clause expressing a consideration for the defendant's undertaking in no way qualifies his promise, or renders it otherwise than absolute and unconditional. If, instead of those words, it had said "for a horse," or "for value received," the contract would be unchanged. The instrument contains no undertaking by the payee to do anything whatever. In *Considerant* v. *Brisbane* (14 How. Pr. 487), which may be taken as a specimen authority among those relied on by the learned counsel for the appellant, the promise to pay was, in law, conditional upon the receipt of stock, whereby the instrument lacked a necessary characteristic of promissory notes. In *Grant* v. *Johnson* (5 N. Y. 247), the decision was founded upon the first rule stated by Sergeant Williams in his note to *Pordage* v. *Cole* (1 Saund. 320 b), in these words: "when a day is appointed for the payment of money, and the day is to happen after the thing which is the consideration to be performed, no action for the money can be sustained without averring performance." The defendant by the agreement was to pay a second installment of the purchase price of land at a day subsequent to the one whereon the plaintiff was to deliver the deed. I can see no applicability in the case to the

one at bar. There is no covenant upon the part of the plaintiff here to furnish the panels, and the payment by the defendant of the money is neither in terms nor by law made dependent upon his so doing. The advertising privilege is the consideration expressed, but failure therein is only matter of defense. Promissory notes are presumed to be founded upon a valuable and valid consideration, and its absence, by virtue of this legal presumption, is a defense to be pleaded by answer.

The disposition by the court of an issue made on demurrer is the trial of an issue of law. The successful party is entitled to the costs given in such event. Under the present practice, no appeal can be taken save from the judgment when entered. If leave to amend or plead over be given, the court may impose payment of the costs, as a condition to the exercise of the leave. The defendant relied upon his legal position for a defense, and judgment has passed against him. This he might have prevented, by availing himself of the leave given by the court below, which he declined to do.

The judgment should be affirmed, with costs.

Van Brunt, P. J., concurred.

Judgment affirmed, with costs.

Thomas Cochran *et al.*, Respondents, *against* George H. Kennedy, Appellant.

(Decided February 6th, 1882.)

By an instrument under seal the defendant guaranteed to C. M. & Co. "the due and punctual payment at maturity of all purchases made of them" by S. for Y. & H., not to exceed a specified sum, from a date named, "said purchases to be based upon a credit of
or such other time as may be agreed upon" between C. M. & Co. and S. Various purchases were accordingly made by S. from C. M. & Co.: in

some cases. upon a credit which was fixed at the time of the purchase; in other cases, goods were ordered generally, and, upon a statement of account afterwards, a credit was agreed upon and notes were given for the time thus fixed: and in some cases the notes falling due at the expiration of the first credit were renewed. *Held*, that in cases of renewals, either of notes which fell due, or at the expiration of the term of credit agreed upon, the defendant was released from his liability as guarantor for those purchases.

Appeal from a judgment of this court entered upon the report of a referee, and from an order denying a motion to vacate the report or to refer it back to the referee.

The facts are stated in the opinion.

W. B. Putney, for appellant.

John E. Parsons, for respondent.

Van Brunt, P. J.—This action was founded upon a guarantee made by the defendant and given to the plaintiff in the following language:—

"For and in consideration of the sale and delivery of goods, wares and merchandise and also a further consideration of the sum of one dollar to me in hand paid by Cochran, McLean & Co. of New York, the receipt of which is hereby acknowledged, I hereby guarantee unto them the due and punctual payment at maturity of all purchases made of them by P. R. Sabin, for Younglove & Harrington, of Jackson, Michigan, not to exceed an amount of five thousand dollars ($5,000) from the 16th day of October, 1874, said purchases to be based upon a credit of or such other time as may be agreed upon between said Cochran, McLean & Co. and said P. R. Sabin, and I hereby waive demand of payment as the representative bills fall due them, provided thirty days be allowed for adjusting in the event of any note or account not being paid at maturity. This obligation and guarantee to be

an open and continuous one until revoked by me in writing. Dated at New York, this 16th day of October, 1874.

Witness my hand and seal.

[Signed] GEO. H. KENNEDY. [Seal.]

Witness.

R. ELDER, Jr.,

Notary Public, N. Y. Co."

The complaint alleges the making of the guarantee, the sale and delivery of goods by the plaintiffs to the amount of $5,000 in reliance upon it, payment therefor demanded and not made, and notice thereof given to the defendant. The answer admits the making of the guarantee, denies the sale of the goods upon the faith of the guarantee, and avers that the sellers, without the knowledge and consent of the defendant, changed and extended the time or credit on the sales after they were made; and also claims that a continuous credit was given to an amount in excess of the amount specified in the guarantee. In regard to the last proposition, it is to be observed that by the terms of the guarantee itself it was to be an open and continuous one until revoked by the guarantor, and the reading of the guarantee seems to convey to the mind the idea that the limitation of $5,000 contained in the guarantee was not intended to apply as a limitation to the amount of credit which was to be given to the purchasers of the goods, but rather to restrict the amount of the liability to which the defendant would be liable because of such guarantee. In the cases of *Curtis* v. *Hubbard* (6 Metc. 186), and *Washington Bank* v. *Shurtleff* (4 Metc. 30), language of a similar character received this construction.

The main point, however, which must be considered upon this appeal, is the allegation contained in the answer, that the sellers, without the knowledge and consent of the defendant, changed and extended the time of the credit on the sales after they were made. The terms of the guarantee were, in respect to credit, that the purchases were to be based upon a credit of or such other time as may be agreed

upon between said Cochran, McLean & Co. and said P. R. Sabin.

The language so employed would seem to imply that there should be an agreement as to credit, between Cochran, McLean & Co. and Sabin, in reference to the credit. Such agreement might be, in its nature, a general one applying to all purchases which were made, or it might be an agreement as to credit, made at the time of each individual purchase, or a general agreement might have been arrived at which would apply to all purchases where a special agreement was not entered into varying its terms, but the terms of credit must be fixed; they could not be left indefinite or uncertain.

The language of the guarantee is, "said purchases to be based upon a credit of or such other time as may be agreed upon between Cochran, McLean & Co., and said P. R. Sabin." It would not for a moment be argued that if the blank had been filled in for any definite time, and the clause following had been omitted, but that any variation in the credit from such term would have absolved the guarantor. Now instead of fixing the term of the credit himself with Cochran, McLean & Co., he has authorized that Mr. Sabin shall fix the length of the credit upon which such purchases should be made. This evidently means that they shall agree, either at the time of the purchase, or at some time prior to the purchase, upon a basis of credit, which is to apply to each individual purchase, and as an elementary principle of law, when that time was fixed, neither Mr. Sabin, nor Cochran, McLean & Co., or both, could alter that time of credit without releasing the guarantor. Now, before the signing of this guarantee, some conversation was had between Cochran, McLean & Co. and Sabin in regard to terms of credit. Any agreement which was entered into between Cochran, McLean & Co. and Sabin, if such an agreement had been established prior to the execution of the guarantee, would not be a fixing of the terms of credit within the scope of the guarantee. The agreement between Cochran, McLean & Co. and Sabin, which is to be covered by the guarantee, must have been made after the guarantee and after Mr. Kennedy had clothed Mr. Sabin with that

power and authority. The evidence in this case shows that in some cases goods were sold upon a credit which was fixed at the time of the purchase; in other cases goods were ordered generally and upon a statement of account; after some period a credit was agreed upon, and notes were given for the time which was then fixed. In some cases, upon the falling due of the notes at the expiration of the first credit they seem to have been renewed. The purchases were made under credits fixed in all of these ways. It may possibly be that a course of dealing between Cochran, McLean & Co. and Mr. Sabin might ripen into an agreement between the parties as to terms of credit, and purchases under such circumstances might be covered by the guarantee; but it is clear that in the case of renewals of notes which fell due, or at the expiration of the term of credit agreed upon, the guarantor was released.

It is urged in answer to this proposition that there was some agreement between Sabin and Cochran, McLean & Co. for a renewal of such notes as they could not meet at maturity. I am unable to see how any agreement of that kind was authorized by the terms of the guarantee. The language of the guarantee is explicit that the time of credit must be agreed upon between Sabin and Cochran, McLean & Co.: that means a time certain, definite and fixed, not an uncertain, indefinite period in the dim future. The protection which the having the length of the credit fixed, at the time of the purchase or before the purchase, afforded to the defendant, was that he would have notice at once of any failure upon the part of the purchasers of the goods to pay for the same at maturity, and he would then be put upon his guard, and he might be able to protect himself for the liability at the time incurred.

But, if the construction which is claimed upon the part of the plaintiffs based upon that portion of the guarantee be correct, then the guarantor, no matter how lax the purchasers might be in their payments; no matter how far they might be in arrear; how often they might allow their bills to go to protest; yet if there was an indefinite agreement between Sabin and Cochran, McLean & Co. that these bills should be renewed, the guarantor need have no knowledge of the facts which were

transpiring and which would necessarily excite his suspicion and alarm.

It is urged upon the part of the respondents that the language of the guarantee must be most strictly construed against the guarantor. That might be very true if this guarantee had been drawn up and presented by the guarantor, or the persons for whom he was giving the guarantee, to the plaintiffs in this action, but I fail to see that any such rule of construction applies to a contract drawn up by the plaintiffs and submitted to the defendant for his signature. The language of the case which is referred to upon the respondent's points, that it does not lie in the mouth of the guarantor to say that he may without peril scatter ambiguous words by which the other party is misled to his injury, does not apply to the case at bar. If there is in this case any ambiguity in the guarantee it does not lie at the defendant's door, but must be borne by the plaintiffs—the instrument in question being their own production. But there is no ambiguity in respect to the point which is now under discussion. The guarantee is certain and fixed in its terms, and those terms must be complied with or the guarantor is released. The evidence in this case shows without dispute that notes have been renewed after they were fallen due, that credits have been extended, and certainly to such an extent the guarantor has been released.

We, at first, endeavored to separate the purchases which would come under the rule to which we have called attention and as to which the guarantor was released, from the evidence as it is now presented to the court, with the view of providing for the reduction of the judgment, but it seemed to be impossible to do so; and undoubtedly the parties should be heard upon these particular points before any decision should be rendered thereon.

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

Beach, J., concurred.

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

LEON COOPER, Respondent, *against* JOHN ALLPORT, Appellant.

(Decided February 6th, 1882.)

Where an infant, after a purchase of property by him, claiming the right to rescind the purchase on the ground of his infancy, restores the property to the vendor, and it is accepted by the latter, the infant may recover back money paid by him to the vendor upon the purchase.

APPEAL from the judgment of a district court in the City of New York.

The facts are stated in the opinion.

VAN BRUNT, P. J.—The plaintiff in this action being an infant bought certain property of the defendant for the sum of $250, and paid $100 on account and gave back a mortgage for $150, and entered into possession of the property. Shortly thereafter, claiming that he was an infant, he restored the property to the defendant, who accepted the same, and brought this suit by his guardian to recover the money which he had paid on account. The justice below decided in favor of the plaintiff, and from that judgment this appeal is taken.

It is true that Parsons lays down the rule that "if an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover the money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud." And also that "if the infant pays money on his contract and enjoys the benefit of it, and then avoids it when he becomes of age, he cannot recover back the consideration paid." But it is equally stated by Parsons that "an infant can rescind his purchase and recover the price he paid, only when he is ready to return the thing purchased;" and it is also held "that an infant has a right to avoid an executory contract at any time before it becomes an executed contract."

Although at first sight it may seem somewhat difficult to harmonize these principles, yet in the disposition of this case no difficulty stands in the way. As an infant's executory contract is voidable he has a right to disaffirm. Two persons, whether one is an infant and the other an adult or not, have the right to rescind a contract which had previously been made. Now, according to the evidence in this case, the contract between the infant and the defendant was by both parties rescinded, because the defendant received the property upon the admitted rescission of the infant, and he therefore accepted such rescission, and it is to be concluded from that fact that there was a mutual rescission between the parties. Under those circumstances the party who accepts the rescission is bound to pay over to the party rescinding all which he has received under the contract.

In view of this fact, the defendant having accepted his rescission, he was bound to repay that which he has received under the contract which has been rescinded by the parties.

The judgment of the district court must therefore be affirmed.

Beach, J., concurred.

Judgment affirmed.

James J. Cosgrove, Respondent, *against* Peter Bowe, as Sheriff of the City and County of New York, Appellant.

(Decided February 6th, 1882.)

Under section 158 of the Code of Civil Procedure, a sheriff is liable in an action as for an escape, where a prisoner in his custody under an order of arrest "goes or is at large beyond the liberties of the jail, without the assent of the party at whose instance he is in custody."

A complaint in such an action which merely alleges that the sheriff permitted the prisoner "to go at large, and refused to detain him in his

custody, or to imprison him as required by law and by the said order of arrest," and does not show that the prisoner was at large beyond the liberties of the jail, is insufficient, and a demurrer thereto should be sustained.

It is also ground of demurrer to such a complaint, that it fails to show that the prisoner was indebted to the plaintiff.

APPEAL from an interlocutory judgment of this court overruling a demurrer to a complaint.

The facts are stated in the opinion.

Edward W. Crittenden, for appellant.—From time "whereof the memory of man runneth not to the contrary," the sheriff might discharge the defendant from arrest, *on mesne process*, without bail, if he have him on the return day (3 Blackst. Comm. 290; *Hawkins* v. *Plomer*, 2 Wm. Blackst. 1048; *Atkinson* v. *Matteson*, 2 T. R. 172; *Pariente* v. *Plumbtree*, 2 Bos. & P. 35; *Lewis* v. *Morland*, 2 Barn. & Ald. 56; *Riley* v. *Whittiker*, 49 N. H. 147; *Arnold* v. *Steeves*, 10 Wend. 515; *Stone* v. *Woods*, 5 Johns. 182; *Adams* v. *Freeman*, 9 Johns. 117; 3 Wait Actions and Defenses, 216; 17 Am. Law Reg. 348, &c.; Crocker on Sheriffs, 146, § 335; Id. 287, § 607; Id. 378, § 860). An order of arrest under the Code of Civil Procedure corresponding to the capias ad respondendum of the old practice, the sheriff is not liable unless he fail to take the prisoner on execution against his person. The Code of Civil Procedure recognizes the law on this subject by making the sheriff liable only as bail (Code Civ. Pro. §§ 158, 587, 595, 596, 597). The statutes of the state on this subject have remained substantially the same for many years, and at and before the times of the decisions of some of the cases cited (Code Civ. Pro. §§ 102, 110, 149, 155, 158, 597; see 3 R. S. 6th ed. 725, § 100; Id. 610, § 10; Id. 639, § 115; Id. 719, § 61; Id. 720, § 68; Id 722, §§ 83, 84; Id. 644, § 29). Such being the law, the complaint should have alleged that the sheriff did not have him to answer a judgment (*Sheriff of Nottingham's Case*, Noy, 72).

The complaint does not allege an escape. It does not allege that Bergen was at large beyond the liberties of the jail. Bergen was entitled to be admitted to the liberties of the jail. His being at large within the liberties was not an escape (Code Civ. Pro. §§ 149, 155).

Even if an action on the case lies, before judgment, for an escape on mesne process, against the sheriff, the complaint does not allege any indebtedness of Bergen to the plaintiff. This is a material and traversable allegation, one which the sheriff is entitled to litigate, and of which the mere issuing of an order of arrest is no proof, but at most only a claim which may or may not be well founded (2 Greenleaf Ev. §§ 584, 589; *Rogers* v. *Jones*, 7 Barn. & Cr. 86; *Williams* v. *Griffiths*, 3 Exch. 584; 18 L. J. Exch. 195; *Alexander* v. *Macaulay*, 4 T. R. 611; *Barnes* v. *Keane*, 15 Q. B. 75; 19 L. J. Q. B. 309; *Williams* v. *Mostyn*, 4 Mees. & W. 145). The complaint does not show how the plaintiff was or could be damaged. The gist of the action is not the neglect of the sheriff, but the damage of the plaintiff (Code Civ. Pro. § 102; *Planck* v. *Anderson*, 5 T. R. 17).

The words in the complaint "in violation of his duty as such sheriff," is not pleading a fact, but a mere conclusion of law (*City of Buffalo* v. *Holloway*, 7 N. Y. 493; *Taylor* v. *Atlantic Mut. Ins. Co.*, 2 Bosw. 106; *Hatch* v. *Peet*, 23 Barb. 575; *Ensign* v. *Sherman*, 12 How. Pr. 35; *Schenck* v. *Naylor*, 2 Duer, 675).

Wm. P. Mulry, for respondent.—It is not necessary in this complaint, seeing that the action is brought for voluntary escape under mesne process, viz., on an order of arrest, to set up that a judgment was obtained and execution against property and person returned unsatisfied, as the sheriff is liable for an escape under mesne process, and an action on the case is still the only remedy (*Barnes* v. *Willett*, 35 Barb. 514; *S. C.*, 12 Abb. Pr. 448; *Planck* v. *Anderson*, 5 T. R. 37; Code Civ. Pro. §§ 102, 385). It has been held that the remedy under section 201 of the Code of Procedure, or sections 587, 565, 597 of the Code of Civil Procedure, *i. e.*, that a sheriff can be

sued for bail on an escape, was distinct from the old remedy by action, which was recognized and retained under section 94 of the Code of Procedure, known in the Code of Civil Procedure as section 385 (*Smith* v. *Knapp*, 30 N. Y. 581; *Levy* v. *Nicholas*, 10 Abb. Pr. 282; *Metcalf* v. *Stryker*, 31 Barb. 62, 65, 66; *Daguerre* v. *Orser*, 3 Abb. Pr. 86; *Van Slyck* v. *Hogeboom*, 6 Johns. 270).

It is an escape, and the sheriff is liable. Every liberty not authorized by law is an escape (*Tell* v. *Allin*, 64 Barb. 568; *Cully* v. *Sampson*, 5 Mass. 310; *Kellogg* v. *Gilbert*, 10 Johns. 220; *Marwell* v. *Barry*, 9 Johns. 234; *S. C.*, 10 Johns. 563; *McElroy* v. *Mancius*, 13 Johns. 121). Permitting defendant to go at large after arrest and before actual commitment is an escape (*Hutchinson* v. *Brady*, 9 N. Y. 208; *Preston* v. *McEntyre*, 12 Johns. 503).

Section 110 of the Code of Civil Procedure, provides that a person arrested by virtue of an order of arrest in an action, must be safely kept in custody until discharged by law. Safe custody means either actual confinement or going at large within the jail limits, upon receipt of a proper bond for the jail liberties (Code Civ. Pro. § 149; *Sartos* v. *Merceques*, 9 How. Pr. 188; *Buckman* v. *Carnley*, Id. 180; *Lockwood* v. *Mercereau*, 6 Abb. Pr. 206; *Metcalf* v. *Stryker*, 31 N. Y. 255). But the complaint alleges that Bergen was permitted to go and did go at large at the voluntary connivance of Bowe, sheriff, out of his custody, and the imprisonment required by law. This is necessarily an implied averment of the fact that he went beyond the liberties, and need not have been pleaded (*Case* v. *Carwell*, 35 N. Y. 385). And every fact impliedly averred may be made the subject of an issue in the same manner as if it were specifically alleged (*Prindle* v. *Caruthers*, 15 N. Y. 425, 429; *Marie* v. *Garrison*, 83 N. Y. 23).

Measure of damages for escape on mesne process, is actual loss sustained by the plaintiff, by reason of escape, and the jury may find such damages as they may think the plaintiff has sustained under all the circumstances (*Patterson* v. *Westervelt*, 17 Wend. 543; *Russell* v. *Turner*, 7 Johns. 188; *Foll* v. *Alvord*, 64 Barb. 568; 2 Dane's Abr. 648–652; *Smith* v. *Knapp*,

30 N. Y. 581, 591; *Metcalf* v. *Stryker*, 31 N. Y. 255; *Bensel* v. *Lynch*, 44 N. Y. 762, or 2 Robt. 448). Here it is alleged that he was put to expense for employment of counsel, &c.

It is not the policy or tendencies of courts operating under a code, to sustain demurrers, unless gross defects are noticeable in complaints (Pomeroy's Remedies and Remedial Rights, 590–591, §§ 548, 549, 550; *Prindle* v. *Caruthers*, 15 N. Y. 425; *Marie* v. *Garrison*, 83 N. Y. 23).

Van Brunt, P. J.—This action was brought to recover damages alleged to have been sustained by the plaintiff, by reason of an escape suffered by the defendant. The complaint alleges that in an action brought in the Marine Court against one Andrew Bergen for wrongfully converting property belonging to the plaintiff, an order was duly made by one of the justices of the court whereby the defendant as sheriff was required to arrest the said Andrew Bergen and hold him to bail in the sum of $1,500; that thereafter the order was duly delivered to the defendant as said sheriff to be executed: that thereafter the said defendant as such sheriff arrested said Bergen pursuant to said order, but in violation of his duty as such sheriff has since voluntarily and before the commencement of this action and without the consent of this plaintiff permitted the said Andrew Bergen to go at large, and refused to detain him in his custody, or to imprison him as required by law and by the said order of arrest, and the said Andrew Bergen then and there and by reason thereof went and was at large without the assent of the plaintiff. That by reason of the premises the plaintiff has been put to great trouble and expense in claiming and preserving his rights, and the remedies afforded him by the law in his said action against the said Andrew Bergen, and the securities of the law so afforded him therein, and in the employment of attorney and counsel in and about the preserving and enforcement of his rights and remedies and otherwise to his damage of two thousand dollars.

The defendant in this action demurs to this complaint upon the ground that it appears upon the face thereof that

the complaint does not state facts sufficient to constitute a cause of action.

This demurrer was overruled, and from the judgment thereupon entered this appeal is taken.

The appellant claims (1) That no action can be maintained for an escape where the prisoner is held upon *mesne* process;

(2) That the complaint does not allege that Bergen was at large beyond the liberties of the jail; and,

(3) That the complaint does not allege any indebtedness of Bergen to the plaintiff. Other grounds were urged which it is not necessary, however, now to mention.

That the first ground is not well taken seems to be established by section 158 of the Code of Civil Procedure, which provides "where a person in the sheriff's custody goes or is at large beyond the liberties of the jail, without the assent of the party at whose instance he is in custody, the sheriff is answerable therefor in an action against him as follows:

(1) "If the prisoner was in custody by virtue of an order of arrest," and so forth.

This language gives clearly a right of action to the plaintiff to the extent of damages sustained by him, in case, without taking bail, the sheriff allows a prisoner whom he has arrested under an order of arrest to go beyond the liberties of the jail, and the long list of authorities which have been cited by the counsel for the defendant under this proposition, seem to have no application in view of the section in question.

The second point, namely, that the complaint does not allege that Bergen was at large beyond the liberties of the jail, seems to be well taken. There is no allegation whatever that Bergen had been allowed to go beyond the jail limits. It has simply a particular allegation that the sheriff has allowed said Bergen to go at large, and what the plaintiff meant by the allegation "go at large" seems to be defined by the next paragraph of the complaint, where he says "and refused to detain him in his custody or to imprison him as required by law and by the said order of arrest." The whole allegation read together would seem to lead to the conclusion that the party making the allegation in the complaint meant to claim

that the sheriff was bound to retain the defendant Bergen in his physical custody and actually imprison him, or he would be liable as for an escape; and hence he alleged that the said Andrew Bergen was allowed to go at large because of the fact that the sheriff refused to keep him in his physical custody and actually to imprison him.

Now in the Code the language used is exceedingly distinct: it is "at large beyond the liberties of the jail," which would seem to indicate that the use of the words "at large" would not by any means indicate that the prisoner had been allowed to go beyond the liberties of the jail.

It is urged by the counsel for the respondent that the allegation contains necessarily an implied averment of the fact that he went beyond the liberties; but I entirely fail to see the force of this suggestion, because as has already been seen the allegation contains a definition of what the pleader meant by the prisoner going at large, and which would be entirely true without any escape having been permitted. It would seem, therefore, that there was no sufficient allegation of escape.

The third ground by which the appellant seeks to sustain the demurrer seems to be also well taken, and that is, that the complaint does not allege any indebtedness of Bergen to the plaintiff. That this allegation is necessary is expressly laid down in Greenleaf on Evidence, § 584, and Chitty on Pleading, vol. 2, p. 738. The sheriff has a right to take issue upon this question of indebtedness, and to avail himself of every defense which the prisoner would have had against such indebtedness.

It is an issuable fact, therefore, and must be distinctly alleged in order that issue may be taken thereon. In the complaint under consideration the allegation is that, on the 21st of June, 1881, in an action brought in the Marine Court of the City of New York against one Andrew Bergen for wrongfully converting property belonging to plaintiff, an order was duly made by one of the justices of said court, and so on.

This allegation might be entirely true, and yet no indebtedness exist, in favor of the plaintiff as against the said Bergen.

The fact that an action was commenced is not equivalent to an allegation of indebtedness and proof thereof. The plaintiff might prove every allegation contained in the complaint, and give no evidence whatever of the existence of any cause of action in the plaintiff against Bergen.

It would seem, therefore, that the complaint is defective in the respects above mentioned, and that the demurrer must be sustained with leave to the plaintiff to amend his complaint within twenty days, upon payment of the costs of the court below and of this appeal.

BEACH, J., concurred.

Judgment accordingly.

JOHN J. DUFFIELD, Respondent, *against* THOMAS JOHNSTON, Appellant.

(Decided February 6th, 1882.)

C., having contracted to furnish and set the brown stone work upon eight houses for the defendant, an arrangement was made between them and the plaintiff, a dealer in brown stone, that the plaintiff should furnish the stone required for the houses, on C. giving him an order for the price, accepted by the defendant. Such an order, requesting the defendant to pay to the plaintiff or order "the sum of $400 when the stoops of the said eight houses are set, and the sum of $375 when the brown stone work of the said houses is completed, and charge the same to me," was signed by C. and accepted by the defendant and delivered to the plaintiff, who thereupon furnished the stone. In an action by plaintiff upon the order for the sums above mentioned, it appeared that the stoops were, in fact, set, and the brown stone work completed, by other persons employed by the defendant, after C. had abandoned the contract. *Held*, that the plaintiff was not entitled to recover those sums from the defendant.

APPEAL from a judgment of the general term of the Marine Court of the City of New York, affirming a judgment of that court entered upon a verdict of a jury rendered by direction of the court.

The facts are stated in the opinion.

Lewis Hurst, for appellant.

I. T. Williams, for respondent.

Van Brunt, P. J.—The defendant in this action gave a contract to furnish and set the brown stone work upon eight houses he was building, to one William G. Chave. Chave applied to the plaintiff, a dealer in brown stone, to furnish the same. The plaintiff declined to do so; thereupon it was arranged that the plaintiff should furnish the stone, and that Chave should give an order upon the defendant, who would accept the same for the sum which the brown stone should amount to, which order was in the following words: "Please pay to J. J. Duffield or order the sum of $400 when the stoops of the said eight houses are set, and the sum of $375 when the brown stone work of said houses is completed, and charge the same to me," signed, "W. G. Chave." The plaintiff thereupon furnished brown stone to the extent of $1,441 of which $666 was paid. The plaintiff proved the contract to accept the order, its acceptance, the delivery of the stone, and that the stoops were set and the brown stone work completed prior to the commencement of this action. The defendant proved (which was undisputed) that the stoops were not set and that the brown stone work was not completed by Chave, but by some other persons in the employment of the defendant: and the only question presented in this case was whether it was necessary, in order to render the defendant liable, that this should have been done by Chave.

It is urged by the respondent that the order upon its face does not say so, and that it is not apparent from the writing that Chave had a contract to do the work, or that he was under any obligation to do the work, and that such a provision cannot be interpolated into the order.

It is difficult to see, if we are to be confined entirely to the wording of the order, how the plaintiff would have a right to prove a consideration for the order, which was absolutely

necessary to entitle him to a recovery thereon; and in order to prove that consideration we have the fact established of Chave's contract to furnish and set the brown stone upon the eight houses, and that it was in contemplation of that contract, and the fact that the plaintiff was to furnish the stone to enable Chave to complete his contract, that the order in question was given.

With those facts before us, the conclusion is inevitable from the language of the order that it was intended that the order should apply to the money which should become due to Chave under his contract, and that it was a mere assignment by Chave of so much of such money in order to pay for the brown stone which was to be furnished, to complete his contract.

The language of the order is "Please pay to J. J. Duffield," &c., so much money, "and charge the same to me," and that order, although accepted by the defendant, was accepted upon certain conditions which are to be interpreted in view of the light of the relations existing between the parties, and the condition was when the work should be in a certain state of completion. It was evidently the understanding of the parties that that state of completion related to the performance by Chave of his contract, otherwise what would be the result? The brown stone would be furnished to Chave, he could divert it to some other purpose, and not put it in the defendant's buildings at all, and although the defendant under those circumstances would be compelled to have bought other brown stone, and completed the work himself, yet when it was completed he would be liable under his order. The fact was, there was no consideration whatever for the order unless Chave became entitled to the money for having performed the work mentioned in the order.

Under these circumstances the case is not at all parallel to those in which, the consideration being expressed, the whole of the contract being contained in the instrument, and no evidence being necessary to establish the right of the plaintiff to recover thereon, no outside testimony can be considered in interpreting the contract. In this case, as has been already observed, the very fact of proving the consideration proves the fact

that this order was intended, simply because of the relations of the parties one to the other, as an assignment by Chave to the man who furnished the brown stone, of so much money which was to be due to Chave under his contract; therefore, we think that the fact that the defendant finished the work himself, no money being due to Chave, did not entitle the plaintiff to recover upon the completion of the work.

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

Beach, J., concurred.

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

James Dunseith, Respondent, *against* Gustav Linke, Appellant.

(Decided February 6th, 1882.)

The approval, by the court, of an undertaking in a given amount, on an appeal from a judgment for the recovery of a chattel, is a sufficient fixing of that sum by the court, within the requirement of section 1329 of the Code of Civil Procedure, that such an undertaking shall be in a sum fixed by the court or a judge thereof.

Where such an undertaking, in its recitals, states the amount of the judgment appealed from, and, in its binding part, distinctly refers to such judgment, the effect is the same as though the amount of the judgment had been inserted in the binding part of the undertaking.

Appeal from a judgment of this court entered upon the verdict of a jury.

The facts are stated in the opinion.

T. Stevenson, for appellant.

Hugh Reavey, for respondent.

Van Brunt, P. J.—On the 4th of March, 1880, the plaintiff in this action recovered a judgment against one Gustav Ludewig, for the recovery and delivery of certain personal property, or the value thereof, to wit, $1,100, in case delivery thereof could not be had, together with $128.88 costs, making in all $1,228.88. The said Ludewig having appealed to the general term of this court, caused to be executed an undertaking for the purpose of staying proceedings upon such judgment, which undertaking, after reciting the foregoing facts, proceeds as follows:

"Now, therefore, we, Gustav Linke, manufacturer, residing at 124 Forsyth Street in the City of New York, and Otto Lehr, cabinet maker, residing at 169th Street in the City of New York, between Washington and Railroad Avenues, do jointly and severally, pursuant to the statute in such case made and provided, undertake that the appellant will pay the costs and damages which may be awarded against the appellant on said appeal, not exceeding $500, and do also undertake that if the judgment so appealed from or any part thereof is affirmed or the appeal is dismissed, the appellant will pay the sum directed to be paid by the judgment, or the part thereof as to which judgment shall be affirmed, and that the appellant will obey the direction of the court, and of the appellate court upon appeal." This undertaking was executed by the defendant and the said Lehr, and was duly approved by one of the justices of this court, and was filed in the office of the clerk of this court, and a copy thereof with the proper notice served upon the respondent in said action.

The judgment appealed from having been affirmed by the general term, an execution was issued upon said judgment, which the sheriff returned wholly unsatisfied, and the proper notice having been given to the sureties upon this undertaking, this action was commenced thereon, and resulted in a judgment in favor of the plaintiff. The objection which is urged upon this appeal is, that the undertaking in question did not comply with section 1329 of the Code of Civil Procedure, which is as follows:

"If the appeal is taken from a judgment for the recovery

of a chattel, it does not stay the execution of the judgment until the appellant gives a written undertaking in a sum fixed by the court below, or a judge thereof, to the effect that the appellant will obey the direction of the appellate court upon such appeal."

It is claimed upon the part of the defendant that no sum was fixed by the court below. It is conceded that no formal order was made by the court below or any judge thereof fixing the amount to be inserted in this undertaking, but it would appear that an undertaking presented to the court and approved by the court in an action of this description would be a compliance with this requirement of the Code, and would be a fixing, within the language of the Code, by the court, of the amount of the undertaking, such fixing being signified by the approval of the court of the undertaking indorsed thereon. The statute nowhere states how or in what way the fact that the court or judge has fixed the amount of the undertaking shall be established, and when the evidence discloses the fact that an undertaking has been submitted to the court for its approval in a given case, and the court has approved that undertaking, I can see no reason why that is not an entire compliance not only with the spirit but with the letter of the Code. The mere fact of approving an undertaking in a given amount is entirely equivalent to the court saying, "We have fixed that amount and approved an undertaking given in such sum."

But it is urged in addition that in this undertaking no sum is mentioned. It is true that in the binding part of the undertaking no sum is stated, but the amount of the judgment which had been recovered is stated in the recitals of the undertaking; and in the binding part of the undertaking the judgment theretofore recited is referred to. The parties executing the undertaking "undertake that the appellant will pay all costs and damages which may be awarded against the appellant on said appeal, not exceeding $500, and do also undertake that if the judgment so appealed from or any part thereof is affirmed or the appeal is dismissed, the appellant will pay the sum directed to be paid by the judgment, or the part thereof as to which the judgment shall be affirmed." This lan-

guage has precisely the same effect as though the amount of the judgment had been inserted in that part of the undertaking, it being distinctly referred to therein, and there being no ambiguity in reference thereto. The undertaking then proceeds and says: "and that the appellant will obey the direction of the court and of the appellate court upon appeal."

This last clause must have reference to that which has preceded, in which, as has already been shown, a sum has been fixed; and is to be interpreted in view of the relief to which the party to whom the undertaking was given would be entitled upon an affirmance of the judgment, which was to a direction from the court that the property be returned, or in default thereof that the judgment should be paid which had been previously recited. The last condition of the undertaking would be fulfilled if the property was returned, and if the property was not returned then the first condition of the undertaking would become operative; and the sureties would be required to pay the judgment which had been previously recited. There seems to be, therefore, a substantial compliance with the section of the Code, and the objection raised to the undertaking upon this ground must be overruled.

The disposition which the court made of the question raised by the evidence of an attempt to compromise was entirely proper. Even if Mr. Reavey, the attorney for the plaintiff, did make the agreement which it is alleged he did make, that for $50 he would procure a release of Mr. Linke, the defendant in this action, from this undertaking, it was not in any respect binding upon the plaintiff. He was not employed for any such purpose, and I have been unable to find any evidence going to show any ratification upon the part of the plaintiff of any such agreement made by Mr. Reavey, or any authorization given to Mr. Reavey to make any efforts towards a compromise.

The judgment should, therefore, be affirmed, with costs.

J. F. Daly, J., concurred.

Judgment affirmed, with costs.

THOMAS J. ELLISON *et al.*, Respondents, *against* THOMAS J. MCCAHILL, Appellant.

(Decided February 6th, 1882.)

By a written contract dated September 18th, 1877, M. agreed to purchase from defendant certain lots of land on 126th Street in the City of New York, and erect houses thereon, and, to enable him to do so, defendant agreed to loan to M. certain sums of money in five payments, of which four were to be advanced as different portions of the work should be completed, and the fifth on the completion of the whole. M. began the work, but before any payment under the contract became due to him, he assigned the contract, with the defendant's consent, to A., who proceeded with the work. Subsequently the plaintiffs contracted in writing with A. that they should furnish the materials and labor required for the plumbing work of the houses, and that A. should pay therefor by giving orders on the defendant for specific sums of money, each sum to be taken out of a specified payment "under the terms of the agreement made September 18th, 1877," between the defendant and M.; and such orders were signed by A., accepted by the defendant, and delivered to the plaintiffs. Of these orders one requested the defendant to pay to the plaintiffs a certain sum "out of the fourth payment under the agreement of September 18th, 1877, between yourself and M., when that payment is reached, said amount being on account of plumbing work and material furnished on 126th Street houses," and was accepted by the defendant "to be paid only when fourth payment is reached as per contract between M. and myself and not otherwise." Another order was drawn in like form for a different sum out of the fifth payment, and was accepted in like terms "to be paid only when fifth payment is reached." The plaintiffs performed their contract with A.; but the latter never progressed with the work so far as to become entitled to the fourth and fifth payments under the original contract; and, after A. had finally suspended work, the defendant, having purchased the property at a sale under foreclosure of a mortgage, procured other parties to complete the houses substantially according to the contract with M. *Held*, in an action by the plaintiffs upon the two orders above mentioned, that they were not entitled to recover thereon from the defendant.

APPEAL from a judgment of the general term of the Marine Court of the City of New York affirming a judgment of that court entered upon the verdict of a jury and an order of that court denying a motion for a new trial.

In September, 1877, the defendant being the owner of four lots upon the north side of 126th Street, and west of the 7th Avenue, made a building contract with one McGown, by which McGown was to erect eight houses upon said lots, and the defendant was to loan to McGown during the course of the construction of said houses certain sums of money, and upon the completion of the houses the lots were to be conveyed to McGown and McGown was to execute mortgages back. The contract between the defendant and McGown contained certain specifications as to the buildings to be erected, and as to the advances which were to be made by the defendant to McGown as the buildings progressed—the number of payments being five; the third payment being due when all the plumbing and gas-fitting work was completed and the water and gas connections made so as to supply the same where required; the fourth payment being due when the painting inside and outside of each and every house was completely finished; and the fifth and final payment being when the buildings were completely finished in all respects. And it was further provided that these payments were not to be made while there were any mechanics' liens filed, and if the work was unreasonably delayed by McGown, the defendant had the right to terminate the contract and foreclose McGown's interest by a sale at public auction, which sale was to be an absolute bar of all claims upon the part of McGown. The houses were to be completed to the satisfaction of the defendant and ready for occupation by the 1st of April, 1878. McGown commenced work upon the contract on the 19th of November, 1877. Before any payment became due under the contract to him he assigned the contract to one William Archer, by and with the consent of the defendant. William Archer thereupon undertook to complete the McGown contract with some modification as to the character of the work, which was agreed upon between Archer and the defendant. The plaintiffs in this action, being about to supply certain plumbing work and materials for said houses, applied to the defendant to know if he would accept the orders in suit of Archer, and upon receiving an acceptance of said orders they made their contract with Archer and completed the work ac-

cording to the modified terms agreed upon between Archer and the defendant. The orders were as follows:—

"New York, July 5th, 1878.

"Thos. J. McCahill, Esq.: Please pay to Ellison & Todd two hundred and fifty dollars out of the fourth payment under the contract of Sept. 18th, 1877, between yourself and Jas. McGown, when that payment is reached; said amount being on account of plumbing work and material furnished on 126th Street houses.

"William Archer."

Indorsed as follows:—

"Accepted, to be paid only when fourth payment is reached, as per contract between McGown and myself, and not otherwise.

Thos. J. McCahill."

"July 10th, 1878.

"New York, July 5th, 1878.

"Thos. J. McCahill, Esq.: Please pay to Ellison & Todd five hundred ($500) dollars out of fifth payment, under the agreement of Sept. 18th, 1877, between yourself and Jas. McGown, when that payment is reached, said amount being on account and in full for plumbing work and materials furnished on 126th Street houses.

"William Archer."

Indorsed as follows:—

"Accepted, to be paid only when fifth payment is reached, as per contract between McGown and myself, and not otherwise.

"Thos. J. McCahill."

"July 10th, 1878.

The plaintiffs, upon noticing the qualified acceptance of the defendant, asked him what the McGown contract was, and defendant replied, "Why, that is only a name; we drew up an agreement, but he has nothing to do with it now; it is

only a name." And he further said that he had sufficient money under the McGown contract to pay the orders.

In August, and after the completion of the plumbing work, the work upon the buildings was suspended by Archer, and the foreclosure of a mortgage upon the premises was commenced. The buildings were sold and were bought in by the defendant, and the mechanics who had filed liens, which were all for work done before the third payment became due, were paid the sum of upwards of $1,500, upon those liens.

Afterwards a new contract was entered into between the defendant and Van Alstyne & Smith, and the buildings were completed by Van Alstyne & Smith substantially according to the McGown contract.

The plaintiffs now bring this action upon these orders upon the ground that the money is due, because the houses have been completed; and having obtained a judgment at the trial term of the Marine Court, the same was affirmed at the general term; and from such affirmance the defendant appeals to this court.

Dewitt C. Brown, for appellant.

Freling H. Smith, for respondents.

Van Brunt, P. J.—[After stating the facts as above.]—The ground upon which the plaintiffs in this action have recovered, is that the contingency under which the orders were made payable has occurred, namely, that the fourth and fifth payments have been reached as per contract between McGown and the defendant.

In considering this question, we must assume that the modifications in the performance of the work which were made between Archer and the defendant are applicable to the McGown contract; that where it was agreed between Archer and McCahill that a lighter pipe should be used than that which was required by the McGown contract, the doing the work with such lighter pipe must be considered as a compliance with the terms of the McGown contract. It is true that if we take

the precise language of the acceptance, it has become due, but the language of the order and the language of the acceptance must be read together. The circumstances under which the order was given, the person by whom the order was given, must also be considered; and the terms of the order are, on the part of Mr. William Archer, that Mr. McCahill is directed to pay, out of the fourth payment of the agreement of September 18th, 1877, between Thomas J. McCahill and James McGown, when that payment is reached,—which means that Mr. McCahill is to pay out of the money to become due on that payment; and under that order Mr. McCahill had no right or authority to appply any other money to the payment of that order than that which arose from that fourth payment itself. And when the defendant in this action accepted that order to be paid only when the fourth payment was reached, he accepted it precisely in the terms in which it was drawn, namely, that when that fourth payment became due to Mr. Archer, he was to apply so much of that money as the order called for, to the payment of the plaintiffs. But it may be said that in this construction of the order in question we assume facts which do not appear upon the face of the order. In answer to that suggestion it is sufficient to say that it is necessary for the plaintiffs to prove the consideration of the order, and in proving the consideration of that order all the facts which have been considered in aiding the construction of that order must necessarily appear, and consequently must affect the construction of the paper.

It is clear from a reading of the order, and in view of the circumstances of the case, the fourth payment being the payment due to Mr. Archer that the intention was that Mr. Archer should apply so much of that money coming due to him to the payment of Ellison & Todd's claim as the order called for, and that none of the parties had any idea that the money should come from any other source, or that it should become due and payable if Mr. Archer did not complete the McGown contract with the modifications consented to upon the part of the defendant.

And the fact that the plaintiffs had performed their entire work, and that it had been entirely completed, does not give

them any other or better rights than Mr. Archer had to claim the fourth payment from the defendant in this action, because it is to be noticed upon an examination of that contract that the fourth payment has nothing whatever to do with the plumbing work under the McGown contract which was done by the plaintiffs in this action.

The $1,500 which constituted the fourth payment was to become due when the painting inside and outside of each and every house was completely finished. The third payment was to become due when the plumbing and certain other work was done, and the claim of the plaintiffs in this action to ask for any money on account of their work is expressly deferred to the payment which was to accrue to Mr. Archer subsequent to the payment which accrued after the finishing of the plumbing work.

Now, it is clear under these circumstances that it was not the intention of these parties that the plaintiffs in this action, as soon as they had performed their work, should be entitled to receive any money which was to become due to Mr. Archer under this contract; but on the contrary their claim was deferred until another payment became due subsequent to that which became due on the completion of the plumbing.

Upon an examination of all the evidence in this case it seems to be impossible to come to any other or different conclusion than that it was an assignment by Archer of money to become due to him under that contract, which was accepted by the defendant in this action.

If the position of the plaintiffs in this action is correct, then, if they had never complied with their contract with Archer, and before their work had been finished the work had been abandoned by Archer, and the defendant in this action had done it himself, they would be entitled to recover upon this acceptance, because its condition had been fulfilled. It does not seem possible to give a construction to these papers which would lead to that result, and the conclusion to which it seems to me we must necessarily arrive is, that the condition for the payment of those orders has never been fulfilled, and that the plaintiffs have no right of action against the

defendant upon them: that the orders were an appropriation out of the fourth and fifth payments which were to become due to Archer upon his performance of the McGown contract with the modifications agreed to by the defendant.

It is urged by the counsel for the respondent that the acceptance by defendant of the orders, he at the time of the acceptance having sufficient funds in his hands payable on the contract, created an equitable assignment in favor of the plaintiffs of a sufficient amount of said funds to pay the orders, if they completed their contract and earned the money.

It is sufficient in answer to this proposition to say that the orders do not so read: the orders say, payable out of the particular payments which were to become due under the McGown contract; and Mr. McCahill had no right or authority to appropriate any moneys which had previously become due under that contract, to the payment of those orders, and only to apply so much of the fourth and fifth payments when they became due under the contract, as should be sufficient to satisfy the orders. The fact that he had money due upon previous payments sufficient to meet the amount of those orders has nothing to do with the question, because the orders were not drawn against any such funds, and were not accepted as against any such funds.

It seems to us, therefore, that the plaintiffs herein had no cause of action, and that the judgment must be reversed and a new trial ordered, with costs to abide the event.

Beach, J.—On September 18th, 1877, the defendant, being the owner of four lots in this city, made a contract with one McGown, whereby the defendant agreed to sell him the lots, for the sum of thirteen thousand dollars, payable as hereafter stated. McGown agreed to buy and forthwith begin building eight dwelling houses upon the property. To enable McGown to do this, the defendant agreed to loan him sixteen thousand dollars, payable in different sums, at different times, regulated by the advance of the buildings toward completion; the final payment of four thousand dollars to be made when they were finished in all respects, yards graded, curbs and

gutters set, walks flagged and fences up. When all was completed, the defendant was to give McGown a warranty deed of the premises, and receive from him nine bonds and mortgages, aggregating twenty-nine thousand dollars, one mortgage of thirty five hundred dollars on each house. On November 19th, 1877, McGown assigned this contract to William Archer, with the defendant's consent, the first payment thereunder not being reached. Archer proceeded with the work, and July 5th, 1878, the plaintiffs contracted in writing with him to complete the plumbing work in the houses, according to written specifications, Archer agreeing to pay them therefor eleven hundred dollars, by giving orders on the defendant, "one for three hundred and fifty dollars, *to be taken out* of the third payment, one of two hundred and fifty dollars *to be taken out* of the fourth payment, and one of five hundred dollars, *to be taken out* of the fifth and last payment, when all the buildings are completed under the terms of the agreement made September 18th, 1877, between Thomas J. McCahill and James McGown."

On the date of this agreement Archer gave the plaintiff three orders on McCahill for the several sums therein mentioned. The first was paid by the defendant. The last two were in these words, differing in amounts and referring to different payments provided for in the McGown contract.

"New York, July 5th, 1878.

"Thos. J. McCahill, Esq.: Please pay to Ellison & Todd, two hundred and fifty dollars out of the fourth payment under the agreement of September 18th, 1877, between yourself and Jas. McGown, when that payment is reached, said amount being on account of plumbing work and material furnished on 126th Street houses. William Archer."

Indorsed as follows:

"Accepted to be paid only when fourth payment is reached as per contract between McGown and myself and not otherwise. Thos. J. McCahill.

"July 10th 1878."

The plaintiffs began the plumbing work about July 10th and completed it prior to July 26th. About August 1st, and before the fourth and fifth payments were earned under the McGown contract, Archer stopped work finally. The defendant, executor of Bryan McCahill, foreclosed a first mortgage upon the premises, and purchased on the foreclosure sale. On October 14th, 1878, he made an agreement with Van Alstyne & Smith, by which they agreed to complete the buildings according to the plans and specifications. When completed the defendant was to give them a deed, they executing the eight mortgages of thirty-five hundred dollars each, and receiving from defendant a sum equal to the unpaid balance due under the original contract with McGown, less certain deductions specified. Van Alstyne & Smith finished the buildings.

This action was brought to recover the amount of the orders, so accepted by the defendant. The trial was had in the Marine Court, before a jury. A verdict was given in plaintiff's favor. Motion for a new trial was denied, and the defendant appealed from the order and judgment to the general term of the Marine Court, where the same were affirmed, and the defendant appealed to this court.

The record does not disclose any contract between the plaintiffs and defendant, with reference to the plumbing work done by the former upon the buildings. Whatever the plaintiffs may have the right to demand in this action, plainly rests in the defendant's acceptance of the two orders drawn by Archer in plaintiffs' favor. It is undoubtedly true that the plaintiffs completed the work under their contract with Archer. This, however, imposed no obligation upon the defendant. Their agreement provides for the giving of orders upon the defendant by Archer, "to be taken out of the payments" provided for in the McGown contract of which Archer was the assignee. These orders and their acceptance by the defendant are the instruments governing the rights of the parties here. By them, the defendant was called upon to pay the plaintiffs certain moneys, from particular payments when reached. The defendant accepted them payable only when such payments

matured. At the time they were drawn and accepted, there was no fund in the defendant's hands to which they applied, and no right to anything *in præsenti* accrued to the plaintiffs. Their work was not begun, and the houses were not in a condition to entitle Archer, as assignee of the McGown contract, to the specified payments thereunder. The orders and acceptances gave no date when they would be payable, but their maturity and the defendant's liability depended upon the happening of an uncertain event, to wit, the falling due of certain payments under the chief contract, which in itself depended upon the completion of work by Archer, its assignee. The money to be paid plaintiffs was not the defendant's, but Archer's when he earned it. The only responsibility assumed by defendant, was to disburse Archer's funds according to the accepted orders, when he should become the holder thereof, and not until then. He certainly could not be in that position until the payments to Archer became due. If the acceptances read to be paid out of the first funds in defendant's hands belonging to William Archer, could the defendant be made liable without proof of having subsequently had the funds? Clearly not, and there is no difference in the case at bar. This view would seem to accord with the terms of the orders and acceptances, to pay when the specified payments "are reached," under the McGown contract. I am unable to see how the plaintiffs' position differs in strength from Archer's. If the latter became entitled to payment, so would the plaintiffs, by virtue of the acceptances, regardless of whether they had or had not done the work called for by their contract with Archer.

It appears from the record that before the fourth and fifth payments were earned by Archer, he abandoned performance of the contract, thereby absolving the defendant from the contingency of future liability to the plaintiffs. The subsequent completion of the buildings by Van Alstyne & Smith, under an independent contract, did not fix defendant's liability to the plaintiffs. His liability did not depend upon that happening, but arose only when Archer became entitled to payment.

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

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

THE FIRE DEPARTMENT OF THE CITY OF NEW YORK, Respondent, *against* GEORGE M. CHAPMAN, Appellant.

(Decided February 6th, 1882.)

Under L. 1871, c. 625, § 28, as amended by L. 1874, c. 547, enacting that certain buildings therein described "shall be provided with such fire escapes, alarms, and doors, as shall be directed by the Superintendent of Buildings," an owner of such buildings, although he has once provided them with fire escapes, in compliance with the direction of that officer, may subsequently be required to provide additional fire escapes therefor.

APPEAL from a judgment of a district court in the City of New York.

The action was brought in a district court, to recover a penalty for non-compliance by the defendant, with an order to provide additional fire escapes upon a building belonging to him. It appeared that the fire escapes already there had been approved, by the then Superintendent of Buildings. Judgment was rendered for the plaintiff. From the judgment the defendant appealed to this court.

Julius Lipman, for appellant.

William L. Findley, for respondent.

BEACH, J.—[After stating the facts as above.]—No question is raised upon the validity of the legislative enactment, which was within the power of the legislature as a police regulation, which extends "to the protection of the lives, limbs,

health, comfort and quiet of all persons and all property within the state."

The contention urged by the learned counsel for the appellant is, that having once placed upon his building appurtenances approved by the proper official, his only remaining duty under the act is to keep them in proper condition. The section reads as follows: "Any dwelling-house now erected, or that hereafter may be erected more than two stories in height, occupied by, or built to be occupied by, two or more families, in any floor above the first, shall be provided with such fire escapes, alarms and doors as shall be directed by the superintendent of buildings. And the owner or owners of any building upon which any fire escapes may now be, or may hereafter be erected, shall keep the same in good repair, and well painted" (L. 1871, c. 625, § 28; amended L. 1874, c. 547). If this law, instead of confiding the power of directing the mode of compliance to the superintendent of buildings, had named a known style of fire escape, it would most certainly be within the power of the legislature to change the appliance for one totally different, compelling owners of buildings to cease the use of one, and replace with the other. This would be only an exercise of a continuing power, to make general regulations needful to the common good and general welfare, subject to which all property within the state is held, by title however absolute. The legislature has conferred this power of direction upon an official, and it is neither circumscribed nor exhausted by one exercise. The leading case of *Gozler* v. *Georgetown* (6 Wheat. 593), in principle decides the question. There, the municipal corporation had "full power to make such by-laws and ordinances for the graduation and leveling of streets as they may judge necessary for the benefit of the town." An ordinance appointed commissioners to grade certain streets, and provided that the level and graduation when signed by the commissioners and returned to the corporation clerk, should *forever hereafter* be the true graduation of the streets, and be binding upon the corporation and all persons, and be *forever hereafter* regarded in making improvements upon the streets. The plaintiff made improvements accord-

ing to this grade, and afterwards the corporation by ordinance directed the grade lowered, to plaintiff's injury. The bill for an injunction was dismissed, the court holding that the power to graduate given by the legislature was a continuing one, and not exhausted by its first exercise, and the provision of the ordinance was not in the nature of a compact, and therefore not final and irrepealable. Similar powers have frequently been held to be continuing like other legislative powers, unless the contrary be indicated, by adjudications in many of the states (*Smith* v. *Washington*, 20 How. [U. S.] 135; *Macy* v. *Indianapolis*, 17 Ind. 267; *Hoffman* v. *St. Louis*, 15 Mo. 657; *New Haven* v. *Sargent*, 38 Conn. 50).

The judgment of the court below should be affirmed.

Van Brunt, P. J., concurred.

Judgment affirmed.

Bernhard Freund, Appellant, *against* John H. Paten, Respondent.

(Decided February 6th, 1882.)

Upon trial of an action where false representations were alleged by the plaintiff to have been made by the defendant, such as would render the debt sued on "a debt created by fraud," within U. S. R. S. § 507, and therefore not affected by the discharge of the defendant in bankruptcy, set up by him as a defense, the jury were instructed that if they should be in doubt whether the defendant made the representations charged against him, or whether the defendant intended to cheat and defraud plaintiff, they must give the defendant the benefit of such doubt, and find a verdict in his favor. *Held*, that this was error, for which a judgment for defendant should be reversed.

Appeal from a judgment of the general term of the Marine Court of the City of New York affirming a judgment of that court entered upon the verdict of a jury and an order denying a motion for a new trial.

The action was brought upon two promissory notes made by the defendant payable to the plaintiff or order. The defendant's answer alleged the filing of his petition in bankruptcy, after the making and delivery of the notes, and his discharge from all claims provable against his estate on August 16th, 1878, which would include the notes in suit. The plaintiff replied, alleging fraudulent representations of solvency by the defendant when the goods were purchased and the notes given for their price.

The jury rendered a verdict for the defendant, and a motion by the plaintiff for a new trial upon the minutes was denied. The judgment and order were affirmed by the general term of the Marine Court; and from the decision the plaintiff appealed to this court.

Abram Kling, for appellant.—The rule of law as charged has only application to criminal cases, and not to those of a civil character, in which latter it becomes the duty of the jury to find for the party in whose favor the evidence preponderates, independent of any doubt (*Johnson* v. *Agricultural Ins. Co.*, 13 Week. Dig. 144; *People* v. *Schryver*, 42 N. Y. 1; *Gordon* v. *Parmelee*, 15 Gray, 413; *Kane* v. *Hibernia Ins. Co.*, 39 N. J. L. 697; *Ford* v. *Chambers*, 19 Cal. 143; *Bradish* v. *Bliss*, 35 Vt. 326; *Walker* v. *Wallace*, 19 Mich. 57; *Bessel* v. *Wert*, 35 Ind. 57; *Scott* v. *Home Ins. Co.*, 1 Dillon, 105; *People* v. *Wreden*, 12 Rep. 682; *People* v. *McCann*, 16 N. Y. 58).

Charles Blandy, for respondent.—The propositions charged are strictly correct. The first is, regarding the representations, and the latter is, regarding the intention not to pay. The charge is nothing more than that the *onus probandi* was upon plaintiff to prove both, and that he was bound to do so to the satisfaction of the jury, otherwise he failed. It is true that the term "giving the benefit of the doubt" is more aptly applied to criminal cases; but is it error to charge in that language in a civil action which is *quasi* criminal in its nature? Every presumption is in favor of honesty and freedom from

crime, and the proof should be as clear as in a criminal prosecution for the same crime (*Paret* v. *Segall*, 12 Week. Dig. 535; *Clark* v. *Dibble*, 16 Wend. 601; *Woodbeck* v. *Keller*, 6 Cow. 118; *McKinley* v. *Robb*, 20 Johns. 350; *Hopkins* v. *Smith*, 3 Barb. 599; *Alby* v. *Rapalje*, 1 Hill, 9). The leading case in England on the question is *Thurtell* v. *Beaumont* (1 Bing. 339); other cases holding the same are *Chalmers* v. *Shackell* (6 Car. & P. 475); *Wilmot* v. *Harmer* (8 Car. & P. 695); *Neely* v. *Luck* (Id. 532); *Magee* v. *Mark* (11 Ir. L. R. N. S. 449); and see Steph. Dig. Ev. 98. The same ruling has been made in Pennsylvania (*Steinman* v. *Mc Williams*, 6 Barr 170; *Gorman* v. *Sutton*, 32 Pa. St. 247); in Maine (*Thayer* v. *Boyle*, 30 Me. 475; *Butman* v. *Hobbs*, 45 Me. 227); in Illinois (*McConnel* v. *Delaware*, *&c. Ins. Co.*, 18 Ill. 228; *Darling* v. *Banks*, 14 Ill. 46); in Tennessee (*Coulter* v. *Stuart*, 2 Yerg. 225); in Indiana (*Lenter* v. *McCowen*, 8 Blackf. 495; *Bryket* v. *Monehon*, 7 Blackf. 83); in Florida (*Schultz* v. *Pacific*, *&c. Ins. Co.*, 14 Fla. 73; *S. C.*, 1 Ins. L. Jour. [1872] 495); in Missouri (*Polston* v. *Lee*, 54 Mo. 291); in Iowa (*Ellis* v. *Lindley*, 38 Iowa, 461; *Fountain* v. *West*, 23 Iowa, 1); in New Jersey (*Kane* v. *Hibernia*, *&c. Ins. Co.*, 38 N. J. L. 441; *S. C.*, 19 Am. R. 747; *Berckman* v. *Berckman*, 17 N. J. Eq. 453; *Taylor* v. *Morris*, 22 N. J. Eq. 606); in Ohio (*Strader* v. *Mulvane*, 17 Ohio, 624; *Lexington*, *&c. Ins. Co.* v. *Paver*, 16 Ohio St. 324); in Wisconsin (*Freeman* v. *Freeman*, 31 Wis. 235). See *Chaffee* v. *United States* (18 Wall. 545); *The Mohler* (21 Wall. 230); and 1 Greenl. Evid. 12th ed. 76, § 65; Roscoe's Crim. Evid. 73; 1 Deac. Dig. Crim. L. 459; 1 Phil. Evid. 506; 2 Russ. Crimes, 588; *Rex* v. *Watson* (2 Stark. 116, 155); *Lord Melville's Case*, (29 How. St. Tr. 376); *United States* v. *Britton* (2 Mas. 464); 2 Greenl. Evid. 13th ed. 368, § 408.

The rules of evidence are the same in civil and criminal cases. The character of the act to be proved, and not the position of the party, determines the degree of proof to be required (*Schultz* v. *Pacific*, *&c. Ins. Co.*, 14 Fla. 73; and see Taylor Law of Evid. 7th Ed. 126).

Beach, J.—Under the Bankruptcy Act (U. S. R. S. § 507), it is provided that "no debt created by the fraud of the bankrupt . . . . shall be discharged by proceedings in bankruptcy." This issue was clearly raised by the plaintiff's reply, and even without that pleading, he would have been entitled to prove it, on the trial, in answer to the discharge, without any allegation in his complaint, it being no part of his cause of action, but an affirmative defense to the promissory notes upon which he declared (*Argall* v. *Jacobs*, Court of Appeals, MSS. opinion).

Upon the trial the learned judge charged the jury, if they should be in doubt whether the defendant made the representations charged against him, they must give the benefit of such doubt to defendant and find a verdict in his favor. And further, if the jury should be in doubt whether defendant intended to cheat and defraud plaintiff, the benefit of such doubt must be given to defendant, and a verdict found in his favor. To these instructions exceptions were taken, and in my opinion should be sustained.

In civil cases the jury should decide issues of fact according to the weight of evidence, and it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is offered to prove. In criminal cases it must produce a moral certainty of guilt and exclude any other reasonable hypothesis (Stark. Evid., 813, 816; *Johnson* v. *Agricultural Ins. Co.*, 13 Week. Dig. 144; *People* v. *Schryver*, 42 N. Y. 1). It is said in Starkie on Evidence, *supra*, that in some contests as to civil rights a mere preponderance of evidence may be insufficient, where it falls short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law. Other exceptional cases are actions of libel or slander wherein the charge is the commission of a criminal offense. A plea of justification requires the same degree of evidence as would be necessary to convict the plaintiff in a criminal prosecution for the same offense (Townshend on Libel, 674; *Woodbeck* v. *Keller*, 6 Cow. 118).

The instructions given the jury were plainly not in accord with the legal rule, and more strongly marked by the omission of the term "reasonable" in qualification of "doubt." The

plaintiff's counsel, by excepting to the court's charge of legal propositions, did all needful to present the question. Under such circumstances counsel are not called upon to suggest amendments or changes to the court, but may rely upon the exception (*Goldman* v. *Abraham*, 10 Week. Dig. 108; *Allis* v. *Leonard*, 58 N. Y. 291).

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

Van Brunt, P. J.—I concur in the result of the foregoing opinion; but I do not concur in it so far as it seems to assume that if the judge in the court below had used the words "reasonable doubt" his charge would have been correct. No party to a civil action is bound to make out his case beyond a reasonable doubt, unless in order to make out his case it is necessary to prove a felony. An issue in a civil action is made out when there is a preponderance of evidence in favor of the party supporting the issue. If there are fewer doubts in the minds of the jury upon that side of the case than upon the other, then such party is entitled to a verdict because a preponderance of evidence exists.

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

Adolph Kessler, Appellant, *against* Solomon S. Sonneborn, Respondent.

(Decided February 6th, 1882.)

Plaintiff, being the family physician of L., and in attendance as such upon the wife and children of L., not having been paid for the services so rendered, and being unwilling to continue his services upon the credit of L., stated to the defendant, a brother of L.'s wife, that he could not afford to continue attending the family unless he was secure about his pay. Thereupon the defendant told plaintiff to go on and charge the services to him, and he would pay for them. *Held*, that the defendant was liable to the plaintiff for services thereafter rendered by plaintiff in

attending the members of L.'s family, who were ill, although the arrangement between the plaintiff and the defendant was made without the knowledge of L. Such services having been rendered upon the credit of the defendant, and not upon the credit of L., the defendant became himself the debtor, and the Statute of Frauds did not apply.

APPEAL from a judgment of the general term of the Marine Court of the City of New York affirming a judgment of that court entered upon the verdict of a jury.

The facts are stated in the opinion.

Evarts, Southmayd & Choate, for appellant.—It is a principle beyond question that a promise by a third person to pay a debt for which another is liable is void under the Statute of Frauds, when the liability of the original debtor continues, and the consideration moves only between the original debtor and creditor (*Mallory* v. *Gillett*, 21 N. Y. 412). This principle does not, of course, apply to cases where the promise of the third person is based upon some consideration moving to the promisor (*Nelson* v. *Boynton*, 3 Metc. 396, 400); or to those cases where the promise for the benefit of the third person is an original liability, there being no other liability to which it can be collateral. But the conditions and circumstances under which the alleged agreement or promise was made show that it is covered by the principle above stated.

Mr. Leipziger had incurred a liability to the physician for such services as the latter should render during the continuance of the illness of the former's family; and without an express understanding with the debtor by which his liability was released, the physician would be able to maintain an action for the services rendered during the entire illness (*Hewitt* v. *Wilcox*, 1 Metc. 154). Nothing was said or done by which Mr. Leipziger was released from his liability. There was an implied contract, made when the physician was called in, that Mr. Leipziger would pay the fair value of the services rendered to his family. In making this contract, whether it be expressed or implied, the minds of the parties met, and to modify or set it aside requires a further meeting of the minds of the contracting parties; no intention or wish of one party,

uncommunicated to the other, can have this effect (Leake Dig. Law of Contracts, 12; *Browne* v. *Hare*, 3 Hurlst. & N. 484; *The Palo Alto*, Davies, 343, 358).

Such a promise as is alleged to have been made by Mr. Sonneborn is within the statute and void, it being a promise to answer for the debt or default of another, the consideration for the promise moving only to the original debtor, and the original debt remaining (*Leonard* v. *Vredenburgh*, 8 Johns. 29; *Barber* v. *Fox*, 1 Stark. 270; *Nelson* v. *Boynton*, 3 Metc. 396; *Hanford* v. *Higgins*, 1 Bosw. 441).

The claim for services rendered prior to the time of the alleged promise is plainly void, and this makes the whole claim invalid, under the principle (*Loomis* v. *Newhall*, 15 Pick. 159) that a promise not in writing, void as to a part by force of the Statute of Frauds, is void in the whole.

Ferd. Kurzman, for respondent.—The action is not upon a guaranty, nor upon any verbal promise to answer for the debt, default, or miscarriage of another.

The services after March 26th, 1879, were rendered for the defendant, and at his request, and under his agreement to pay for them. It was wholly immaterial that the services were rendered to the defendant's sister and her children.

The credit was given to the defendant. The undertaking of the defendant was original, and not collateral. The Statute of Frauds has, therefore, no application (*Brown* v. *Weber*, 38 N. Y. 187; *Booth* v. *Eighmie*, 60 N. Y. 238).

Van Brunt, P. J.—Prior to the 26th of March, 1879, the plaintiff had been the family physician of a Mr. Leipziger. In the latter part of 1878 the plaintiff was called in his capacity of family physician to attend certain members of Mr. Leipziger's family. He continued to attend them until on or about the 26th of March, when the defendant Mr. Sonneborn, a brother in-law of Mr. Leipziger, called at Dr. Kessler's office, and in a conversation there had the defendant was told by the plaintiff that he could not afford to go on and attend this family unless he was secure about his pay. To that Mr.

Sonneborn's reply was "Doctor, I want you to go on in this case: you do as you please, employ nurses if you like, do all you can for my poor sister and her children, and you charge your bill for medical services to me, and I shall pay it."

The doctor then continued his services until the 6th of May. His bill being unpaid he commenced this action to recover for the services rendered subsequent to the 1st of March. Upon the trial of the action all charge for services prior to the 26th of March was waived, and a judgment was rendered for the balance.

The objection raised by the appellant in this case is that the promise of Mr. Sonneborn, if made, was within the Statute of Frauds, and therefore void.

In order to determine this proposition, of course it is necessary to consider as to whether Mr. Sonneborn's agreement was an original undertaking, or whether Mr. Leipziger still remained liable to the plaintiff for the services which were subsequently rendered. It seems to be claimed by the defendant that because Mr. Leipziger knew nothing of this arrangement with Mr. Sonneborn, that therefore, he remained liable for the services which were rendered by the plaintiff to him by and with his consent; that the arrangement with Sonneborn, if made as claimed upon the part of the plaintiff, in no way released Mr. Leipziger or in any way changed or affected the relation of Mr. Leipziger to the plaintiff in this action; and that he still remained liable, even if the agreement as sworn to by the plaintiff was made between the parties to this action.

As has already been suggested, the burden of the appellant's argument seems to be that Leipziger's liability to pay for services thereafter to be rendered to him could not in any way be affected except by and with his consent. In the case of *Brown* v. *Weber* (38 N. Y. 187), the court lays down the rule that to determine whether a contract is within the second clause of section 2 of the Statute of Frauds it must be ascertained whether the party sought to be charged entered into an independent obligation of his own or whether the responsibility so made by him was contingent upon the act of another; if the

former, the case is outside of the statute, if the latter, it is within it.

Applying this rule to the facts of the case now under consideration, it is apparent that a finding that Dr. Kessler refused to render any further services upon the credit of Mr. Leipziger is sustained by the evidence; as is likewise a finding that Mr. Sonneborn, as an inducement for him to continue those services, said that he would pay his bill therefor, and that such promise related to the services which were thereafter to be rendered, and that Dr. Kessler, relying upon that promise and upon the faith and credit of the defendant Sonneborn only, rendered the services which he did subsequent to the 26th of March, 1879.

It is true that this arrangement between Sonneborn and Kessler was made without the knowledge of Leipziger, but whether made with or without his knowledge, if those subsequent services were rendered upon the credit of Sonneborn and not upon the credit of Leipziger, in law, Leipziger was discharged from the liability and Sonneborn became the debtor.

Under these circumstances the Statute of Frauds could not apply, and the plaintiff in this action would have a right to recover the value of those services notwithstanding the Statute of Frauds.

In regard to the requests to charge, it would seem that the judge was entirely correct in refusing the second request, because the request was that it should be submitted to the jury to determine whether Leipziger was liable for the services which Dr. Kessler rendered subsequent to the 26th of March, without any request calling their attention to the facts which were necessary to be established in order to justify them in finding such liability.

The charge of the judge, in answer to that proposition, that if the agreement was as alleged by the plaintiff, Mr. Leipziger was not liable for those services and the plaintiff could in no event recover from him, seems to have been entirely correct. The fact of his having placed the exemption of Mr. Leipziger from liability upon the finding of the jury that the plaintiff's statement of the conversation between him-

self and Sonneborn was correct, involves the proposition that if the jury did not find such to be the fact, Leipziger would be liable. In his charge he had submitted that proposition squarely, that if they believed the plaintiff, that his version of the transaction was correct, the plaintiff was entitled to recover; if, however, they did not believe the plaintiff, then the defendant was entitled to a verdict.

We can see no error in the trial of the cause, and the judgment should be affirmed with costs.

BEACH, J., concurred.

Judgment affirmed, with costs.

LEWIS G. KNOWLES, Appellant, *against* CLARA C. TOONE, Respondent.

(Decided February 6th, 1882.)

Where a promissory note is indorsed by a married woman, no intention to charge her separate estate thereby being expressed in the indorsement or in any contract made simultaneously therewith, statements subsequently made by her in writing, that if the note is not paid by the maker, she considers it incumbent on her to pay the same, and her private estate bound therefor, although made to a purchaser of the note before the purchase thereof by him, can not operate to bind her separate estate.

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

The facts are stated in the opinion.

P. & D. Mitchell, for appellant.

George H. Yeaman, for respondent.

Van Brunt, P. J.—This was an action brought upon a promissory note dated April 22nd, 1875, for $1,100, payable in six months, made by Laura V. Toone to Clara C. Toone, and indorsed by her and William C. Toone, who brought it to the plaintiff and tried to sell it. The plaintiff, before purchasing the note and parting with his money, wrote out the following questions and sent them to the defendant with the request that they should be answered; who did answer them in her own handwriting as hereinafter indicated and sent them back to the plaintiff:—

"1st. Is the note made by Laura V. Toone in favor of yourself and indorsed by you, and now in William C. Toone's possession, his property to dispose of, and *bona fide?*

"A. Yes.

"2nd. If the same is not paid by the drawer, do you consider it incumbent on yourself to pay the same, and private estate bound therefor?

"A. I do.

"Where is your real estate owned in your name situated?

"A. Saratoga Springs.

"What is its value, less all incumbrances and debts you owe?

"Five thousand dollars."

And then follows a declaration in the following language:—

"I, Clara C. Toone, subscribe to the above answers of my own free will and accord."

The complaint declares the fact to be that the defendant was a married woman, and the judgment in the case was founded upon this fact—the referee to whom the case was referred finding, that being a married woman the defendant did not by the indorsement bind her separate estate—the indorsement being made entirely for the benefit of a third party.

The only ground upon which it is sought to secure a recovery against the defendant is because of the answers to the questions which were propounded to her by the plaintiff before taking the note in suit.

The answers in question could not operate as an estoppel, because, if the intention to charge the separate estate must be

expressed in the contract of indorsement or a contract made simultaneously therewith, the failure to secure such a charge in writing cannot be cured by any subsequent representation.

The answers to the questions could not operate by way of an amplification of the contract of indorsement and by way of inserting therein the words suitable to make the indorsement a charge upon her separate estate, because the questions and answers were not intended for any such purpose, and did not contain any of the elements of a contract. The plaintiff had the note: he knew precisely what the contract of indorsement was: he knew or ought to have known that the plaintiff being a married woman, by the indorsement in the way in which it was made had not incurred any liability; and yet he asks her what she considers the law upon the subject is, and she expresses an opinion which is utterly at variance with the law as expounded by the courts of this state, and that is the whole purport of the question and answer in which the binding of the respondent's private estate is spoken of.

Under these circumstances there seems to have been an entire failure to comply with the provisions of law in reference to those particulars which are necessary to be observed, when it is sought by an indorsement of a promissory note to charge a married woman's separate estate.

The judgment must be affirmed, with costs.

Beach, J., concurred.

Judgment affirmed, with costs.

In the Matter of David Levy.

(Decided February 6th, 1882.)

The liability of the attorney for the plaintiff, to the amount of one hundred dollars, for the costs of the defendant in an action where the defendant is entitled to require security for costs, under sections 3268, 3278 of the Code of Civil Procedure, may be enforced by an application for an order requiring the attorney to pay that amount on account of such costs.

The denial on the ground of laches of a motion by the defendant to require the plaintiff to give security for costs, does not affect the liability of the plaintiff's attorney for the defendant's costs.

Appeal from an order of this court requiring a plaintiff's attorney to pay one hundred dollars on account of costs recovered by the defendant.

The facts are stated in the opinion.

David Levy, appellant, in person.

James Armstrong, for respondents.

Van Brunt, P. J.—In September, 1877, the appellant, as attorney for one Nanny Alexander, a resident of the state of Georgia, commenced an action against Joseph Myers and Solomon Marcus for damages for the conversion of plaintiff's property. In August, 1878, a motion was made to compel the plaintiff to file security for costs. This motion was denied by the court at special term upon the ground of laches, and an order was duly entered upon such decision of the court. An order was subsequently made at a trial term of the court dismissing the complaint in the action with costs, and a judgment was subsequently docketed therein dismissing said complaint, and for the recovery of the sum of $122.86, the costs and disbursements therein. An execution was issued upon said judgment against the property of the plaintiff, and being returned unsatisfied a motion was made for an order requiring

the appellant, as attorney for the plaintiff, to pay the sum of $100 on account of the said costs, which motion was granted; and from the order thereupon entered this appeal is taken.

The appellant raises the question that the order made is erroneous, and not authorized by any law, because the only liability against the plaintiff's attorney existed against him in the action brought by plaintiff's attorney; such costs can only be enforced by execution in such action against the property of the plaintiff's attorney; and the order made is an order which if disobeyed would be punishable as for contempt, and imprisonment would follow. In support of this point is cited the case of *Boyce* v. *Bates* (8 How. Pr. 495). The order in question is precisely in the form pointed out in that case and sustained by the authorities therein mentioned; that case simply deciding that as a means of enforcing such an order, an attachment against the person should not be resorted to, but rather an execution against the property.

In all the cases that I have been able to find, the making of an order upon a motion of this description seems to have been the practice pursued, and I know of no other way in which the liability of an attorney for costs could be properly adjudicated upon.

The next point raised by the appellant is that, Mr. Justice Daly having refused to compel the plaintiff to file security for costs, the liability of the attorney was terminated, because that was an adjudication that under section 3268 of the Code the defendants were not entitled to require security for costs.

It is to be remarked in considering this proposition that the section making the attorney liable for costs in the cases mentioned under section 3268, expressly provides when that liability shall terminate, which is when security is given. The section reads that the attorney shall be liable for costs until security be given, and then proceeds that if the attorney does not desire to run the risk of such a liability before commencing an action, he may file security. The language of the section seems to be reasonably explicit, and the necessary interpretation is, that if an attorney commences an action where, under the provisions of section 3268, the defendant might

require security for costs, such attorney becomes liable for such costs to the extent of $100 until security is filed; but any laches upon the part of the defendant to procure the filing of such security cannot release the attorney from such liability.

The objection that the papers are not entitled in the action does not seem to be well taken, for the reason that they contain a distinct reference to the action in respect to which the proceeding is taken, and it does not appear from the record that any objection of a like character was taken at the time of the argument of the motion in the cause below.

We are of the opinion, therefore, that the order appealed from must be affirmed, with $10 costs and disbursements.

J. F. Daly, J., concurred.

Order affirmed, with costs.

James McKee, Respondent, *against* Richard Hecksher, Appellant.

(Decided February 6th, 1882.)

Freight is not earned, under a bill of lading calling for the delivery, from a canal boat, at a specified pier, of a cargo of coal "alongside," if the boat sinks with the cargo after arrival at such pier and notice thereof to the consignee, but before a reasonable time for him to take the coal from the boat has elapsed.

Appeal from a judgment of a district court in the City of New York.

The facts are stated in the opinion.

Van Brunt, P. J.—This was an action to recover freight upon a cargo of coal, by the owner of a canal boat. The bill of lading called for the delivery at Jackson Street, East River, of a cargo of coal alongside.

The vessel arrived alongside the pier, of which arrival, the defendant, the consignee, had notice; but before he had an opportunity to take the coal from the boat she sank.

Upon the trial of the case in the court below the court held that, the boat having arrived alongside of the pier, the freight was earned.

A very brief consideration of the contract of a carrier will show such judgment to have been erroneous. The uniform course of decisions upon this subject is that the obligation of the carrier continues after the arrival at the point or place of delivery until a reasonable time after such arrival in order to allow the consignee to take possession of the goods. It is true that no case can be found which entirely covers the one at bar, but the principle has been established by a long series of decisions, and is recognized in Angel on Carriers, section 315 *et al.*, as the principle which comprises all contracts of carriers. Indeed no other rule could possibly prevail, because, if the contention of the plaintiff is correct, if merchandise is to be delivered upon the wharf, then the carrier is absolved from his obligation as a carrier the moment the goods are upon the wharf, notwithstanding the consignee or owner of the goods may not have had the slightest opportunity to reduce them to possession. The rule in such cases is universal, that the obligations of the carrier do not cease until the consignee or owner has had notice of arrival and a reasonable time in which to remove. In the case at bar it is conceded from the record that the defendant had no time within which to take the coal out of the boat prior to the time when she sank. If the plaintiff's contention is true, then in contracts of this description, freight would be earned even if the boat sank instantly upon her touching the pier at which she was to deliver her cargo. No such rule as that can possibly prevail without upsetting all the principles which control contracts of carriers.

The case which was relied upon by the counsel for the appellants in 17 Barb. 184, expressly recognizes this rule. There the boat lay at the place of destination ready to deliver the cargo for several days before the happening of the accident; and the court there held that the owner, having had

a reasonable time within which to remove the merchandise after its arrival at the port of destination, the freight was earned notwithstanding the subsequent loss of the cargo.

The term "alongside" involves no more than that the freighter was not bound to deliver the cargo upon the wharf, but that the consignee should take it from the boat himself.

The plaintiff in this action would have no greater right to recover than if his contract required him to deliver the coal upon the wharf, and he got it upon the wharf, but the owner had no opportunity to retake possession of the coal before the wharf sank and the coal was lost. In such a case it is perfectly clear that freight would not be earned. And that it was the understanding of the parties that the owner was to have a reasonable time in which to take possession of the coal is evidenced by the bill of lading itself, because it provides that the owner should have four days, exclusive of the day of reporting, and exclusive of Sundays and holidays, within which to remove that cargo—demurrage not commencing until after such four days shall have expired. It would appear, therefore, that the canal boat having sunk before the owner had an opportunity to take possession and remove the coal from her, a right to recover freight never became vested in the plaintiff.

The judgment must therefore be reversed.

Beach, J., concurred.

Judgment reversed.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent, *against* HENRY J. EISLER, Appellant.

(Decided February 6th, 1882.)

A summons upon which the name of the plaintiff's attorney is printed, instead of his written signature, is "subscribed" by him, within the meaning of section 417 of the Code of Civil Procedure.

The requirement of section 1897 of the Code of Civil Procedure, that "in an action to recover a penalty or forfeiture, given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons so delivered," &c., extends to an action by the corporation of the City of New York to recover a penalty for violation of a corporation ordinance.

APPEAL from a judgment of a district court in the City of New York.

The facts are stated in the opinion.

W. J. A. McGrath, for appellant.

William A. Boyd, for respondent.

VAN BRUNT, P. J.—This is an appeal from a judgment rendered in a district court upon an action brought by the plaintiff against the defendant for violation of a corporation ordinance. The objections raised by the defendant are;

1st. That the summons was not subscribed by the attorney for the plaintiff, his name being printed thereon; and

2nd. That the copy of the summons served on the defendant did not comply with section 1897 of the Code of Civil Procedure.

In respect to the first ground, it is sufficient to call attention to the case of *Barnard* v. *Heydrick* (49 Barb. 62), in which the whole subject is discussed by LOTT, J., all the cases

reviewed, and the very sensible conclusion arrived at, that the statute is complied with even though the summons be not subscribed in the handwriting of the attorney, but that a printed signature issued by him is just as effectual upon him as though he had subscribed the summons with his own name and in his own hand.

The objection that the summons did not comply with section 1897 of the Code seems to be well taken. The distinction which is attempted to be drawn between an "ordinance" and a "statute" does not seem to be well founded.

It is true that the term "ordinance" as usually employed applies to the legislative acts of municipal bodies, but they have precisely the same authority of law as the statutes of a legislature within the jurisdiction which has been confided to such body, and the ordinary definition of an ordinance includes the word "statute." Acts of Congress have been styled "ordinances;" as for example the "ordinances of 1787" regulating the government of Territories. It would seem, therefore, that because the word "statute" is used in the section of the Code referred to, it does not necessarily exclude its application to a statute of a municipal corporation, which is equally an ordinance. The reason of the rule applies, and the wording of the section does not exclude it. The section is as follows: "In an action to recover a penalty or forfeiture given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons so delivered in the following form:—'According to the provisions of,' etc.; adding such a description of the statute as will identify it with convenient certainty, and also specifying the section if penalties or forfeitures are given in different sections thereof for different acts or omissions."

It is true that this section occurs in an article entitled, "Action by a private person for a penalty or forfeiture," and that all the preceding sections of this article relate to such an action. But it is to be observed that the fact that the action referred to in those sections is for the benefit of or to be brought by some person, is distinctly mentioned in each of the sections; and

that such phraseology is dropped when the section in question is reached; and it would seem, therefore, to have been the intention to make the provisions of section 1897 general, especially as there is no reason which would apply to an action brought by a private person which would not have equal force when applied to an action brought by a state or municipal corporation. The summons in the case at bar not complying with this provision of the Code, must therefore be held to have been irregular, and the justice should have dismissed the complaint upon that ground.

It is not necessary that the ordinance should have been printed verbatim upon the summons; all that the section requires is such a reference to the ordinance of the City of New York as would enable the party who was served with a summons to turn to the ordinance and determine for what offense he has been sued and what penalty it is charged that he has incurred.

The judgment must therefore be reversed with costs.

Beach, J., concurred.

Judgment reversed, with costs.

Edward Prial, Appellant, *against* Edward Entwistle, *et al.*, Respondents.

(Decided February 6th, 1882.)

By an agreement for the hiring of premises, the tenant was to take possession of them on the 15th of April, at a certain rental per year, the term to expire on the 1st of May of the following year. He took possession on April 15th, accordingly, and occupied and paid the rent until July of that year, when he removed from the premises. *Held*, that, the agreement being void by the Statute of Frauds, the tenant was liable only for the use and occupation of the premises for the time he actually occupied them; and that a tenancy from year to year was not to be implied from his occupation under the circumstances.

Prial *v.* Entwistle.

Appeal from a judgment of a district court in the City of New York.

The facts are stated in the opinion.

R. H. Channing, for appellant.

Robert W. Todd, for respondent.

Van Brunt, P. J.—On the 10th of April, 1880, the defendant, Entwistle, hired certain premises of the plaintiff for one year from the 1st of May, 1880, he to take possession on the 15th of April, and to pay rent from that time. The defendant, Entwistle, did take possession on the 15th of April, and paid the rent of the premises up to sometime in the month of July, when he moved out; and this action was brought to recover the balance of the rent which became due subsequent to his removal and prior to the 1st of May, 1881. The evidence in this case showed negotiations between the plaintiff and defendant which terminated in a contract for the taking possession of the premises on the 15th of April, at a certain rental per year, and an agreement for a term which should expire on the 1st of May of the following year. At the close of the plaintiff's case the objection was taken that the alleged contract of letting was within the Statute of Frauds and therefore void, and no recovery could be had for rent which might fall due under that contract. The complaint was dismissed upon this ground, and from the judgment rendered thereon this appeal is taken.

It is somewhat difficult to harmonize the conflict in the language of the decisions of the Court of Appeals in reference to the question now before the court; but a consideration of the facts which were before the court at the time of the various decisions, seems to afford a reasonable solution of what might be deemed at first glance an irreconcilable conflict.

In the case of *Thomas* v. *Nelson* (69 N. Y. 118), the court held distinctly that under a verbal lease, for more than a year, and therefore void under the Statute of Frauds, the defendant

is only liable for use and occupation, and cannot be compelled by virtue of the lease to pay for a longer period than he actually occupies. In that case the question was presented squarely, and the decision to which I have referred was announced.

In the cases of *Reeder* v. *Sayre* (70 N. Y. 181), *Laughran* v. *Smith* (75 N. Y. 205), a different rule seems to be enunciated, as the court in those cases stated that although an agreement by parol for a longer period than a year is void under the Statute of Frauds, yet if the party goes into possession under such agreement, the occupancy enures as a tenancy from year to year, and the agreement regulates the relations of the parties and determines their rights and duties in all things consistent with a yearly tenancy. And in support of this position, in one of those cases, the learned judge writing the opinion alludes to the fact that it is a well settled principle of law, where a party holds over after the expiration of his term and is permitted so to do by the landlord, without any new agreement in regard to such occupancy, the law implies a contract between the parties for another year upon the same terms and conditions as were contained in the lease which had expired; and it is this principle which was applied to the facts of those cases, and upon which they were decided. In each of those cases the parol agreement had been for a number of years, and the tenant had gone into possession, had remained in possession one or two years, and then continued the occupation; and the court held that, under those circumstances, although the original letting was void under the Statute of Frauds, the occupation enured as a tenancy from year to year, the terms and conditions of which were to be determined by the original letting—a very different state of facts from those which appeared in the case of *Thomas* v. *Nelson*, above referred to. In the cases of *Reeder* v. *Sayre* and *Laughran* v. *Smith*, there had been a continuous occupation from year to year which had been recognized and acted upon between the parties, and the relation of landlord and tenant had thereby been established upon certain terms and conditions, which were recognized by the parties and acted upon by them. The holding over, therefore, after the termination of any one year,

under the rule of law to which attention has been called, would imply a new contract for a new year upon the same terms and conditions as the occupancy had been permitted for the year before; and the tenancy would, therefore, become a tenancy from year to year. This view of the case entirely harmonizes the decisions above referred to, and in no way conflicts with or ignores the provisions of the statute, which would be the result if the interpretation which is sought to be placed upon the cases of *Reeder* v. *Sayre* and *Laughran* v. *Smith* should prevail.

It evidently was not the intention of the Court of Appeals in those decisions to repeal the statute, but to apply a well recognized principle of law in reference to tenants holding over after expiration of term, to the facts of those particular cases, which are entirely different from the actual facts presented in the testimony in the case at bar.

The judgment should therefore be affirmed, with costs.

J. F. Daly, J., concurred.

Judgment affirmed, with costs.

Daniel S. Riddle, Respondent, *against* Henry A. Cram, Appellant.

(Decided February 6th, 1882.)

In an action for fees of a referee appointed to take the examination of a judgment debtor in proceedings supplementary to execution, the plaintiff cannot recover upon a *quantum meruit*, as the compensation of such a referee is fixed by statute; and evidence that the examination disclosed that the debtor had property or means to pay the judgment is therefore inadmissible.

Appeal from a judgment of the general term of the Marine Court of the City of New York affirming a judgment of that court entered upon the verdict of a jury.

The facts are stated in the opinion.

H. S. Cram, for appellant.

Daniel S. Riddle, respondent, in person.

Van Brunt, P. J.—This is an action to recover referee's fees by a referee appointed in supplemental proceedings. The defenses were a denial that the plaintiff ever rendered any services to the defendant, and the Statute of Limitations. The plaintiff in his complaint alleged the value of the services to be a certain sum, and this was denied by the answer.

The evidence shows that the defendant in this action was an assignee of the judgment upon which the supplemental proceedings were had, that he was cognizant of the reference, and that he appeared before the referee and urged that it should proceed; and it was also testified by one of the witnesses, Girding, that the defendant knew of the reference and approved of it. This was more than was necessary to establish a liability upon the part of the defendant for the fees which he had incurred upon that reference. It was urged upon the part of the appellant that, the reference never having been terminated, no cause of action accrued. It would seem that a complete answer to this objection is presented by the evidence of the fact that the proceedings were suspended and that the judgment upon which the proceedings were founded was paid in full to the defendant, and the judgment satisfied.

Several exceptions to the introduction of testimony were taken, some of which seem to be well founded. It is true that the plaintiff alleged a *quantum meruit*, and that the answer denied it, but the theory upon which the plaintiff based his recovery was the compensation fixed by the statute, and had nothing to do whatever with the nature of the services, or with their value, but simply depended upon their rendition.

Under such circumstances the evidence in regard to the nature of the services and their value seems to have been entirely immaterial. The plaintiff in this action had no right to raise the issue of a *quantum meruit*, and although it was

denied by the answer, that did not authorize him to introduce proof upon that issue when the only amount which he could recover was that which the statute had fixed as compensation for such services. Therefore, the question contained in the 12th interrogatory propounded to the witness Girding as follows: "State whether or not, if you know, the examination of Van Valkenberg disclosed property or showed that he had means to pay the judgment upon which the proceedings had been based?" was clearly improper, particularly when we consider the nature of the answer, which was as follows: "The examination of Van Valkenberg disclosed that he had a large amount of money, and it was in consequence of that fact that the judgment was paid."

This testimony may have influenced the jury in determining the question as to whether Mr. Riddle had been employed by Mr. Cram or Mr. Girding, which was a very material issue in the case as presented by the evidence.

We think, therefore, that the admission of that evidence being erroneous under the theory of the plaintiff's action, the judgment must be reversed and a new trial ordered, with costs to abide the event.

Beach, J., concurred.

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

Harmon B. Whitbeck, Appellant, *against* Peter Kehr *et al.*, Respondents.

(Decided February 6th, 1882.)

Where the facts stated in a complaint may constitute either a cause of action for conversion or a cause of action upon contract, but are alleged as a single cause of action, only, and no motion to have such two causes of action separately stated is made before the trial, the court should not, upon the trial, compel the plaintiff to elect between them.

Whitbeck *v.* Kehr.

Appeal from a judgment of the general term of the Marine Court of the City of New York affirming a judgment of that court entered upon a dismissal of a complaint, and affirming an order requiring the plaintiff to elect between causes of action stated in the complaint.

The facts are stated in the opinion.

Charles Reinhardt, for appellant.

E. H. Benn, for respondent Kehr.

Lawrence & Waehner, for respondent Stauf.

Van Brunt, P. J.—This is an appeal by the plaintiff from an affirmance by the Marine Court of a judgment rendered in favor of the defendants by direction of the court, dismissing the complaint after a trial before the court and a jury; and also from the affirmance of the order made on the trial compelling the plaintiff to elect upon which of the causes of action set forth in the complaint he would rely. Upon the trial of the action the defendants' counsel moved that the plaintiff be compelled to elect on which cause of action he would rely. The court held that he must so elect, to which decision the plaintiff excepted.

The complaint in the action contains a statement of facts in reference to a transaction which occurred between the parties to the action. It is true that upon all the facts stated one could make out an action for a conversion or an action upon contract. There are no words alleging a conversion contained in the complaint, but there are statements of fact from which a conversion might be inferred. All these allegations are set forth as a single cause of action; they are not separately stated, and the complaint contains no indication that the pleader supposed that he was alleging more than one cause of action. Under these circumstances we cannot see what power the court had to compel the plaintiff upon the trial to make any election in reference to what he deemed his cause of action to

be. If the defendants were of the opinion that the complaint contained two causes of action, their motion should have been at the special term or chambers of the court, to have had such causes of action separately stated, and then the question could have been squarely presented as to whether a good cause of action was set out upon either of the grounds relied upon. Then the question could also have been determined as to whether two causes of action were improperly united, which was the ground of the first motion which the defendants made to dismiss at the trial of this cause. If the plaintiff claimed that there was but one cause of action set out in the complaint, then a motion should have been made upon the part of the defendants, to have stricken out from the complaint those allegations which were not pertinent to the cause of action relied upon by the plaintiff. In this action no such motion was made, no separation of the allegations in the complaint was ever insisted upon, and the plaintiff, upon a simple narration of certain facts from which two causes of action of a different nature might be spelled out, was compelled, upon the trial, without his attention ever having been called to the subject before, to determine precisely which cause of action he would pursue.

It seems to us that until the causes of action were separated, the allegations of the one taken out and separated from the allegations of the other, so that it could be determined upon an inspection of the complaint what allegations belonged to one cause of action and what allegations to another, the plaintiff could not be called upon to elect at the trial whether he would pursue one or the other.

We are of the opinion, therefore, that the court erred in compelling the plaintiff to characterize the cause of action which his complaint contained, and that the judgment thereon must be reversed and a new trial ordered, with costs to abide the event.

Beach, J., concurred.

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

ANNIE STUEBING, as Administratrix of the Estate of ANTONIE STUEBING, Deceased, Appellant, *against* JESSE A. MARSHALL *et al.*, Respondents.

(Decided February 6th, 1882.)

A release, given by the father of a deceased minor child, whose death was caused by negligence, to the parties liable therefor, is a bar to an action against them by the personal representative of the child under L. 1847, c. 450, where the father alone would be entitled to the proceeds of the claim for damages, for which an action is given by that statute.

APPEAL from a judgment of this court entered upon findings by a judge at a trial without a jury.

On May 8th, 1878, Antonie Stuebing, a minor daughter of Charles and Annie Stuebing, was run over by one of defendants' line of stages, and died from the injuries.

On May 10th, the father, by a written instrument, in consideration of one hundred dollars, released and discharged the defendants from all and every claim he had against them, arising from the death of his child.

On the same day the plaintiff was appointed administratrix and as such, in June following, brought this action, claiming to recover five thousand dollars damages.

The action was tried before the court without a jury, upon the issue raised by the release, and judgment rendered for the defendants. From the judgment the plaintiff appealed.

Henry Wehle, for appellant.—The cause of action arose on the appointment of the administratrix (L. 1847, c. 450; L. 1870, c. 78). The father, as mere *cestui que trust*, could not release the claim in this action; it being a debt due by the person through whose negligence death ensues to the legal representatives of the deceased (*Yertore* v. *Wiswall*, 16 How. Pr. 12; *Dolt* v. *Wiswall*, 15 How. Pr. 128), the *cestui que trust* cannot release, convey, or in any way or manner alienate the trust estate (*Rathbone* v. *Hooney*, 58 N. Y. 463).

The release does not affect the claim in this action. The father had valid claims against defendants, as father, which he could release. He was entitled to the infant's services during the two days during which she lingered (*Ford* v. *Monroe*, 20 Wend. 210; *McGovern* v. *New York Central, &c. R. R. Co.*, 67 N. Y. 420; see *Hyatt* v. *Adams*, 16 Mich. 180). He was entitled to reimbursement of his outlays for medicines and funeral expenses (*Pack* v. *Mayor*, 3 N. Y. 489). The release does not in terms discharge the claim to which the legal representative would become entitled, nor any claim the father would be entitled to receive at the hands of the legal representatives. It cannot be assumed that the father intended to release the claim in this action. There is no proof to sustain this assumption. On the contrary, it is extremely probable that the father had no knowledge of the right to this claim, and that the parties made their agreement without any reference to this claim.

A valid claim existing in favor of the father, as such, the release being silent as to a claim in any other capacity, the court must infer that the parties intended to release that claim only. Even if the release contains general words discharging the defendants "from every claim from the beginning of the world to the day of the date," these general words must yield to the clear intention of the parties (*Connecticut Fire Ins. Co.* v. *Erie R. R. Co.*, 73 N. Y. 399; *Rich* v. *Lord*, 18 Pick. 322; *Lyman* v. *Clark*, 9 Mass. 234; *Wiggens* v. *Norton*, R. M. Charlt. 15; *Gimble* v. *Smith*, 7 Ind. 627; *Taylor* v. *Homersham*, 4 M. & S. 423; *Lindo* v. *Lindo*, 1 Beav. 496; *Eaton* v. *Boston R. R. Co.*, 12 Am. R. 147; *Hallett* v. *Collins*, 10 How. U. S. 174). And a release, although in terms including all claims, will not be construed to include those held by the grantor in *autre droit*, or such as were not at the time known to him (*Wiggens* v. *Norton*, R. M. Charlt. 15; *Lyall* v. *Edwards*, 6 H. & N. 337; *Reading R. R. Co.* v. *Jackson*, 7 Watts & Serg. 327).

If the administratix can maintain the action, the fact that the proceeds would naturally go to a next of kin who has executed a release cannot interfere with the right of action

(See *Whitford* v. *Panama R. R. Co.*, 23 N. Y. 467). The release has no greater force than a recovery by the father, under his common law right of action, for the loss of services of his child during her life time would have had (*Ib.*; *Schlichting* v. *Wintgen*, 25 Hun, 626).

Earnest G. Stedman, for respondents.—The release is a good and sufficient defense, if executed by the proper party; for the right of action was complete at the time of its execution. The father was the proper party to execute the release; he was the only next of kin, and, as such, was entitled to the whole recovery (3 R. S. 6th ed. 105, § 90, subd. 7). The damages recovered form no part of the assets of the estate, but are the exclusive property of the husband, widow and next of kin, so that a release, executed by either of them, is valid without the signature of the legal representative (*Yertore* v. *Wiswall*, 16 How. Pr. 12; *Quin* v. *Moore*, 15 N. Y. 436; *Dickens* v. *New York Central R. R. Co.*, 23 N. Y. 159). The administratrix then is only acting as the trustee or agent of the father, who has already received full satisfaction from defendants for the loss of his child, and has given his release accordingly.

Beach, J.—[After stating the facts as above.]—The conclusion of the learned justice below is, in my opinion, correct. The claim created by statute, arose when the child died, and prior to the settlement with the father (L. 1847, c. 450). It was enforceable by the personal representative, but its existence in no way depended upon the appointment of an administrator. In law the claim belonged to whomsoever would be entitled to its proceeds. This was the father, and he gave release. Had the child legally settled all claims, and thereafter died from the effects of the injury, the plaintiff could not have sustained an action (*Dibble* v. *New York & Erie R. R. Co.*, 25 Barb. 183). She having power to release any claim possible to arise under the statute, from her death, the release given by the person entitled to the proceeds after it had accrued, is quite as effectual. These proceeds

would belong to the father, less expenses of administration and collection, and could at any any time be, by him, legally assigned, and being assignable, could as readily be settled for, and the right of action from which they were to result, discharged and released (*Quin* v. *Moore*, 15 N. Y. 432.)

The judgment should be affirmed with costs.

Van Brunt, P. J., concurred.

Judgment affirmed, with costs.

Jeremiah Crowley, Appellant, *against* The Royal Exchange Shipping Company (Limited), Respondent.

(Decided April 3d, 1882.)

Where the facts are undisputed and the law certain, the service of a summons and complaint may be vacated, on motion, for want of jurisdiction of the action, without compelling the defendant to raise the objection by demurrer or answer.

Appeal from an order of this court vacating the service of a summons and complaint.

The action was brought against a foreign corporation, to recover damages for a personal injury to plaintiff, committed out of the state. Upon the hearing it appeared that the plaintiff was a non-resident of the state, and the motion to set aside the service of the summons and complaint was granted. From the order entered thereon the plaintiff appealed.

Edward E. McCarthy, for appellant.

Butler, Stillman & Hubbard, for respondents.

J. F. Daly, J.—This court had no jurisdiction of the action. A late decision of the Supreme Court, general term

of the first department, holds, that the objection, if the want of jurisdiction appear on the face of the complaint, should be taken by demurrer, otherwise by answer; and that the question of jurisdiction should not be tried upon affidavits (*Johnson* v. *Adams Tobacco Co.*, 14 Hun, 89). Where a question of fact arises upon the motion raising an issue as to jurisdiction, the case cited is good authority for denying the application, and leaving the defendant to his answer; but where the facts are undisputed and the law certain, the order asked for should be granted, as in *Cumberland Coal Co.* v. *Sherman* (8 Abb. Pr. 243), affirmed at general term in this district.

Beach, J., concurred.

Order affirmed, with $10 costs and disbursements.

Patrick McKenna, Respondent, *against* Helena M. Edmundstone, Impleaded, &c., Appellant.

(Decided April 3rd, 1882.)

The Mechanics' Lien Law of 1875 (L. 1875, c. 379), applicable to the City of New York, being a local and special act, is not repealed by implication by the general act of 1880 (L. 1880, c. 486), on the same subject, applying to all the cities of the state except the City of Buffalo.

Appeal from an order of this court denying a motion to discharge a mechanics' lien.

The plaintiff having filed a mechanics' lien against property of the defendant, this motion was made by the defendant to discharge the lien upon executing and filing a bond for that purpose, pursuant to the lien act of 1875 (L. 1875, c. 379, § 18, subd. 4). The motion was denied on the ground that the general lien act of 1880 (L. 1880, c. 486) did not authorize the application. From the order denying her motion the defendant appealed.

J. F. Daly, J.—The act of 1880 (L. 1880, c. 486), applies to all the cities of the state save the city of Buffalo, which is expressly excepted, and contains provisions for discharging liens filed under it, but there is no provision such as is contained in the lien act of 1875, applicable exclusively to the city of New York, permitting the discharge of the lien upon the owner executing and filing a bond. It is claimed by the appellant, that the statute of 1880 is a general act and does not repeal the statute of 1875, which is a special enactment for the city of New York, according to the familiar rule that a special and local act will not be deemed repealed by implication in consequence of the passage of a general law covering the subject (*Whipple* v. *Christian*, 80 N. Y. 523; *In re*, *The Evergreens*, 47 N. Y. 216; *Bowen* v. *Lease*, 5 Hill, 225; *Village of Gloversville* v. *Howell*, 70 N. Y. 287; *In re*, *Delaware*, &c. *Canal Co.*, 69 N. Y. 209; *Van Denburgh* v. *Village of Greenbush*, 66 N. Y. 1; *Matter of Comm'rs of Central Park*, 50 N. Y. 493).

The cases of *Whipple* v. *Christian*, and *Van Denburgh* v. *Village of Greenbush*, were decisions upon questions arise eing upon successive mechanics' lien acts in other parts of th state, and the expressions contained in the opinions are broad enough to warrant all that appellant claims, although the decision in each case was put upon an additional ground that rendered discussion of the point here involved unnecessary. As all the judges concurred in the opinions delivered by Earl, J., in the second case, and all but he (he not voting) concurred in the opinion of Danforth, J., in the first case, we have a satisfactory statement of the views of the court on this subject. It is said that a general act concerning the acquiring and enforcing of mechanics' liens does not repeal, by implication, a prior local statute embracing the same subject. Under this construction the statute of 1875, applicable to the city of New York only, would be in force notwithstanding the general act of 1880, and the court had power to grant the motion.

Van Brunt, P. J., concurred.

Order reversed, without costs.

THEODORE W. DENISON, Jr., Plaintiff, *against* ROBERT T. FORD, Defendant.

(Decided April 3rd, 1882.)

In an action against a landlord for eviction of his tenant from the demised premises, the tenant cannot recover as damages profits which he would have made if he had not been disturbed in his occupancy.

EXCEPTIONS taken at a trial term of this court, ordered to be heard in the first instance at the general term.

The facts are stated in the opinion.

B. Wright, for plaintiff.

Thos. E. Stewart, for defendant.

VAN HOESEN, J.—When this case was here on a former occasion (see 7 Daly, 384), the court said that as the landlord virtually evicted the tenant, the measure of damages recoverable by the tenant was the difference between the rent reserved and the value of the premises, together with rent which he had paid in advance, deducting for the period that he was actually in the beneficial enjoyment of the demised premises. That rule of damages was applied in a case strongly resembling this, the case of *Mack* v. *Patchin* (42 N. Y. 167). In *Lock* v. *Furze*, a late case, decided upon great consideration by the Exchequer Chamber (L. R. 1 C. P. 441), the court said, "if the covenantor makes himself actor in ousting his grantee, he becomes liable for the value of the estate he was instrumental in taking away." So again, Taylor, in the seventh edition of his Landlord and Tenant, section 317, says, "it is now held that in an action for the breach of a covenant for quiet enjoyment, the measure of damages is the value of the unexpired term less the unpaid rent."

These authorities would seem to leave no doubt as to the rule, but the learned counsel for the plaintiff thinks otherwise,

and has made an elaborate argument to show that the evicted tenant is also entitled to recover, as damages, the profits which he would have made if he had not been disturbed in his occupancy. Although the case was not cited by the learned counsel, there is one decision in his favor, but it is not one that has been, or ever will be, followed. In *Shaw* v. *Hoffman* (25 Mich. 163), the tenant was evicted from a barn used as a sale and boarding stable; on July 11th, and on the 21st of the January following, he brought suit, claiming as items of damage, loss of profits that he would have made from boarding the horses of third persons, and also his loss from boarding his own horses at another stable, where he was compelled to pay two dollars per week for each horse more than he could have kept them for in the barn from which he had been ousted by his landlord. Ch. J. Christiancy, in delivering the opinion of the court, said, without citing any authority or discussing the question, that the loss of profits was a proper element of damages, inasmuch as the evidence showed that it was a proximate and natural consequence of the acts complained of. But, as if afraid of the doctrine he had laid down, he added, that these profits must be "for the proper length of time." What the proper length of time was, or how it was to be ascertained, he did not state. If the horses had been converted, instead of the barn, the landlord would, upon the principle of that case, have been liable for the profits they would have earned for the former owner "in a proper length of time." There is no such rule in the case of a conversion of personal property, and it has been repeatedly held that where a leasehold is converted or destroyed by the act of the lessor, the damages are to be estimated by the rule that obtains where personal property has been converted (*Mack* v. *Patchin*, 42 N. Y. 172).

There are cases of interruption of business in which, for the purpose of ascertaining the extent of the interference, and the seriousness of the injury, the plaintiff has been permitted to prove the amount of the business that he did before the interruption occurred, the profit that was made upon the business, and then the amount of business done after the interruption. To this class of cases *Schile* v. *Brockhahus* (80 N. Y.

620) belongs. There was no eviction, but simply an interruption of the plaintiff's business by the tearing down of a party wall, and the plaintiff was allowed to prove how great his loss was by showing the usual profits of his business before the wall was interfered with, and the diminution of receipts that followed such interference. There is no case of recognized authority which holds that profits as profits are recoverable in an action for the breach of a covenant for quiet enjoyment. In actions of trespass, generally, where proof of profits is received, it is not because those profits are the measure of damages, but it is for the purpose of enabling the jury to arrive at the extent of the loss which the defendant's wrongful act has inflicted. Thus, in the case of *Marquart* v. *Lafarge* (5 Duer, 555), the landlord wrongfully bricked up the entrance to his tenant's saloon, converted his goods, and destroyed his business. The court said, "it was competent to prove in some manner the nature and extent of the injury, and the value of the business was a proper subject of estimate by the jury. It may be that a calculation of possible or probable profits, in view of the ordinary uncertainties of business, would not be allowable, but general testimony to the value of the business, though not specific enough to form a very clear guide to the value of the good-will, unless it were followed by other proof, was, in its nature, competent."

In this case, instead of bringing suit for a breach of the covenant for quiet enjoyment, the plaintiff has attempted to steal a march upon his adversary by suing for the ruin and destruction of his business, hoping that the rule of damages in the action of trespass might prove more profitable to him than the rule which prevails in an action of covenant. But there is nothing in the evidence to support a charge of fraud or of trespass. The case is simply one in which the defendant, finding that his hope of establishing a new market was doomed to disappointment, did his best to retrieve his loss by turning the building to a more profitable use. In doing this, he closed some of the doors of the market, and furnished so little light that the plaintiff could not advantageously carry on his trade; and in view of all the facts we held, when the

case was here before, that enough had been done to constitute an eviction. The result was that the defendant was liable on his covenant for quiet enjoyment, and in an action on that covenant the rule of damages is, as I have already said, too well settled to be called in question. The evidence shows nothing more than an eviction, and any injury that has resulted to the plaintiff's business is traceable to that, and to that alone. Upon the evidence, there is not the slightest reason for supposing that the defendant intended any injury to the plaintiff's business, that he committed any trespass, except in a technical sense, or that the plaintiff sustained any other damage than such as was effected by the breach of the covenant for quiet enjoyment. It would be a great hardship to tolerate a practice through which a mere covenantor may, by the contrivance of the pleader, be metamorphosed into a trespasser, and punished accordingly.

In actions *ex contractu*, the rule respecting the allowance of profits is thus stated by Mayne, Treatise on Damages, 2nd ed. 27: "In cases where the profit to be made by the bargain is the thing purchased, the amount of that profit is strictly the measure of damages. But where the thing purchased is a specific article, and not the right to make a profit, the measure of damages will be the value of that article, or the difference between the contract price and that for which it could be purchased elsewhere." Here the thing purchased was a specific thing—the privilege of occupying stand No. 46. It was not the right to a profit that was purchased, and hence the profits are not the measure of damages. I am aware that this is only re-stating in other words the rule already said to be applicable to this case, but I repeat it because I think Mr. Mayne has clearly and forcibly summarized it.

Treating this as an action for a breach of covenant, the only inquiry before us is, whether the judge erred in excluding some testimony offered by the plaintiff. Where an article has no market value, testimony may be received of facts from which the jury may draw their conclusion as to its value, but where it has a market value, it is not permissible to attempt to prove its intrinsic value by testimony as to the

uses to which it may be applied, and as to the profits likely to accrue from such uses. The market value is the best evidence of its actual value, and must be proved, unless it be shown that such proof is not to be had. Most of the testimony offered by the plaintiff was intended to show that large profits could be made at this stand, and by those profits the plaintiff sought to have the jury measure the value of the stand. It is undoubtedly true that the value of a place of business depends principally upon the profits that may be gained there; but it is also true that the value of the place is a fact, and the very fact that it is the object of courts to elicit, and that an inquiry as to the profits is only a means of arriving at that fact. As the plaintiff made no attempt to show the actual value of the stand, or to show that it had no market value, I think the judge was right in excluding the testimony offered as to the profits made at the stand in April and May. As to the ruling that the plaintiff did not show himself competent to testify as to the value of the lease of the stall, I am not prepared to say the judge erred. His knowledge, gained by inquiries at some other markets, did not necessarily qualify him to speak as to the value of stands at this market, where the business was poor at the start, and never became good.

Upon the whole, I think there was no error in the rulings at the trial, and that the plaintiff should have judgment for the amount named by the judge at the trial.

The plaintiff's exceptions should be overruled.

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

Exceptions overruled, and judgment ordered for plaintiff.

LAVINIA C. H. DEMPSEY, Appellant, *against* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Decided April 3rd, 1882.)

Upon trial of an action against a city to recover damages for a personal injury sustained by the plaintiff from a fall upon a sidewalk of a street in the city alleged to have been at the time dangerously covered with snow and ice, specific questions may properly be submitted to the jury as to the condition of the sidewalk when the plaintiff fell, and the time it had then remained in its alleged dangerous condition; and the special findings upon such questions, if inconsistent with the general verdict, must control the latter.

In such a case, the setting aside of a general verdict for the plaintiff, and directing a verdict for the defendant upon the special findings, being, at most, erroneous in point of form, is not ground for reversal of a judgment for the defendant entered thereupon.

APPEAL from a judgment of this court entered upon a verdict of a jury directed by the court, and from an order denying a motion for a new trial.

The action was brought to recover damages for injuries received by the plaintiff by falling on the sidewalk of Spring Street, in the City of New York, on Friday, January 17th, 1879. The sidewalk was at the time covered with snow and ice. On the Sunday preceding there had been a snow fall, and another on Wednesday, ending on Thursday afternoon.

At the trial the court submitted to the jury specific questions, which were answered, and a general verdict found for the plaintiff; but because of the special findings the court set aside the verdict, and directed a verdict for the defendant. The plaintiff moved to set aside this verdict and for a new trial, which was denied, and judgment for the defendant was entered on the verdict. From the judgment and the order denying her motion for a new trial, the plaintiff appealed.

John H. V. Arnold, for appellant.

Wm. C. Whitney, *D. J. Dean*, and *E. H. Lacombe*, for respondent.

Beach, J.—[After stating the facts as above.]—The submission of specific questions to the jury on the trial was eminently proper. In actions of this class it tends to avoid verdicts resulting from sympathy or compromise, by directing the attention of jurors to precise questions of fact, leaving the application of legal principles with the court.

Where the special findings and general verdict are inconsistent, the former must control, and judgment be rendered accordingly (Code Civ. Pro. § 1188).

The learned counsel for the appellant claims the action of the court erroneous in setting aside the general verdict for plaintiff, and directing a verdict in defendants' favor. This, at most, was an error of form, and was disregarded by the court in *United States Trust Company* v. *Harris* (15 Super. Ct. 75), although the setting aside of the general verdict was condemned. There would seem to be no difference in result between so doing and permitting it to stand with judgment ordered for the defendants. The record is not thereby materially changed.

The direction to find specially upon questions of fact rests in the discretion of the court, and an exception thereto is not available, unless the case be one where such proceeding is not authorized by the statute.

The first question related to the condition of the sidewalk where the accident happened. The jury found that foot passengers, by the exercise of ordinary care, could pass over the place in safety. This was equivalent to finding it to have been in a condition sufficiently safe for passage, to relieve the defendant from legal liability. The general verdict for the plaintiff was inconsistent with this special finding. The former upheld the caution of the plaintiff, and the latter may not be adverse to her upon that point. But although the evidence might show her to have been sufficiently careful, still, in answering the question, the jury settled a fact relative to

the condition of the sidewalk legally conclusive in defendants' favor.

No actual notice of the dangerous condition of the walk was shown to have been given to the public authorities. It was incumbent, therefore, upon the plaintiff to prove the place to have been in such condition for sufficient time to establish constructive notice. In this respect the submission of specific questions was a safeguard to the correct application of the law, while within the province of the jury to find the facts bearing upon the point. When these facts were thus settled, there remained but questions of law. In *Todd* v. *The City of Troy* (61 N. Y. 506), there was evidence tending to show the existence of the ice extending across the sidewalk of a much traveled street for the several days prior to the accident. The verdict in plaintiff's favor was upheld. But if, notwithstanding the verdict, the obstruction had appeared by clear proof to have existed but four hours, I am constrained to think the ultimate result would have been different upon appeal. In the case at bar, the jury found the accumulation of ice and snow had not remained in its then condition for more than twelve hours prior to the accident. In my opinion, under this finding, it was right for the court below to hold, as matter of law, that no constructive notice to the public authorities resulted. Such notice is a legal inference from established facts (*Birdsall* v. *Russell*, 29 N. Y. 220).

The exception at folio 29 was not well taken. The length of time the ice and snow appeared to have been there was not a subject upon which the witness could properly give an opinion. It was for the jury to pass upon, enlightened by any description of the obstruction witnesses might give.

The action of the court had no effect upon the right of the plaintiff to move for a new trial upon the ground of insufficient damages. Had the general verdict been allowed to stand, and judgment directed for the defendant, the suggested proceeding could not have been taken, nor does it seem possible the jury could have been influenced in estimating the plaintiff's damages by the specific questions.

The more rational supposition is that the verdict was the

outcome of those feelings of sympathy which, however creditable, under most circumstances, often produce injustice, if exercised by jurors when performing their important duties.

The judgment and order should be affirmed, with costs.

J. F. Daly, J., concurred.

Judgment and order affirmed, with costs.

John F. Higgins, Respondent, *against* John Callahan *et al.*, Impleaded, &c., Appellants.

(Decided April 3rd, 1882.)

After judgment against the defendant in an action, a motion was made by him and his sureties in a bond for the limits given by him in the action, that the judgment be satisfied of record, which motion was granted by the special term. From this order of the special term the plaintiffs in the action appealed. *Held*, that the general term, on reversing the order, might impose the costs of the appeal upon all the parties making the motion, although the defendant's sureties were not parties to the action; that such costs should be adjusted by the clerk upon notice; and that, as no process is provided for collecting costs on a motion made after judgment, an action for their recovery might be maintained.

Appeal from a decision of the general term of the Marine Court of the City of New York reversing a judgment of that court upon a demurrer to a complaint and overruling the demurrer.

The action was brought by plaintiff, who was the assignee of Albert G. Woodruff and others, composing the firm of Woodruff, Morris & Co., to recover the sum of $55.37, the amount of costs upon an appeal in the Marine Court, from an order made in an action brought by said firm against Daniel McGuire.

A judgment had been recovered against Daniel McGuire by said firm, and a motion after judgment was made by Daniel

McGuire and by John Callahan and Thomas McGuire, who were his sureties on a limit bond given by him in said action, to have the said judgment satisfied of record. Their motion was granted; but the plaintiffs in the action appealed to the general term of the Marine Court, which reversed the order appealed from, and denied the motion to mark the judgment satisfied, and ordered the parties making the motion to pay costs and disbursements, which were directed to be taxed by the clerk. The costs were duly taxed on notice at $55.37, and demand thereof made and payment refused. The cause of action for the recovery of that sum was assigned to this plaintiff, who brought this action in the Marine Court. The defendants interposed a demurrer that the complaint did not set forth facts sufficient to constitute a cause of action. The special term of the Marine Court gave judgment sustaining the demurrer. Plaintiff appealed, and the general term of the court reversed the judgment of the special term, and gave judgment on the demurrer in favor of plaintiff, with leave to defendants to answer over in six days, in default of which, final judgment was directed. Defendants did not avail themselves of the leave granted and final judgment was entered. From that judgment the defendants appealed to this court.

George G. Dickson, for appellants.

John Brooks Leavitt, for respondent.

J. F. Daly, J.—[After stating the facts as above.]—The plaintiff's cause of action is based upon the order of the general term of the Marine Court awarding costs against all these defendants and directing taxation by the clerk. The questions raised by the demurrer are: 1. The authority of the general term to impose costs upon two of these defendants, Callahan and Thomas McGuire, who were parties to the motion before the court but not parties to the action, they being merely sureties of the defendant therein and joining with him in a motion to have the judgment marked satisfied. 2. The authority of the general term to direct such costs to be taxed by

the clerk. 3. The right to bring action for such costs even if regularly awarded.

The costs awarded by the general term of the Marine Court were upon appeal from an order granting a motion made by Thomas McGuire and John Callahan, joining with Daniel McGuire, the defendant in the action. The two former had submitted themselves to the judgment of the court in applying for relief in a matter in which they had an interest. They were before the court to sustain the order they had obtained at special term. The costs on appeal from the order were in the discretion of the court (Code Civ. Pro. § 3239), and might therefore be imposed upon any party to the application then before the court. This section does not limit the power to impose costs on such of the litigants as are strictly parties to the action in which the application is made, but gives the appellate tribunal the fullest discretion.

When costs are in the discretion of the court, the decision must specify which party is entitled to costs, but the costs must be taxed by the clerk (Code Civ. Pro. § 3262). This section may be construed to cover the case before us. On an appeal, the amount of costs is uncertain, because "the reasonable expenses of printing the papers for a hearing" are to be included in such costs (Code Civ. Pro. § 3256), and the amount to be allowed for such reasonable expenses is to be ascertained on proofs and should be adjusted by the clerk on proper notice. This practice was strictly followed here. The general term, in reversing the order obtained by the defendants, satisfying the judgment against Daniel McGuire, awarded costs to the appellants, the plaintiffs in that judgment, and against the respondents Callahan, Thomas McGuire and Daniel McGuire, and directed the clerk to tax such costs. This was done on notice, and the amount adjusted by the clerk at $55.37. We cannot say that this included more than $10 on reversal of the order, and necessary disbursements for printing; if it did, the respondents on that appeal had their remedy to review the taxation if it were incorrect as to amount, but they made no motion in respect of it.

Those costs were awarded on a motion made after judgment,

and no process is provided for collecting them. The parties entitled had therefore an action (*McDougall* v. *Richardson*, 3 Hill, 558). This authority will not, at this day, be questioned No subsequent case cited by appellants is in conflict with it, and the Code of Civil Procedure is silent as to the mode of collecting costs awarded in a summary motion made after judgment.

The demurrer to the complaint was not well taken, and the general term of the Marine Court properly overruled it and ordered judgment in favor of plaintiff on his appeal from the judgment against him. The final judgment of the Marine Court entered by direction of the general term is appealable to this court. The last point taken by appellants, that this is an appeal from an order, is therefore not well taken. Their notice of appeal states that they appeal from the judgment and the order.

The judgment and order should be affirmed, with costs.

Van Brunt, P. J., concurred.

Judgment and order affirmed, with costs.

Mary Eliza Hynes *et al.*, Respondents, *against* Kate McDermott *et al.*, Appellants.

(Decided April 3d, 1882.)

Upon a question of the validity of a marriage and the legitimacy of children, any presumption in which a jury may indulge for the purpose of arriving at a verdict in favor of such marriage and legitimacy, if founded upon any evidence whatever, will be sustained by the court.

Upon the trial of such an issue, the jury found, in answer to questions specially submitted to them, that the parties to the alleged marriage, in England, entered into an agreement to be then and from thenceforward man and wife, and that they did thenceforward cohabit together as man and wife; that the man was, at the time, a citizen of the state of New York, temporarily sojourning in England, and that the agreement was made with the *bona fide* intention of the parties to contract a valid marriage according to the laws of the state of New York, and to return to that state and reside there as husband and wife; that afterwards, in

France, they entered into an agreement by which they consented to take each other then and there as man and wife; that they thenceforward, in France and in England, cohabited together as man and wife; that two children thereafter born to the woman, during the lifetime of the man, were his children; and the jury found, generally, in favor of the validity of the marriage. *Held*, that as there was evidence of the facts specially found, sufficient to furnish a foundation for the presumption of marriage and legitimacy, such presumption was not overcome by proof of facts showing that the connection between the parties had been illicit in its origin; and showing, or tending strongly to show, that the name borne by the woman, previous to her connection with the man, had been given by her, in registering, as required by law, the births of the children in question at London, as the family name of the children and their parents; that subsequent to the alleged contracts of marriage, she, with his knowledge and approval, had opened a bank account for herself in such former name; that checks had been drawn by him to her order in the same name and paid to her; and that she had signed, also in the same name, a lease of a house occupied by them as a residence: and, therefore, the verdict would not be set aside as against the weight of evidence.

Held, further, that the law of marriage in France, in the absence of evidence as to what it in fact was, must be presumed to be the same as the common law, or the civil law, or the law of the state of New York; and as the agreement found by the jury to have been entered into between the parties in France constituted a valid marriage under any one of these laws, it must be held by the courts of this state to be a valid marriage.

The question in dispute on the trial of an action being whether the plaintiffs were the wife and children of H., deceased, a witness who had testified that she knew them and had visited them, being asked whom she saw at the time of her visit, answered, that she saw H. "and his wife, and his child," &c. *Held*, that a motion to strike out the words "and his wife and his child," was properly denied, as those words were merely descriptive of the persons, and the witness was not to be understood as intending to testify, of her own knowledge, that such persons were the wife and child of H.

In actions involving the issue of marriage, evidence of the conduct of the parties toward each other is admissible, as such conduct is frequently the very foundation of the reputation of marriage.

Appeal from a judgment of this court entered upon the verdict of a jury and from an order denying a motion for a new trial.

William R. Hynes, a resident of New York, was accustomed to spend considerable time in Europe. In the spring of 1871, while at the Langham Hotel, London, he made the acquaint-

ance of the plaintiff Mrs. Hynes (who was a British subject), and an intimacy sprang up between them. In May, 1871, she was living in lodgings at 199 Cleveland street, London, being then pregnant by Hynes, and on the night of the Derby day in that month he visited her, desiring to remain with her, and she refused, complaining that he had not kept a promise of marriage that he had made to her. Mr. Hynes said that he did not believe in the marriage ceremony, but that if she would promise to be true and faithful to him he would consider her his wife, and thereupon in the presence of witnesses he gave her a ring and she took the ring, and he stayed there that night. Shortly after this, in June, 1871, Mr. and Mrs. Hynes went to Paris and stayed there some time, during the season, where they had a residence together on the Place Madeleine. In the Autumn before the birth of the eldest of the infant plaintiffs, who was born in December, 1871, they returned to England and continuously lived together, he holding her out to the world as his wife, and during this cohabitation two children were born, the one in December, 1871, and the younger in 1873. In 1874 Mr. Hynes died. Thereupon the defendants, his sisters, took possession of his estate, consisting of several pieces of real property in the city of New York, and the plaintiffs, Mrs Hynes and the two children, brought an action in ejectment as the widow and heirs at law of Mr. Hynes. Special questions were submitted to the jury, to which answers were made, and a general verdict was rendered in favor of the plaintiffs. From the judgment for the plaintiffs entered upon this verdict the defendants appealed.

John Hallock Drake, for appellants. — The verdict is against the clear preponderance of evidence, and on the appeal from the order denying the motion for a new trial, it is the duty of the court to set the same aside and grant such new trial (*Macy* v. *Wheeler*, 30 N. Y. 237; *Courtney* v. *Baker*, 60 N. Y. 6; *Boos* v. *World Mutual Life Ins. Co.*, 64 N. Y. 242). The judge erred in charging the jury that the marriage claimed to have been contracted was what is called a common law marriage. The presence of a priest or clergyman is

absolutely necessary to the validity of a common law marriage (*Reg.* v. *Millis*, 10 Clark & F. 534; *Beamish* v. *Beamish*, 9 H. L. Cas. 274). The common law of this state is the common law of England; and the statutes of the state of New York have no force or effect outside of the state (*Davis* v. *Davis*, 1 Abb. N. C. 140; *Van Voorhis* v. *Brintnall*, 86 N. Y. 18). The pretended ceremony in England was not a marriage. It was void by the laws of England, and the *lex loci contractus* must determine the status of the parties (1 Bishop Marriage and Divorce, § 335; Story Conflict of Laws, §§ 79–81; *Dalrymple* v. *Dalrymple*, 2 Hagg. 54; *Scrimshire* v. *Scrimshire*, Id. 395; *Connolly* v. *Connolly*, 2 Eng. L. & Eq. 570; *Herbert* v. *Herbert*, 2 Hagg. 271; *Stevenson* v. *Greely*, 17 B. Monr. [Ky.] 193; *Medway* v. *Needham*, 16 Mass. 157; *West Cambridge* v. *Lexington*, 18 Mass. [1 Pick.] 506; *Putnam* v. *Putnam*, 25 Mass. [8 Pick.] 433; *Matter of Webb*, 1 Tucker, 373; *Van Voorhis* v. *Brintnall*, 86 N. Y. 18).

Joseph H. Choate and *William H. Secor*, for respondents. —The jury having found specifically that the parties contracted a marriage in France, that finding, if there was evidence to sustain it, must end the case in the plaintiffs' favor. It was not only permissible, but peremptory upon the jury to find such a marriage from the facts as presented to them. The law presumes everything in favor of the legitimacy of children, and it is a very powerful and overwhelming presumption (*Fenton* v. *Reed*, 4 Johns. 52; *The Breadalbane Case*, L. R., 1 Sc. App. 182). Even without the special finding of the marriage in France, the general verdict in the plaintiffs' favor establishes their case upon an impregnable basis. The presumption in favor of legitimacy is so strong and absolute that in order to defeat it the party claiming illegitimacy must negative every possibility.

The marriage acts of Great Britain declaring all marriages void unless solemnized in the places and according to the formal observances prescribed by those acts, do not apply to an American citizen whose domicil and residence is in New York, and who marries while temporarily sojourning in

England, intending not to remain there, but to remove with his wife to America as his permanent home, and if in such a case the marriage is valid according to the law of New York, it must be sustained by our courts. There is no reason why the United States should accord to the English Marriage Act any greater extra-territorial force, or any more effect to impair the marriage of its domiciled citizens there sojourning temporarily, than the policy and laws of England accord in the like cases to foreign local statutes as affecting the marriage of English subjects under similar circumstances; and the English authorities have uniformly recognized the validity of marriages contracted by British subjects in foreign countries in accordance with the law of the domicil under similar circumstances (*Ruding* v. *Smith*, 2 Hagg. 390; *Harford* v. *Morris*, Id. 423; *Middleton* v. *Janverin*, Id. 437; *Latour* v. *Teesdale*, 8 Taunt. 830). The French authorities go even further (Duchesne, Du Mariage; Savigny, VIII. § 381). The law of America recognizes the validity of marriages of American citizens temporarily sojourning abroad, which are valid by the law of the domicil, even when they disregard provisions of the *lex loci contractus* (Story Conflict of Laws, § 113; Wharton, Conflict of Laws, §§ 170, 180, citing *Simonton* v. *Wallace*, 2 Swaby & Tr. 67; Friedburg, 127, 150, and Reinold Schmid, Die Herrschaft der Gesetze, &c., 79; 1 Wharton Evidence, 100, § 83; *Hutchins* v. *Kimmell*, 31 Mich. 133; *Newbury* v. *Brunswick*, 2 Vt. 151; *Brower* v. *Bowers*, 1 Abb. App. Dec. 214; *Loring* v. *Thorndike*, 5 Allen [Mass.] 257; *Davis* v. *Davis*, 1 Abb. N. C. 140).

Van Brunt, P. J.—[After stating the facts as above.]—In the foregoing statement of the case, it has not been attempted to call attention to all the grounds which were litigated during the progress of the trial, nor to give any more than a general statement of the evidence upon which the jury based their special findings:

(1) That there was a common law marriage in Cleveland Street, London, between the plaintiff Mary Eliza Hynes and William R. Hynes, on the last Wednesday of May, 1871.

(2) That the parties thenceforward cohabited together as man and wife.

(3) That William R. Hynes at the time of said marriage agreement was a citizen of the state of New York temporarily sojourning in London.

(4) That the agreement was made with the *bona fide* intention of the parties to contract a valid marriage according to the laws of the state of New York, and to return to said state and reside there as husband and wife.

(5) That the said parties while in France entered into an agreement by which they consented to take each other then and there as man and wife.

(6) That the parties thenceforward in France and England cohabited together as man and wife.

(7) That each of the infant plaintiffs was the child of the said William R. Hynes.

The evidence offered upon the part of the defendants might, if any other issue than that of legitimacy was involved, call upon the court to set aside the verdict as against the evidence. The fact that the connection was illicit in its origin; the fact that the Registry of Births contains reasonably clear proof that Mrs. Hynes registered these children as the children of one William Saunders, and in the one case gave Mary Saunders and in the other E. Saunders as the mother, within the time limited by the British statute; the fact that subsequently to each of these alleged marriages a bank account was opened by Mrs. Hynes in the name of Elizabeth Saunders, with the knowledge and apparent approbation of Mr. Hynes; the fact of Mr. Hynes drawing checks to the order of Elizabeth Saunders or E. Saunders; the fact of Mrs. Hynes signing the lease for the premises in Leverton Street, London, which she occupied in 1872, in the name of Elizabeth Saunders (which it is true she denied, but which an inspection of the papers and the circumstances seem to establish); would seem to indicate with reasonable certainty that neither Mrs. Hynes nor Mr. Hynes was of the opinion that the marriage relation existed between them; and as these occurrences all took place after the sojourn in Paris, they appear to negative any pre-

sumption which might be drawn that a contract of marriage had been entered into during their residence in that city. But in view of the fact that the law seems to have been settled that every presumption is in favor of marriage and of legitimacy (the extent of which presumption will presently be considered), notwithstanding this preponderance of evidence, the court should not set aside the verdict of the jury.

The first case which is to be found reported in this state is the case of *Fenton* v. *Reed* (4 Johns. 51). The question involved in that case turned upon the proof of a marriage between William Reed and Elizabeth Reed. In the year 1785 Elizabeth Reed was the lawful wife of one John Guest. Sometime in that year, Guest left the state for foreign parts, and continued absent until sometime in the year 1792; and it was reported and generally believed that he had died in foreign parts. The plaintiff, Elizabeth Reed, in 1792, married William Reed, and subsequently to the marriage, Guest returned to this state, and continued to reside therein until June, 1800, when he died. He did not object to the connection between the plaintiff and Reed, but said that he had no claim upon her, and never interfered to disturb the harmony between them.

After the death of Guest, the plaintiff continued to cohabit with Reed until his (Reed's) death in September, 1806, and sustained a good reputation in society, but no solemnization of marriage was proved to have taken place between the plaintiff and Reed subsequently to the death of Guest. Upon these facts the court held that the plaintiff was the widow of William Reed, upon the theory that there existed strong circumstances from which a marriage subsequent to the death of Guest might be presumed, the parties having cohabited together as husband and wife, and under the reputation and standing that they were such, from 1800 to 1806, when Reed died, and the wife during this time having sustained a good character in society. It was held that a jury would have been warranted, under the circumstances of this case, in inferring an actual marriage. The court seems to have laid considerable stress in the decision of that case upon

the fact that the cohabitation in its inception was with a matrimonial intent.

In the case of *Jackson* v. *Claw* (18 Johns. 345), the presumption in favor of matrimony was also adhered to. In the case of *Rose* v. *Clark* (8 Paige, 574), the doctrine of presumption was carried further than in either of the preceding cases. About 1790, Abigail Roberts married Jonas Frink at Hoosic, and after living together a short time they separated. Some time afterwards Frink married another woman and removed with her to the state of Massachusetts, and continued to reside with her there several years, and had children by her. Frink subsequently came back to Hoosic, and was in the poor-house there. He was in the city of Troy in 1830, and was taken to the House of Industry, where he died on the 24th of October of that year. Some ten years after Mrs. Abigail Roberts and her husband Frink had parted, she was living with J. Owens as his housekeeper. She was there married to S. Thurston, who left her the next day, and never after claimed her as his wife. She afterwards continued to live with Owens as his wife, and passed by his name until his death in March, 1826. Two or three years after Owens' death, she was married to a man by the name of Rose, and she and Rose resided and cohabited together as husband and wife until the death of Rose in January, 1838. Both of them sustained fair characters during that time, and Rose frequently, after the death of Frink, recognized her as his wife. Upon these facts the surrogate decided that the marriage to Rose during the life of Frink was void, but that the facts and circumstances proved were sufficient to warrant the inference of an actual marriage subsequent to the death of Frink, the first husband. The learned court, in its opinion, says "that an actual marriage may be inferred in ordinary cases from cohabitation, acknowledgments of the parties, &c., as well as by positive proof of the fact, there can be no room to doubt, and the only doubt in this case arises from the prove of the fact that the matrimonial cohabitation between these parties commenced previous to the death of the first husband under a contract of marriage which was absolutely

void previous to the Revised Statutes, although neither may have known at that time that Frink was still living.

"It appears, however, from decisions in our own courts, as well as in England, that a subsequent marriage may be inferred from acts of recognition, continued matrimonial cohabitation, and general reputation, even where the parties originally came together under a void contract of marriage." The court in this case also relied upon the fact that the inception of the intercourse was matrimonial in its character, and that the parties always sustained a good reputation after the removal of the disability preventing the contraction of a valid marriage.

In the case of *Clayton* v. *Wardell* (4 N. Y. 230), the question was whether the mother of Catharine Ann Clayton at the time of her intermarriage with George Messerve was in fact the wife of Richard Schenck. The following facts appeared: that Schenck, being the reputed father of a child with which Sarah Maria Youngs, the mother of Mrs. Clayton, had become pregnant, was, on the 22nd of November, 1822, arrested as such putative father, under the provisions of the bastardy act, and entered into the usual recognizance to answer to the charge, and that no further proceedings were ever had thereon; that in the early part of May, 1823, Sarah Maria was delivered of a child, which lived about eleven months, and then died; that after the birth of the child, and while it lived, Schenck, for some part of the time at least, cohabited with Sarah Maria, who lived with her mother; that it was understood among the relatives and friends of Schenck, that they were married, and Sarah Maria was received by them as his wife, and the child as his child; that very soon after the death of the child, as early at least as the summer following, Schenck ceased to cohabit with Sarah Maria, and in June, 1825, an instrument was executed between them, in which they are described as husband and wife, and by which they mutually agreed to a separation. The principal witnesses relied upon to establish the marriage were Mrs. King and Ida Schenck, both sisters of Schenck. The other testimony on the same side was chiefly upon the question of reputation. Mrs. King and Ida Schenck lived together.

The former testified that she first heard of the marriage of her brother at the funeral of another brother, which was on the 22nd of February, 1823; that when the child was two or three months old, her brother and his wife came to her house and brought the child with them. This was the first time she had seen her brother's wife, and until then she did not know that her brother lived with Sarah Maria at her mother's. It did not appear that Schenck ever paid anything for the board of himself or his wife, or that he ever in any way contributed to her support. On the contrary, it was proved that as well after the birth of the child as before, the alleged wife supported herself by making segars; that when the child was a few weeks old, Mrs. List, the mother's sister, took the child to church and had it christened; and that when it died her husband paid its funeral expenses. Two sisters of Sarah Maria, and John Watson and his wife, also relatives of the family, all testified that they never heard her called any other name than that of Youngs before her marriage with Messerve. This marriage took place within a month of the time when the articles of separation were alleged to have been executed. She was married by the name of Sarah Maria Youngs.

From the foregoing facts and circumstances the question was whether a legal presumption of a marriage between Schenck and Sarah Maria Youngs was warranted? The court, relying upon the rule laid down by Lord Eldon in the case of *Cunningham* v. *Cunningham* (2 Dow. P. C. 482), that when the connection is at first notoriously illicit, the presumption in favor of the legality of the connection is rebutted by the fact that it was at first illicit; the presumption being that having been illicit in its origin it was likely to continue so; and that if it was subsequently changed, there should be some evidence to show when or how the change from concubinage to marriage took place; and invoking this rule, it was held that no marriage was established under the circumstances stated to have taken place between Schenck and Sarah Maria Youngs.

In the case of *Caujolle* v. *Ferrié* (23 N. Y. 90), the

question involved was whether Jean P. Ferrié was the legitimate son of one Jeanne Du Lux, by one Valentin Ferrié, or whether he was her natural son by said Ferrié. Jeanne Du Lux, whose original name was Jeanne Icard, was a native of Pau, a city in the south of France, where she was born in 1777.

She was the daughter of John Icard and of Magdalen Riviere, people of humble condition, residing at Pau. Her father died when she was about eight years old, and her mother afterwards went to live at Biert, a small village in the department of L'Arriege, and Jeanne, at a later period, went to service as a domestic in a family at Massat, a neighboring village. From thence, about the year 1798, she went to St. Girons, a city in the same department, and became a servant of one Anére, a merchant. Here she formed an intimacy with Valentin Ferrié, the son of Balthazar Ferrié, a tanner, and the next door neighbor of Anére, the result of which was that she was likely to become a mother. The father of Valentin objected to his marrying her, as he was desirous of doing, on account of the inequality of their social condition, the family of Ferrié being small proprietors, and the friends of Jeanne being poor, and herself a domestic servant. Shortly before her confinement, she left Anére's for a house in the outskirts of the city, where she lived with Ferrié, and where she gave birth to the respondent, on the 30th June, 1800. Prior to this, an entry had been made in a register of publications of marriage in the archives of the mayoralty of St. Girons, pursuant to the requirements of the French law, dated May 4th, 1800, whereby Valentin Ferrié and Jeanne Icard declared their intentions to execute the *acte* of their marriage on the 20th of the current month, at 10 o'clock in the morning, before the president of the municipal administration of the canton of St. Girons. In the margin of this entry there was written the French word *neant* (null or nothing) in a large hand, from which a line was drawn diagonally across the entry, which was crossed by another similar line. The ink of this marginal entry, and of the lines, was yellow and faded, and so far as could be judged, the writing was of the same date with the original record. The person who had the custody of the records at

the time was dead. The certificate of the mayor of St. Girons was produced, to the effect that no entry of any civil act of marriage of Valentin Ferrié and Jeanne Icard could be found in the archives of the city, though the book containing entries of that character, embracing the time of the birth of the respondent, existed there. Similar evidence was given in respect to the neighboring communes in which Jeanne Icard was shown, at any time, to have lived. But in the baptismal records of the parish church of St. Girons, an entry was found in the following words :

"Year 1800. Balthazar Pierre Ferrié, son of Valentin and of Jeanne Icard, was born and baptised the thirtieth of June, eighteen hundred. Godfather Balthazar Ferrié, Godmother, Rose Ferrié. In proof of this, Baque, *Cure of Ledor.*"

Upon the death-bed of Jeanne Du Lux she declared that she had been married in France during the revolution, and that the respondent was her sole heir, and would take all she left. From these facts the court held that it was proper to assume that there was a marriage celebrated between Valentin and Jeanne, either *per verba de presenti* or before some proper officer, in fulfillment of their declared public intention, great stress being laid by the court in its opinion, upon the fact, that, although the commencement of the intercourse was illicit, the circumstances showed a subsequent matrimonial intent, laying down as the rule, that the presumption that an intercourse illicit in its origin continued to be of that character may be repelled by a contrary presumption in favor of marriage and of the legitimacy of offspring, although the circumstances fail to show when or how the change from concubinage to matrimony took place,—a conclusion exactly opposite to that arrived at in the case of *Clayton* v. *Wardell.*

It will be seen by reference to these cases in this state, and to others which it is not necessary to cite, to what an extent the doctrine of presumption in favor of marriage and legitimacy has been carried. In the case of *O'Gara* v. *Eisenlohr* (38 N. Y. 296), the extent to which such presumptions have been indulged in was severely criticised in the following language :

"Presumptions of this kind require to be made with caution, and no one can look through the adjudged cases on this subject without being convinced that the legitimate limits of presumption have too frequently been overlooked. There are many cases in the books which cannot be considered as law, and which are condemned by the best commentators (Best on Presumptions of Law and Fact, 46; 31 Law Library N. S. 47).

"It has been well and truly said by Mr. Gresley in his valuable treatise on equity evidence, while considering this subject, that the power of directing the jury to what length they might venture, has often been stretched beyond due limits by the judges, for in cases of hardship, they have urged juries to presume facts which were manifestly incredible (Gresley's Eq. Ev. 272, 273); and such are the cases of *Rex* v. *Fouring* (2 Barn. & Ald. 386), and *Wilkinson* v. *Payne* (4 Term, 468), both of which have been severely criticised; and EYRE, Ch. B., characterized the latter case as one of 'presumption run mad.' It must be confessed that decisions of this kind, requiring courts and jurors to presume facts to be true which are probably, if not obviously, false, are pernicious, and ought not to be followed. The presuming of absurdities in order to meet the exigencies of a particular case, must ever be fraught with mischief."

But an examination of the facts of this case shows that under the evidence, as it stood, the proof was, that the defendant's first husband was living at the time that the second husband died, and thus, in order to support the second marriage, presumption must be carried to a far greater extent than ever had been done in any case before.

A brief examination of a few English cases will show that the doctrine in favor of marriage and legitimacy has been carried probably farther in the English courts than in any case which has been decided by our own tribunals. In the case of *King* v. *The Inhabitants of Twyning* (2 Barn. & Ald. 385) it was held that the law always presumes against the commission of crime, and therefore where a woman, twelve months after her first husband was last heard of, married a second

husband, and had children by him, it was held, that the sessions did right in presuming *primâ facie* that the first husband was dead at the time of the second marriage, and that it was incumbent upon the party objecting to the second marriage to give some proof that the first husband was then living, thus reversing the general rule that the law presumes the continuance of life; and that the death of neither husband nor wife will be presumed until an absence of seven years, without being heard from.

The case of *Wilkinson* v. *Payne* (4 Term, 468), was an action upon a promissory note for £180, given to the plaintiff by the defendant in consideration of the plaintiff's marrying his daughter.

The defense set up was that though there was a marriage in fact, it was not a legal one, because the parties were married by license when the plaintiff was under age, and there was no consent by his parents or guardian; in fact, both his parents were dead when the marriage was celebrated, and there was no legal guardian, but the plaintiff's mother, who survived the father, on her death bed desired a friend to become guardian to her son, with whose approbation the marriage was had. It also appeared that when the plaintiff came of age his wife was lying *in extremis* on her death bed, and died in three weeks afterwards, but in her lifetime she and the plaintiff were always treated by the defendant and his family as man and wife.

Upon these facts the court left it to the jury to presume a subsequent legal marriage, which they did accordingly, and found a verdict for the plaintiff. Upon a motion for a new trial it was contended by the defendants that if no evidence whatever of any illegal marriage had been given the presumption of a legal one might have arisen, but that in the case at bar all presumption of the legal marriage was rebutted by the fact proved, that this marriage was illegal; that it was a strong circumstance in that case that there could be no marriage after the plaintiff was of age since the supposed wife was on her death-bed, and if there was a marriage by bans before, it might easily have been proved by the plaintiff, on whom the

onus lay: that if the presumption in the case at bar could be supported, the marriage act would be totally repealed. In the decision of the case, Lord KENYON, Chief Justice, said:

"In the case of new trials it is a general rule, that in a hard action, where there is something on which the jury have raised a presumption agreeably to the justice of the case, the court will not interfere by granting a new trial where the objection does not lie in point of law. This rule is carried so far, that I remember an instance of it bordering on the ridiculous; where in an action on the game laws it was suggested that the gun with which the defendant shot was not charged with shot, but that the bird might have died in consequence of the fright; and the jury having given a verdict for the defendant, the court refused to grant a new trial. In this case, though the first marriage was defective, a subsequent one might have taken place. The parties cohabited together for a length of time, and were treated by the defendant himself as man and wife. These circumstances therefore afforded a ground on which the jury presumed a subsequent marriage. And if there were any ground of presumption it is sufficient in a case like this. In this case, the parties did not intend to elude the marriage act; but all their friends were fully informed of and concurred in the former marriage. And I think we should ill exercise the discretion vested in the court if, after the jury had presumed a subsequent legal marriage under all the circumstances of this case, we were to set aside their verdict. In a late case of *Standen* v. *Standen*, the jury presumed a legal marriage, though there was strong evidence to induce a suspicion that there had not been time enough for the bans to have been published three times."

In the *Breadalbane Case* (L. R., 1 Scotch & Div. App. 182), equally strong presumptions were indulged in, in support of the marriage. In that case, one James Campbell eloped with the young wife of a middle-aged grocer, who survived her departure about three years. About a year after the elopement they went to America, where he represented her as his wife. About two years after, the elder brother speaks of hearing from his brother James and his wife. About three years after, and

a month after the first husband's death, James Campbell and his alleged wife arrived in England, where it was open to them to celebrate a legal marriage. In 1788, they had a son, and the question in the case was whether that son was legitimate or not, that question depending upon another question, whether his parents had ever lawfully married. There was no proof whatever of any actual marriage after the death of the first husband, and before the birth of the first child, and the case was decided upon the fact that the oldest son was uniformly recognized and treated as the legitimate son of James Campbell by all the family of the Campbells, as well as by Lord Breadalbane and his relations, and the court say that "under these circumstances, every presumption is in favor of the respondent's title, and the appellant must be required to overcome that presumption by the proof of facts which are utterly inconsistent and irreconcilable with it. This he proposes to do by proving that the original cohabitation of the respondent's grandfather and grandmother commenced with an unlawful marriage after their elopement, and from that time the habit and repute began which constitutes the only evidence of a marriage between them: that there never was any marked change in the nature of the cohabitation, and that without such a change a connection which is illicit in its origin cannot become the foundation of such habit and repute as will be sufficient proof of a subsequent marriage having taken place."

Attention also is called to the contention of the plaintiff, "that beginning in an illicit connection, the presumption of subsequent marriage, from the continuance of it, altogether ceases, and that nothing short of proof of actual marriage, or of such a total change in the character of the cohabitation as will amount to habit and repute of a marriage, will be sufficient to establish the respondent's title," and the cases upon which this position is founded, viz., *Cunningham* v. *Cunningham*, supra, and *Lapsley* v. *Grierson* (1 H. L. C. 498), are adverted to at length, and it is held that even the doctrine laid down in those cases, in view of the reputation established by the evidence, did not preclude the presumption of a marriage after the death of the first husband.

The case of *Steuart* v. *Robertson* (L. R. 2 H. L. Sc. App. 494), is peculiar in many of its features.

In 1865, Major William George Drummond Steuart, the heir of a baronetcy, and of a large estate in Scotland, when nearly forty, made the acquaintance of, and became familiar with, Margaret Wilson, then sixteen, the daughter of a fishing-tackle maker in Edinburgh, in whose house a supper was given on the 13th of February, 1866; the party consisting of the Major, the father and mother of Margaret Wilson, her elder brother, and her friend, a Mrs. Kellet. After the supper the father said to the Major, "I am getting a bad name with your staying so long in my house among my three daughters." The Major answered, "I will show you what I can do to shut people's mouths. I am poor now, and cannot marry; but I will marry her in the Scotch fashion;" whereupon the Major went down on one knee, took a wedding ring from his pocket, put it on Margaret's finger, and said, "Maggie, you are my wife before heaven; so help me, oh, God." They then kissed each other; and Margaret said "Oh, Major." The health of the couple was drunk, and the entertainment was closed by the Major and Margaret being "bedded" according to an obsolete Scotch fashion.

The question was, whether the affair here described constituted a real marriage by the law of Scotland, or was only got up to sooth the father, and to "shut up people's mouths."

The Major and Margaret Wilson lived together for some weeks after the supper festivity, and at several periods subsequently; but there was no continuous matrimonial cohabitation; nor did they represent each other to third parties as husband and wife, the Major invariably repudiating the marriage, till on his death-bed he appeared, but somewhat doubtfully, to admit it, being then in a fit of *delirium tremens*.

On the 2nd of April, 1867, a son was born of the connection. The mother had it registered as *illegitimate*. The Major died on the 19th of October, 1868. She thereupon claimed alimony for the boy as a bastard, and she signed the receipts for the allowances, not as a widow but as a spinster.

On the 12th of March, 1871, she, as a spinster, married Lieutenant Robertson.

On the 14th of March, 1872, her child died.

On the 27th of April, 1872, she commenced, with her husband's concurrence, the suit in the present case, praying a judicial declaration that she had been the lawful wife of the deceased Major Steuart, and that their child, whom she had previously described as a bastard, was "their lawful son."

The first division of the Court of Session obtained opinions from the judges of the second division, and on the 27th of February, 1874, pronounced a declaration in conformity with the prayer of the summons; in other words, they, by a majority of nine judges against four, decided that the supper ceremonial, combined with the "bedding," constituted a valid marriage between Margaret Wilson and the deceased Major Steuart, and that the child was "his lawful son."

Against this judgment an appeal was taken to the House of Lords and the judgment reversed.

The Lord Chancellor (Lord Cairns), in delivering his opinion, before the House, gave an elaborate and detailed statement of the evidence, tending to establish the facts to have been as above stated.

He held that there was no doubt, that if the words spoken at the time of the alleged marriage, were used in fact seriously, and with the intention of constituting a marriage, they were sufficient for the purpose; and that the question was, were the words used at all, and were they used in this way and with this intention?

The conclusions arrived at were based upon the facts of want of reputation; denial of both parties that any marriage existed; that the mother had the child registered as illegitimate; that she claimed alimony for the boy as a bastard; that she signed the receipts for the allowance not as widow but as spinster, and that upon one occasion, at least, a priest had been sent for to celebrate a marriage between Major Steuart and the plaintiff—a circumstance which the Lord Chancellor seemed to think cast great doubt upon the testimony as to the previous marriage, because of the uselessness of another mar-

riage when one had already been accomplished satisfactory to all the family; and that the child was baptised as an illegitimate child with the knowledge and approbation of Major Steuart and his alleged wife; and that in March, 1871, the alleged wife was, as a spinster, married to Lieutenant Robertson.

The learned Lord Chancellor says that "the foregoing facts present a body of evidence of unusual weight, derived from documents written, acts done and declarations made, all bearing with a strength almost irresistible against the marriage. To countervail this evidence, the biased, inconsistent, improbable and inaccurate evidence of the alleged ceremony, is, I think, altogether inadequate."

That the difference in the position of the alleged husband and wife seems to have had some influence in the disposition of the case, is indicated by the exalted manner in which the worldly position of Major Steuart is described (he being, to use the chancellor's words) "the heir of an old family, and the future possessor of large estates, although in a moral point of view not entitled to anything beyond a very low place in the social scale," and by the pains which are taken to picture the character of the alleged wife in as unfavorable a light as the evidence could possibly warrant.

The result of an examination of these authorities seems to establish the conclusion that where the validity of a marriage and the legitimacy of children is in question, no presumption (that is founded upon any evidence whatever) in which a jury indulges for the purpose of arriving at a verdict in favor of such marriage and legitimacy, will be disturbed by the court. Therefore, the finding of a jury that a marriage was entered into between Mr. and Mrs. Hynes during their sojourn in France, is conclusive upon the court in this case.

As was held when this case was before the court upon a previous appeal, there being no evidence as to what the law of France was, it must be presumed that it is the common law, the civil law, or the law of the state of New York; and as a marriage *per verba de presenti* entered into by parties capable of contracting, is under any one of the laws above

mentioned valid, without the intervention of any priest or magistrate, without the performance of any ceremony; and as the jury have found such a marriage to have taken place, it must be held by our courts to be valid.

In respect to the marriage which the jury found to have been celebrated in England, it seems to me that such marriage must be held to be void, because it should be governed by the *lex loci contractus*. It is urged upon the part of the plaintiffs, that this rule will not apply to the case at bar because Mr. Hynes was a resident of New York, and the jury found that he intended to return to New York with his wife. There are cases which have held, both in England and in this country, that the *lex domicilii* might be resorted to for the purpose of supporting a marriage, but in all of those cases, as far as I have been able to ascertain, the contracting parties were domiciled under the same government; and no case has decided that a marriage, celebrated in a country where one of the parties lived, and of which one of the parties was a subject, and which was void by the *lex loci contractus*, is valid.

It is urged by the counsel for the respondent that the English marriage laws apply only to English subjects. If that proposition is true, and such law does not at all regulate the marriage contract between persons not British subjects, still it must apply to a contract entered into by the plaintiff Mrs. Hynes and Mr. Hynes, because Mrs. Hynes was a British subject, resident in Great Britain and subject to its laws, and she could not make a contract except according to the requirements of that law; and if the contract of marriage was void as to her, she being an English subject, it was equally void as to Mr. Hynes, although he was an American citizen, and it was celebrated according to the laws of his domicil.

In view, however, of the conclusion at which I have arrived in reference to the presumptions which the jury had a right to draw, in respect to the French marriage, the consideration of this question becomes of little or no importance.

It is now necessary to consider briefly the exceptions taken by the defendants during the course of the examination of the

witnesses. The first arose under the following circumstances: Georgiana Mills had been examined as a witness *de bene esse*, and after having testified without objection that she had visited Mr. and Mrs. Hynes at their residence at Victoria Villa, London, upon the invitation of Mrs. Hynes, and after having stated among other things that she knew the plaintiffs Mary Eliza Hynes, William R. Hynes and Andrew Hynes, and also that she knew Mr. William R. Hynes, now deceased, in his life-time, she was asked, whom did she see at Victoria Villa at the time of her visit. She answered, "I saw Mr. Hynes and his wife and his child and his servants."

A motion was made to strike out before the reading of the answer the words "and his wife," and also the words "and his child," which was denied, and an exception was taken.

There was no error in this ruling. The witness, in describing Mrs. Hynes as the wife of Mr. Hynes, and the child as his child, was merely naming the persons she saw by stating the relationships which they apparently bore to him. The witness did not intend to swear of her own knowledge by the evidence she gave that the lady she saw was Mr. Hynes' wife or that the boy was his child, any more than she intended to swear of her own knowledge that the servant was his servant, but she merely described the persons whom she saw there by stating the relationship which each appeared to bear to the apparent head of the house; which evidence could not possibly convey any erroneous impression to the jury.

The same reasoning applies to the next exception, at folio 71. At folio 72, the witness was asked, "What was Mr. Hynes' general conduct towards the plaintiff?" Objected to, because witness not competent to answer the question. It appeared that the witness stayed with the family two weeks at her first visit in 1872, and that in 1873 she made another visit, and being married in August, 1873, was thereafter a frequent visitor at their house,—facts which clearly showed ample opportunity to have become acquainted with Mr. Hynes' general conduct toward the plaintiffs.

The objection at folio 94 was not well taken, for the reasons given in respect to the objection at folio 71.

The objection at folios 129 and 130 is clearly untenable; the evidence that the witness was introduced by Mr. Hynes as his brother-in-law was clearly competent.

The objection taken at folio 136 was to the reading of a paragraph of an answer which was competent and omitting the balance which was incompetent. The propriety of such a ruling has, as far as I have been able to ascertain, never before been questioned, and no ground of objection has been suggested by counsel.

The objection to the question at folio 214 is clearly not well taken. In actions where the issue involved is that of marriage, evidence of the conduct of the parties toward each other has always been permitted, as it frequently happens that their conduct toward each other is the very foundation of the reputation which they enjoy in the community in which they live.

The objection at folio 153 to what Mr. Hynes said about his coming back to America to reside is entirely immaterial in view of the conclusion which has been arrived at in this opinion.

The objection at folio 163 to the evidence that Mrs. Gay, one of the defendants, said that she was fully cognizant of Mrs. McCreery's (the other defendant), transactions in this suit, is not well taken. The object of the evidence was to show and it tended properly to show Mrs. Gay's knowledge of what Mrs. McCreery had done and was doing.

The objection at fol. 610 is clearly not well taken. Mrs. Hynes certainly was competent to testify when and where her children were born.

The objections at folios 611, 612, 613, 614, 615, 616, 617, 618, 619 and 620 cannot be sustained. It being claimed by the defendants that the registry of the births of these children was made by Mrs. Hynes, it was certainly competent to show by her that no part of the entry was in her handwriting, that she had nothing to do with, nor any knowledge of it. The making of this entry certainly did not involve any transaction between Mr. and Mrs. Hynes. The objections at folios 622 and 623 to her explanation of how the bank account came to be opened in the name of Elizabeth Saunders is untenable. An act being

proven, the circumstances leading to the performance of the act may always be shown to modify or alter the influences which might be drawn from the mere act itself.

What has been said as to Mrs. Hynes' evidence as to the entries of births applies to her evidence as to the lease at folios 646 and 647.

The exception at folio 669 is not well taken. The defendants were asking Mrs. Hynes for her various residences. Among others she said "we went to Paris," which certainly, in view of the nature of the cross-examination, she had a right to do, as the question put assumed that she had not done so.

The ruling at folio 254 was entirely discretionary with the court. The fact that a woman not married can have children, seems to be a physical fact so well established that the circumstance that a woman has been the mother of a child does not seem to be very responsive to a question as to whether a woman is married or single.

The court was clearly justified in rejecting the photographs at folios 319–322 without proof as to the accuracy of the photographs or some evidence going to prove their correctness.

The exception to the admission of the petition of Mary J. McCreery is not well taken. The statements contained therein were evidence against her, and in any event, in view of the conclusion arrived at in this opinion, the evidence was entirely harmless.

The objection at folio 631 to the admission of the check book is not well taken, after proof of Mr. Hynes' handwriting appearing among the entries contained therein.

All the exceptions to the requests to charge have been disposed of by the conclusion at which this court has arrived upon this appeal, and it is not necessary to consider them in detail.

We are of the opinion, therefore, that no errors were committed upon the trial, and that the question involved in this case being one of legitimacy, in view of the current of the decisions, this court should not set aside the verdict as against the evidence, and that the jury had a right to infer from the

facts of the case, as established by the evidence, that a contract of marriage was entered into between Mr. and Mrs. Hynes during their sojourn in Paris, which (there being no evidence of what the marriage law of France is) was a valid contract.

The judgment and order appealed from must be affirmed, with costs.

VAN HOESEN, J.—I do not agree with Judge VAN BRUNT in saying that "the jury had a right" to infer from the facts of the case, as established by the evidence, that a contract of marriage was entered into during the sojourn of Hynes and the plaintiff Mary Eliza in Paris. They had the power, not the right, to draw that inference. They decided as they did in spite of the overwhelming weight of evidence. Nevertheless, I concur in affirming the judgment and the order which have been appealed from. I do so, because I understand that in actions involving a question of legitimacy the courts support juries in acting upon what Lord Chief Baron EYRE styled "presumption run mad." What may be done in this direction is shown by the case of *Wilkinson* v. *Payne* (4 Term, 468), cited by Judge VAN BRUNT, in which Lord KENYON mentioned a case in which the court presumed that a bird died of fright, though the evidence showed that it was soaring aloft, after the manner of its kind, an instant before it fell lifeless to the ground upon the discharge of a sportsman's shot-gun.

I affirm the judgment and the order, simply because under the rules applicable to this class of cases I cannot set the verdict aside as against the weight of evidence.

Judgment and order affirmed, with costs.*

* The judgment entered upon this decision was affirmed by the Court of Appeals, March 6th, 1883 (see 91 N. Y. 451).

JOHN H. KEHLENBECK, Appellant, *against* DIEDRICH LOGEMAN, President of the Norddeutscher Bund, No. 1, Respondent.

(Decided April 3d, 1882.)

A by law of a voluntary association cannot be held by the courts to be invalid merely because it is not reasonable, if it has been adopted in the way agreed upon by the members of the association.

APPEAL from a judgment of this court, entered upon the dismissal of a complaint.

The defendant in this action was a voluntary association, and the action was brought by the plaintiff, claiming to be a member thereof, to recover certain sick benefits.

The by-laws and constitution of this association were so worded as to permit three-fourths of the members present to amend them in any respect as they might see fit, and there was nothing which required notice of such amendment to be sent to the members. Pursuant to the constitution, the by-laws were so amended some considerable time prior to the plaintiff's sickness, requiring every member, as soon as he became sick or unable to work, to notify the secretary of the Bund, and to deliver to him or the Bund within three days thereafter a certificate of the attending physician as to the nature of the sickness. Of this amendment the plaintiff had no notice. This provision of the by-laws was not complied with by the plaintiff, and he was denied sick benefits.

Upon the trial of this action, the plaintiff's complaint was dismissed by the court, and a judgment for the defendants was entered thereupon. From the judgment the plaintiff appealed.

George W. Ellis, for appellant.

Alfred Steckler, for respondent.

VAN BRUNT, P. J.—[After stating the facts as above.]—It seems that the true interpretation of the by-law in question

makes the furnishing of the physician's certificate a condition precedent to a recovery. It is one of the regulations adopted by the organization for the purpose of determining as to who shall be entitled to sick benefits and under what circumstances. The objection to the admission of the evidence of the by-law upon the ground that the by-law introduced in evidence was different from the one pleaded, does not seem to be well taken. It is true that there are contained in the record other regulations beside the one which has been pleaded, but they have no relevancy whatever to the issue presented under the pleadings. Article 3 is substantially set out in the answer. It is true that the language differs in its order and arrangement, and that there are some omissions, but as far as this case is concerned the legal effect of the by-law as it is sought to be invoked as a defense is substantially contained in the answer, and duly apprises the plaintiff of precisely what the defense claims to be the effect of the by-law which had been passed. Under these circumstances the evidence seems to have been admissible, as the legal effect of the by-law may be set out in an answer without reciting its exact language.

The objection that the new by-law is not binding upon the plaintiff, because it is a fundamental alteration of the constitution of the society, does not seem to be well taken. It was adopted pursuant to the provisions of the constitution relating to by-laws, to which provisions the plaintiff in this action subscribed in order to become a member,—it being a voluntary association. It was an amendment relating to the objects of the society, and was simply a change in the regulations by which proof was to be made to the association of the right to relief. In other words, in order to entitle members to relief, they should make their claim at once in order that the society might be apprised of it, and should furnish some *prima facie* evidence beside their own of their right to relief.

It has been held in this court upon more than one occasion that in respect to the by-laws of a voluntary association the court has no visitorial power, and cannot determine whether they are reasonable or unreasonable, and the only question which it can examine is whether they have been adopted

in the way which has been agreed upon by the members of the association.

The case at bar is distinguishable in many particulars from the case of *Poultney* v. *Bachman* (10 Abb. N. C. 252), decided by Mr. Justice Westbrook in April, 1881. In that case, after the plaintiff became entitled to sick benefits to a certain amount, there was an attempt upon the part of his associates to restrict his recovery by an amendment of the by-laws. The by-laws provided that when he became sick he should be entitled to certain relief during his sickness or disability, and it was held by the learned court in that case, that by the happening of the contingency provided for, namely, the sickness, the plaintiff's right to the sum provided for in the by-laws during his sickness or disability became a vested one, of which he could not be deprived; and an illustration is resorted to by the learned judge, who refers to the clause contained in an insurance policy giving either the insured or the insurer the right at any time to end the risk; and he says it would certainly be a somewhat novel construction of the clause conferring such power of termination to hold that, after a loss has occurred to the insured against which the agreement was to protect, the payment of the sum stipulated for could be either reduced or repudiated by the insurer. This case, it will be seen, is entirely different from the one at bar. The alterations of the by-laws in the case at bar were made long before the plaintiff became entitled to any relief, and were made in accordance with the method which he subscribed to upon becoming a member, and of which he has now no right to complain.

The association being a voluntary one, as has above been stated, this court has no power to pass upon the question as to whether such rules and regulations as they chose to adopt for the guidance of their own affairs are reasonable or unreasonable; and I am, therefore, of the opinion that the judgment appealed from should be affirmed, with costs.

Van Hoesen and Beach, JJ., concurred.

Judgment affirmed, with costs.

JAMES MCCARTHY, Respondent, *against* LEWIS MCDERMOTT, Appellant.

(Decided April 3d, 1882.)

Upon the execution and delivery of a bill of sale of the furniture of a boarding house, the purchaser went to the house and there stated to the vendor that he took possession of the property; and he delivered to the vendor's wife a writing constituting her a bailee for him of the property; but there was no change in the apparent ownership, and nothing done to disclose that the title had been transferred. *Held*, that the sale was fraudulent and void as against creditors of the vendor; and that, in an action for taking the furniture under an execution against the property of the vendor, the facts being undisputed, it was error to submit the question of change of possession to the jury.

APPEAL from a judgment of this court entered upon the verdict of a jury, and from an order denying a motion for a new trial.

The action was brought to recover damages for the taking of certain household furniture seized and sold by defendant, a city marshal, under an execution against the property of D. A. Skinnell, on March 7th, 1877. The plaintiff had purchased the property from Skinnell, February 1st, 1875, and the question submitted to the jury was whether this sale was fraudulent, and intended to hinder, delay or defraud the creditors of Skinnell, the vendor. The defendant's counsel asked the court to charge: "That the evidence shows that there was not an actual and continued change of possession such as is required by the statute, and that the burden of proof is on the plaintiff to rebut the presumption of fraud arising from this state of facts." This was refused, and defendant excepted. The court had charged the jury, leaving the question whether there had been an actual and continued change of possession, as a question of fact, to them to decide. The jury found a verdict for the plaintiff, and a motion by the defendant for a new trial was denied, and judgment in favor of the plaintiff

was entered on the verdict. From the judgment and the order denying the motion for a new trial the defendant appealed.

Jones Cochrane, for appellant.

Richard S. Newcombe, for respondent.

J. F. Daly, J.—[After stating the facts as above.]—The facts as to the alleged change of possession upon the sale of the furniture by Skinnell to the plaintiff were undisputed, and presented a question for the court to decide and to instruct the jury upon, under the statute. On February 1st, 1875, when the sale took place, the furniture was at 54 Clinton Place, where Skinnell and his wife carried on a boarding house, and the furniture sold was all the furniture used in the business. Plaintiff at that time had a residence in Brooklyn, keeping house and paying rent there, but his family lived at 54 Clinton Place. His wife and Skinnell's wife were sisters. It was not shown whether he lived with his family at that house. On the day the bill of sale to him was executed, plaintiff went with Skinnell to 54 Clinton Place, went all through the house with his (plaintiff's wife), stated that he took possession of the property, and delivered to Mrs. Skinnell a writing dated February 1st, 1875, and signed by himself, placing the property in her care and custody to take charge of it for him and for his benefit, to be surrendered to him whenever he should require or demand the same; and that until he should require said property she was to have the use and custody of it as compensation for caring for it. Mrs. Skinnell and plaintiff's wife then carried on the boarding house; plaintiff's wife was sick at the time; plaintiff's wife and family remained in the house for six weeks, when he and they went back to Brooklyn. Skinnell remained in the house a few weeks or a month, then went to Boston, and then returned before May 1st, 1876, when he went by direction of his wife to hire the house 28 W. 9th St., she being authorized by plaintiff to hire it. On May 1st, 1876, the Skinnells moved into 28 W. 9th St. with the furniture, and plaintiff and his fam-

ily moved there from Brooklyn. Plaintiff and his family went back to Brooklyn on September 1st, 1876, and left Skinnell and his wife in the 9th St. house; Mrs. Skinnell had charge of the house for plaintiff; Skinnell was not there at all times. The furniture was seized and sold there by defendant upon execution against Skinnell on March 7th, 1877.

It is clear that the change of possession on February 1st, 1875, was constructive only. The vendor remained in the house with the furniture, and the boarding house business continued, his wife running the establishment instead of his doing so. Nothing in the apparent ownership of the property was changed. There was nothing to disclose that the title had been transferred from Skinnell to plaintiff. There were words spoken by plaintiff announcing that he took possession; there was a paper given by him to the vendor's wife constituting her a bailee for him of the property, but that was all;—words and the delivery of a paper. Skinnell, the vendor, remained in the house, the property remained in the house, and the whole change was constructive, not actual. Even if there had been an actual change at the date of the transfer, and Skinnell had gone away, his return to the house and remaining there with the property, household furniture, while plaintiff moved away from the house, would have brought the case within the statute, for the change of possession was not continued. The change of possession must be actual, as distinguished from constructive, and must in addition be continued, in order to remove the presumption of fraud in the transaction as against the vendor's creditors (2 R. S. 136; *Randall* v. *Parker*, 3 Sandf. 69; *Betz* v. *Conner*, 7 Daly, 550).

The court should have charged defendant's request as made, and not left the question of change of possession to the jury. It is said by respondent, that as defendant subsequently requested the court to charge "if you find from the evidence that there was no transfer of possession of the property sold, to McCarthy, the fact that the bill of sale was not put on record would alone create a presumption of fraud," this was virtually an acquiescence in the court's leaving the question

of possession to the jury. I hardly think defendant was left free to choose. His request to take the question from the jury was refused, and the court left it to them; he was entitled to ask any instruction he thought fit, consistent with that action of the court, without losing the right to object to such action, and to avail himself of his exception formally taken to the refusal to instruct the jury that there was no actual and continued change of possession.

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

Beach, J., concurred.

Van Hoesen, J., dissented.

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

Thomas Molloy, Respondent, *against* The New York Central and Hudson River Railroad Company, Appellant.

(Decided April 3d, 1882.)

Where upon the trial of an action the testimony of a party is wholly inconsistent with a written statement, previously made by him under oath out of court, a verdict in his favor, unsupported except by such discredited testimony, should not be permitted to stand.

A master is liable to third persons for the tortious act of his servant, where discretion or force is to be used by the servant in the employment, and the servant misjudges in discretion, or wantonly or recklessly uses an injurious excess of force, within the scope or course of his employment; but the master is not liable when the act is not only willful and intentional, but plainly outside the general limits of the servant's duty, and without the line of the business he was employed to do.

Appeal from a judgment of this court entered on the verdict of a jury, and from an order denying a motion for a new trial.

In November, 1875, the plaintiff, then about thirteen years old, either attempted to board or succeeded in boarding a train moving over the defendant's railway, in Eleventh Avenue. On the trial, the plaintiff testified he had hold of the car rail, with one foot on the step and the other just leaving the ground, when defendant's brakeman kicked him in the chest, breaking his hold upon the rail, whereby he fell, and the car passed over his leg. The injury necessitated its amputation. The evidence on defendant's behalf was in material respects contradictory to the plaintiff's version. The jury rendered a verdict in plaintiff's favor for ten thousand dollars. From the judgment entered thereon, and an order denying a motion for a new trial on the minutes, the defendant appealed.

Frank Loomis, for appellant.

Christopher Fine, for respondent.

Beach, J.—The principal legal contention of appellant's counsel is settled adversely to his argument by the decision of the Court of Appeals in *Hoffman* v. *The New York Central & Hudson River R. R. Co.* (87 N. Y. 25). The removal of trespassers is there held to be within the implied authority of defendant's servants, and an illegal removal while the train is in motion does not exonerate the defendant.

The plaintiff testified on the trial, that he was kicked by defendant's brakeman, while holding to the car rail, with one foot upon the step. In a sworn statement made by him out of court, which he stated was correct, he said he was running along by the forward end of the rear car, not trying to get on, and the brakeman standing on the top of the platform kicked him in the breast, and he fell under the car. He also adds, "I am sure I didn't have hold of the car, or try to get on."

It is impossible to reconcile these different stories. Each is made under oath, the one in July, 1880, the other in May, 1881. He directly contradicts himself in the relation of an occurrence where he was so prominent an actor, with the lame explanation of not having observed the above quoted

sentence. His testimony was therefore unworthy of credence, and the court could properly have instructed the jury to wholly disregard it. In *Boyd* v. *Colt* (20 How. Pr. 384), the plaintiff's testimony was opposed by the contents of his letter, produced by the defendant. The learned judge writing for the court said, "It appears to me that this letter, unexplained, was conclusive against the plaintiff, and that the jury were bound to disregard his oath when flatly contradicted by his own letter, written long before the action was commenced."

This plaintiff should be entitled to no consideration, when his oath at the trial is wholly inconsistent with his oath taken ten months before. The sole evidence of his having been kicked by the brakeman is his own. Opposed to it, the brakeman testified he never did so, and the disinterested witness Brooks, who happened to see the occurrence, swears that no man kicked him, but that he caught hold of the front rail of the last car, and then he saw him fall. If this rendition be true, the defendant was not liable. It needs the intervention of the brakeman's alleged act to impose liability upon the defendant. The jury must have so found, and their conclusion is unsupported save by the discredited testimony of the plaintiff. In such a case the verdict should not be permitted to stand (*Baxter* v. *McDonald* 5 Daly, 508).

Upon request of plaintiff's counsel, the learned judge charged the jury, "Even if the plaintiff was not in fact attempting or intending to get on defendants' car to ride, without paying fare, or at all, yet if the defendants' agent or servant in charge of the car, in the exercise of his judgment and observation, thought the plaintiff was attempting or intending to do so, the defendants will be responsible for the act of their servant in kicking or pushing the plaintiff, as claimed, while the car was in motion. The defendants are responsible for the mistaken judgment of their servant, while acting in the line of his duty."

The concluding paragraph of this request is unobjectionable, but the main proposition is unsound. Its only applicability to the facts of the case, arises from the plaintiff's written statement, wherein he in substance said that he was running

along side the car, when assaulted by the brakeman. The request further assumes the absence of any attempt or intention to board the train. In my opinion, the proposition involved is an advance beyond the limit of legal principle and adjudication. In *Hoffman* v. *The New York Central & Hudson River R. R. Co.* (*supra*), and *Rounds* v. *Delaware, &c. R. R. Co.* (64 N. Y. 129), the person removed was in each case a tresspasser, and his removal by the defendant's servants an act within their implied authority. The liability of the master for the servant's tortious act, results from its doing in the former's business. Where discretion or force is to be used by the servant in the employment, its exercise is, in law, the master's act, and for the consequences he is liable to third persons, although the servant may have misjudged in discretion, or wantonly or recklessly used an injurious excess of force. But this discretion or force must be exercised by the servant in the scope or course of his employment, to render the master liable (Story on Agency, §§ 308, 452, 453). If the brakeman of the car, standing upon the platform, kicked the plaintiff, who was making no attempt to board the train, and thereby caused the injury, the defendant cannot be held liable, because the act was not only willful and intentional, but plainly ontside the general limits of his duty, and without the line of business he was employed to do for the company (Story on Agency, § 450, and cases cited in note; *Mott* v. *Consumers' Ice Co.*, 73 N. Y. 543; *Isaacs* v. *Third Avenue, R. R. Co.*, 47 N. Y. 122; *Shea* v. *Sixth Avenue R. R. Co.*, 62 N. Y. 180; Moak's Underhill on Torts, 31, 32, 33). The proposition charged is not strengthened by stating that the servant in the exercise of his jndgment and observation thought the plaintiff was attempting or intending to get on the car. The mistaken judgment for which the master is held liable mnst be exercised in the commission of an act within the employment, and not in relation to a trespass which may or may not be committed by a third person, who does not exhibit by his action either intent or effort to commit it. In so charging the jury, the learned justice presiding at the trial erred in my opinion, and the exception thereto was well taken.

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

J. F. Daly, J., concurred in the decision.

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

Francis Murphy, Appellant, *against* John Voorhis, Respondent.

(Decided April 3d, 1882.)

In an action to recover treble damages, under L. 1879, c. 168, for alleged extortion in exacting dockage for a canal boat lying and unlading at a bulkhead claimed by the defendant to be his private property, the burden of proof is on the plaintiff to show that the bulkhead was within the class of bulkheads to which the act of the legislature fixing dockage and wharfage charges is applicable.

Appeal from a judgment of the district court in the City of New York for the Ninth Judicial District.

The facts are stated in the opinion.

M. J. Earley, for appellant.

Lydecker & Romaine, for respondent.

Van Hoesen, J.—The plaintiff sued to recover treble damages under chapter 168 of the Laws of 1879, for alleged extortion of wharfage by the defendant. The defendant is the owner of a wharf at the foot of 112th street, East river, and is also the owner of the bulkhead between 112th and 113th streets. The charge made for wharfage at the wharf is not complained of, but the complaint is that the defendant

exacted three dollars per day as dockage for a canal boat lying and unloading at the bulkhead already mentioned. In order to establish his right of action, it was necessary that the plaintiff should show that the bulkhead was within that class of bulkheads to which the act of the legislature which fixes dockage and wharfage charges is applicable. The defendant insists that the bulkhead is the boundary of upland, which is his private property, and that it was for the use of this upland, and not for the use of any bulkhead that was constructed on the bulkhead line or line of solid filling, under chapter 763 of the Laws of 1857, that the sum of three dollars per day was demanded. As I have said, the burden of proof was on the plaintiff, and it was for him to show that the bulkhead was subject to the act of the legislature regulating wharfage charges. The statute under which he sued is highly penal, and no presumptions against the defendant were to be indulged. The plaintiff contented himself with proving that the agent of the defendant demanded three dollars per day for the use of the property, on the ground that it was private property, and not a bulkhead that was within the terms of the act limiting the rates of dockage and wharfage. The plaintiff offered no evidence to show that the upland was a highway, or that he was entitled to pass over it without the defendant's permission, for the purpose of reaching the bulkhead. If, in point of fact, it was necessary for him to obtain the defendant's leave to cross over the upland, and if he agreed to pay, and did pay, for such permission, he can not recover the money so paid. Extortion in wharf charges, not extortion for a license to pass over private property contiguous to a river, is the act which it is the design of the statute to punish. The plaintiff failing to prove what kind of a bulkhead this was, and also failing to prove that he had a right to cross over the defendant's upland without leave, there was no evidence on which the justice could have given judgment in his favor.

Van Brunt, J., concurred.

Judgment affirmed, with costs.

WILLIAM PEASE, Plaintiff, *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Defendant.

(Decided April 3d, 1882.)

Although the court has no jurisdiction of an action against a foreign corporation, bought by a non-resident of the state, to recover damages for a personal injury committed out of the state, yet the objection, being for want of jurisdiction of the person of the defendant, not of the subject-matter, may be waived; and it is waived if the defendant fails to take the objection in its answer, or before answering.

EXCEPTION taken at a trial term of this court ordered to be heard in the first instance at general term.

The action was brought against defendant, a foreign corporation, for an injury to the person of plaintiff, committed n New Jersey.

The answer was a defense to the merits. On the trial it appeared that plaintiff, at the time of commencing the action, had his legal residence in the state of New Jersey, and that he had a place of business in the city of New York and spent most of his time in that city. The court dismissed the complaint under authority of *Harriott* v. *The New Jersey R. R. &c. Co.* (2 Hilt. 262). Plaintiff excepted, and the exception was ordered to be heard in the first instance at the general erm.

Edward B. Kennedy, for plaintiff.

Hamilton Odell, for defendant.

J. F. DALY, J.—[After stating the facts as above.]—When the case of *Harriott* v. *The New Jersey R. R. &c. Co.* (2 Hilt. 262) was decided, it was assumed that this court had no jurisdiction of the *subject-matter* of an action like the one before us, because section 33 of the Code of Procedure, which defined the jurisdiction of this court, limited its jurisdiction in actions

against foreign corporations to such causes of action when they arose within this state. This construction of that decision was adopted by the Court of Appeals in the case of *McCormick* v. *Pennsylvania Central R. R. Co.* (49 N. Y. 308), distinguishing between the limited jurisdiction of the Common Pleas and the general jurisdiction of the Supreme Court (see also *Gibbs* v. *Queen Ins. Co.*, 63 N. Y. 114); and it was, therefore, held that the appearance and general answer of the defendant was not a waiver of objection to the jurisdiction of of the Court of Common Pleas, because jurisdiction of the subject matter (as distinguished from the person), could not be conferred by consent.

In these decisions, section 427 of the Code of Procedure, which gave the same jurisdiction to the Court of Common Pleas in actions against foreign corporations, which is conferred upon the Supreme Court, seems to have been overlooked. The jurisdiction of this court under the present Code (Code Civ. Pro. §§ 263, 1780, as to actions against foreign corporations) is substantially the same as it was under the old Code; and it has the same jurisdiction as the Supreme Court in such actions. The only limitation upon our jurisdiction in actions brought by *non-residents* against foreign corporations is to be found in the general provision of the Code (§ 1780) which is applicable to all the courts of the state, and provides that an action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: 1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state at the time of the making thereof. 2. Where it is brought to recover real property situated within the state, or a chattel which is replevied within the state. 3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

A similar limitation to cognizance of causes of action arising within the state, was contained in section 427 of the for-

mer Code, defining the actions which might be brought by a non-resident, against a foreign corporation, in the Supreme Court, the Superior Court and the Court of Common Pleas; yet notwithstanding that limitation it was held that the Supreme Court could acquire jurisdiction of actions brought by non-residents upon causes of action arising out of the state, if objection to the jurisdiction were not taken before answer or by answer; that the Supreme Court had jurisdiction of the subject-matter of such an action, and acquired jurisdiction of the person of the defendant by its consent, expressed by appearing and answering generally (*McCormick* v. *Pennsylvania Central R. R. Co.*, cited above).

There being no limitation upon the jurisdiction of this court which does not apply to the Supreme Court, it has jurisdiction of any cause of action against a foreign corporation where the summons is served as prescribed in the act, and the action is brought by a resident of the city. Its jurisdiction of the subject-matter is not restricted.

Where, however, the action is brought by a non-resident for a cause of action arising out of the state, it cannot acquire jurisdiction of the person of defendant except by consent. This is the case with all the courts of the state. Jurisdiction of the person may be conferred by consent expressed by failure to make objection in the answer, or before answering.

The case of *Harriott* is, therefore, no authority for dismissing such an action after defendant has appeared and answered generally. Objection to the jurisdiction must be taken by answer, or if the facts are undisputed, by motion before answer (*Crowley* v. *Royal Exchange Shipping Co.*, *ante*, p. 409).

The exception is well taken, and a new trial must be ordered, with costs to abide event.

Van Brunt, P. J., and Van Hoesen, J., concurred

Exception sustained and new trial ordered, with costs to abide event.

BERNARD REILLY, Respondent, *against* JAMES FLYNN, Appellant.

(Decided April 3d, 1882.)

An action by a sheriff to recover his term fees in certain causes, cannot be sustained by proof merely that such causes appeared upon the calendars of the courts for certain terms, and that the defendant was the attorney for the plaintiffs therein, without any evidence showing by whom the notes of issue in such causes were filed.

APPEAL from a judgment of a district court in the City of New York.

The facts are stated in the opinion.

Leroy S. Gove, for appellant.

Vanderpoel, Green & Cuming, for respondent.

VAN BRUNT, P. J.—This is an action to recover the sheriff's term fees upon certain cases, appearing upon the calendars of the courts of this county, in which the defendant was the attorney for the plaintiffs. The sole proof upon the part of the plaintiff was the production of certain calendars showing that the causes had appeared for certain terms upon such calendars, and that the defendant was the plaintiff's attorney therein.

That the sheriff has a right to recover such fees from the attorney in a proper case has been decided by this court in the case of *Reilly* v. *Tullis* (*ante*, p. 283), and it is not necessary now to consider that question, except so far as to state that the principle upon which the attorney was held in that case was, that the services were performed at the request of the attorney, and that it has been the uniform practice for sheriffs to charge their fees to the attorney for the party for whose benefit the services are rendered, and that there is an implied assumpsit by the attorney from the uniform prac-

tice to pay for the services done for his client by his express or implied request.

In the case at bar there is no evidence whatever as to who filed the note of issue, and as a consequence there seems to be a link missing in the evidence necessary to hold the defendant responsible for these term fees. In the absence of all evidence showing by whom the note of issue, was filed, there is no room for an implied assumpsit against the attorney of the plaintiff rather than the attorney for the defendant.

Under these circumstances it would appear that there was a defect of proof in the case at bar, and that the judgment must be reversed.

J. F. Daly and Van Hoesen, JJ., concurred.

Judgment reversed.

Frank D. Schuyler, Appellant, *against* Michael Englert, *et al.*, Respondents.

(Decided April 3d, 1882.)

Where an order of arrest has been vacated by consent of the parties upon a stipulation on the part of the defendant not to sue for false imprisonment or malicious prosecution, no action can be maintained on the undertaking given by the plaintiff to obtain such order of arrest.

Appeal from an order of the general term of the Marine Court of the City of New York reversing a judgment of that court entered upon a trial by the court without a jury and ordering a new trial.

In July, 1879, an action having been commenced by the defendant Michael Englert against one August G. Genez, an application was made for an order of arrest against said Genez, and upon such application an undertaking executed by all the

defendants herein in the manner and form required by the Code was offered and accepted by the judge to whom the application was made, who thereupon issued an order of arrest, upon which order the said Genez was arrested and was released upon giving bail.

A motion was thereupon made to set aside the order of arrest, which motion was granted by consent, the said Genez agreeing to stipulate not to sue for false imprisonment or malicious prosecution, which stipulation was duly given and the said Genez discharged from arrest.

Genez having assigned to the plaintiff any cause of action which he might have upon the undertaking above mentioned, this action was brought thereon in the Marine Court, and a judgment recovered. From that judgment an appeal was taken to the general term of that court, where the judgment was reversed and a new trial granted. From this order the plaintiff appealed to this court.

John O. Mott, for appellant.

Christopher Fine, for respondent.

Van Brunt, P. J.—[After stating the facts as above.]—The ground upon which the appellant bases his appeal is, that although the plaintiff's assignor stipulated not to sue for false imprisonment or malicious prosecution, he did not release any right of action upon the undertaking which he had acquired by reason of the vacatur of the order of arrest. That the setting aside of the order of arrest was a final decision within the terms of the undertaking, that the plaintiff was not entitled to the order of arrest, seems to me to be certain, because it is the only determination which can be made where the ground of the arrest is upon facts outside of the cause of action, as were the facts in the case at bar.

The undertaking carefully distinguishes between cases where the nature of the cause of action gives the right to the order of arrest, and the cases where the order of arrest is obtained upon facts outside of the cause of action.

In the one case the right to the order of arrest is determined by the fact that the plaintiff obtains judgment, and in the other, although the plaintiff may obtain judgment, he may not be entitled to the order of arrest.

In the latter cases, the right to the order is determined upon motion, and if the order is set aside upon a motion, and the order entered setting aside the order of arrest is not vacated or reversed, it is finally decided that the plaintiff is not entitled to the order of arrest, and the condition of the undertaking is fulfilled.

But a more serious point is raised by the stipulation not to sue.

It is claimed by the appellant that although his assignor stipulated not to sue for false imprisonment or malicious prosecution, he did not release any cause of action which he had upon the undertaking given upon the order of arrest.

A brief examination of the position of the plaintiff's assignor, will, I think, show that this position cannot be maintained.

His stipulation was not to sue for false imprisonment or malicious prosecution. If he brought such a suit, what would he bring the suit for? The answer is obvious: to recover damages. Therefore, in stipulating not to sue for false imprisonment or malicious prosecution, he has stipulated not to bring any suit to recover damages by reason of the false imprisonment or malicious prosecution, and notwithstanding this stipulation, his assignee has recovered damages against the plaintiff in the action, the very person whom he agreed not to sue to recover such damages. It is true that the proof in an action for false imprisonment or malicious prosecution varies from that which would be offered in an action upon the undertaking, but the damages recovered in the former action would include those which could be recovered in a suit upon the undertaking, and would be established by the same proof. The plaintiff's assignor having stipulated not to sue for any damages caused by the false imprisonment or malicious prosecution, it is difficult to see by what right he can sue to recover a part of that which he agreed not to sue for, by merely changing the form of action.

Just as well when a plaintiff had a cause of action arising from the conversion of his goods, and for a good consideration he had executed an agreement not to sue for the conversion of his goods, might he claim to sue for the value of the goods upon the implied contract.

The plaintiff's assignor having stipulated not to sue for any damages arising from the false imprisonment or malicious prosecution, and the amount recovered in this action being a legitimate part of such damages, no such recovery should have been had.

The order of the general term granting a new trial must be affirmed, and judgment absolute given to the defendants upon the stipulation, with costs.

J. F. Daly and Van Hoesen, JJ., concurred.

Order affirmed and judgment absolute ordered for defendants, with costs.

Henry Stedeker, Appellant, *against* Henry O. Bernard *et al.*, Respondents.

(Decided April 3rd, 1882.)

After an answer has been stricken out as frivolous, and judgment thereon ordered against a defendant, he should not be permitted to plead another defense known to him at the time of serving such frivolous answer, and purposely withheld by him.

Appeal from an order of this court allowing a defendant to serve an answer, after a previous answer by him had been stricken out, and vacating a judgment entered against him thereupon.

In November, 1881, the plaintiff commenced an action against the defendants, as copartners, by the service of a sum-

mons and complaint upon the defendant Henry O. Bernard personally, to recover the amount of a check given by the said H. O. Bernard in the name of the firm.

The defendants appeared and answered that the said check was given by Bernard individually, and that the same was not made by or on behalf of the firm, or in any of the business transactions of the firm. An application having been made for judgment against the defendants on account of the frivolousness of the answer, said application was granted absolutely against the defendant Henry O. Bernard, but the defendants Taft and Smart were given leave to amend their answer as they might be advised. Thereupon the defendant Bernard made an application for leave to serve his individual answer, setting up the defense that the check mentioned in the complaint was given for money wagered and lost by the defendant at a gaming table in the city of Baltimore, in the state of Maryland, at a game of hazard called poker.

As this check was given by the defendant Bernard personally, he knew at the time the suit was commenced that this defense existed, and it appears from the affidavit of Mr. Owen that upon the application for judgment, the existence of this defense was stated, but it was intimated virtually that the defendant did not desire to set it up; and it appears from the other papers in the case that he had relied upon the advice of counsel that no individual judgment could be rendered against him. Upon the application for leave to serve his answer, an order was made upon terms granting such application; and from that order the plaintiff appealed.

John Graham, for appellant.

E. J. Myers, for respondent.

Van Brunt, P. J.—[After stating the facts as above.]—It appears conclusively from the papers in this case, as has been above stated, that the defendant was always aware of the defense which he now desires to set up against the check in question.

It appears that he alone of the members of the firm was personally served with process. It is true that a general appearance was entered for all the members of the firm at the time of the service of the answer. It also appears that he was in consultation with the attorney who put in the answer for all the defendants, and that he was his adviser then as he is now. Knowing then as well as he does now that he had a certain defense to the instrument sued upon, under advice of counsel, he relies upon another which is set up and which fails. The reason that he does not desire to set up the defense contained in his individual answer seems to be apparent, and he therefore, speculates upon the decision of the court upon other defenses, rather than place himself upon the record setting up the defense of gaming.

I know of no rule or practice which has allowed a defendant knowingly to withhold defenses, depending upon the establishment of others, who has been allowed subsequently to set them up. Such speculations are not to be fostered by the courts. A defendant is bound to set up his whole case as he knows it at the time of putting in his answer at his peril, and where a defendant knowingly withholds a defense from a pleading, after he has been beaten in respect to those which have been set up, he has no claim to be allowed to place upon the record that which he has purposely withheld, until he has been forced by the course of the litigation to place upon the record a defense, which at the time of putting in the original pleading he shrank from exposing.

The defendant in this action, if he could get clear of paying the check in question, was unwilling to plead the fact that the money was lost at gaming. Perhaps some sentiment of honor may have been struggling through his brain, but the prospect of having to pay the money that he had lost, which by the ruling of the court had become a certainty, seems to have overcome this reluctance, and he now desires to place upon the record that defense which he was unwilling to set up at the time that he first answered.

I know of no rule which would authorize the court to permit a defense to be put in under such circumstances.

The order appealed from should therefore be reversed, with $10 costs and disbursements.

Beach, J., concurred.

Order reversed, with costs.

John A. Sweeney *et al.*, Respondents, *against* William P. Rogers *et al.*, Impleaded, &c., Appellants.

(Decided April 3d, 1882.)

Where a promissory note made for the accommodation of the payee is by him indorsed and delivered to brokers as collateral security to them for the purchase and carrying for him by them of certain stocks, the brokers, in an action upon the note, in order to recover against the payee, must show that they did in fact purchase such stock for him, and that a loss was thereby incurred. And for this purpose, proof merely that the plaintiffs employed other brokers to make the purchase, who reported to them that it was made, and that, upon an alleged failure of the defendant to provide additional security when called for, on a fall in the price of the stock, the plaintiff instructed such other brokers to sell the stock, which the latter also reported to them to have been done, is not sufficient.

Appeal from a judgment of the general term of the Marine Court of the City of New York affirming a judgment of that court entered upon a verdict of a jury.

The action was brought upon a promissory note made by the defendant William P. Rogers, to the order of the defendant James F. Rogers, and indorsed and delivered by the latter to the plaintiffs. The note was made without consideration, for the accommodation of James F. Rogers, and was indorsed and delivered by him to the plaintiffs as collateral security for the purchase by them for his account, of certain stock, which they were to carry for him. They alleged that such stock was in fact purchased for them by other brokers, Owens & Mercer, one of whom was a member of the Stock Exchange; and that the stock was afterwards, upon a decline in its value,

and upon notice to the defendant James F. Rogers, sold for the plaintiffs by Owens & Mercer, and a loss thereby incurred by the plaintiffs.

At the trial the jury found a verdict for the plaintiffs. A motion by the defendants for a new trial was denied, and judgment for the plaintiffs was entered on the verdict. From the judgment and the order denying their motion for a new trial, the defendants appealed to the general term of the Marine Court, which affirmed both; and from this decision the defendants appealed to this court.

Malcolm Campbell, for appellants.

A. C. Aubery, for respondents.

Van Hoesen, J.—At the time of the delivery of the note Rogers gave to the plaintiffs an order for the purchase of one hundred shares of Wabash stock, fifty shares of which were to cover a short sale, so that the defendant James—to use the language of the brokers—went long of fifty shares. It devolved on the plaintiffs to buy one hundred shares for James, and to prove that they did so, in case they sought to hold him liable for any loss occasioned by a decline in the value of the stock. It matters not that they employed other persons to make the purchase at the stock exchange, for the quantum of evidence, or the methods of proof, cannot be altered by the fact that an agent engages a third person to act as sub-agent. The plaintiffs were bound to show that they themselves or their employes, Owens & Mercer, actually bought the one hundred shares of Wabash and actually sold them so that a loss took place. It was not enough for the plaintiffs to swear that Owens & Mercer had reported that they had sold, for the report was merely hearsay. Legal proof was indispensable, unless there were an account stated, or some action on the part of the defendant either admitting or estopping him from denying the correctness and the validity of the plaintiffs' claim.

I should be reluctant to set aside the verdict on the ground that the plaintiffs did not buy the one hundred shares, for

there is some evidence, at least, that the plaintiffs did have in their hands and carry for the defendant James fifty shares of long stock; but I find no evidence at all that those shares were ever sold. No one that was examined as a witness seemed to have any knowledge of the subject. Mr. Sweeney knew that he telephoned to Owens & Mercer to make the sale, but he does not know, though he has been told, that those gentlemen followed his instructions.

Unless a sale has taken place, the plaintiffs must still stand in the relation of pledgees of the stock; and there is nothing in the evidence to show what loss, if any, they have sustained through carrying it. The value of the stock may, for aught we know, be greater now than it was at the time the purchase was made. The transaction must be closed, either by a sale of the stock in a lawful manner in consequence of the defendant James's default in furnishing the necessary margins, or else by the agreement of the parties. In no other way can the loss be ascertained. Where a note is given as collateral security by a payee for whose accommodation it is made, it may be collected by the holder according to its terms, whether the debt to which it is collateral be due or not (*Agawam Bank* v. *Strever*, 18 N. Y. 502). It may well be that the plaintiffs could have maintained an action on this note against William P. Rogers without showing that they had sustained any loss whatever; but they also sued James F. Rogers, and chose to litigate in this action the question as to whether or not the event had occurred that entitled them to hold all, or a part, of the proceeds of the note as an indemnity against a loss which their transactions on his account had occasioned them. This threw upon them the burden of showing a loss, and that they failed to show (*Williams* v. *People's Fire Ins. Co.*, 57 N. Y. 274).

There must be a new trial, with costs to abide the event.

Van Brunt, P. J., and J. F. Daly, J., concurred.

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

LAWRENCE F. WELDON, Executor, &c. of Elizabeth S. Weldon, Deceased, and individually, Respondent, *against* JOSEPH BECKEL *et al.*, Appellants.

(Decided April 3d, 1882.)

Articles of copartnership between the plaintiff, his wife, and the defendants, recited that the plaintiff and his wife had each contributed certain machinery, tools, &c., of a specified value, and that each of the defendants had contributed cash in various amounts to the capital stock; and it was agreed that on the termination of the copartnership the assets should be distributed by repaying to each the amount of capital contributed by him, and dividing the balance equally; and the plaintiff and his wife agreed, in such distribution, to receive the machinery, tools, &c., contributed by them, at the same value it represented in the capital stock. The copartnership having been dissolved by the death of the plaintiff's wife, the defendants took the property of the firm into their possession and sold part of it. The plaintiff, as executor of his wife and in his individual capacity, brought an action against them for an accounting of the affairs of the copartnership. *Held*, that upon such accounting, there being evidence that the value of the property contributed by the plaintiff and his wife had depreciated, and was in fact less than the value stated in the copartnership articles, such property should be charged against the defendants at its actual value only at the time of the dissolution.

APPEAL from a judgment of this court entered upon the report of a referee.

The action was brought for an accounting of the affairs of a copartnership.

On the 2nd of January, 1877, articles of copartnership were entered into between the defendant, Joseph Beckel, Elizabeth Stowell Weldon, Emile H. Roth, L. F. Weldon and Benjamin F. Beckel. The business of the copartnership was to be the manufacture of ladies' bustles, corsets, bosom pads and other articles of ladies' wear, and the buying, vending and selling of all sorts of goods to the business belonging or appertaining; the business was to be conducted in the City of New York, and at such other places as the said parties or a majority of them should agree upon. The partnership was to com-

mence on the 2nd of January, 1877, and to continue until and including the 31st of December, 1877, subject, however, to certain other covenants contained in the articles of copartnership. The agreement then recites that Joseph Beckel has contributed and paid in as capital stock $10,000 in cash, stock and book accounts; that Elizabeth Stowell Weldon has contributed and delivered in lieu of cash capital one-half of all the machinery, tools, implements, apparatus and appurtenances owned by her as her separate estate and property . . . of the value of $5,000, and also the further sum of $1,000 in cash and book accounts; that Emile H. Roth has contributed and paid in as capital stock the sum of $1,000; that Lawrence F. Weldon has contributed and delivered in as capital stock one-half of all the machinery, tools, implements, &c., owned by him . . . of the value of $5,000; and that Benjamin F. Beckel has contributed and paid in as capital stock the sum of $1,000. The agreement then provides for the division of profits equally between the partners, and the payment of losses in the same proportions. It further provides that at the end or other sooner termination of their copartnership, the copartners shall have an accounting together, and the assets shall be divided as follows:—after first paying to each one the amount of capital contributed by him, then the balance remaining shall be divided equally between the said copartners, share and share alike; and the said Elizabeth S. Weldon and Lawrence F. Weldon covenanted and agreed to take and receive, on the distribution of the assets of the copartnership at the expiration of the term thereof, all the machinery, tools, implements, &c., contributed by them respectively in lieu of capital stock, at and after the same value and amount it represented in the capital stock of said firm.

The parties entered upon the business of the copartnership, and the same was dissolved in the month of November, 1877, by the death of Elizabeth S. Weldon.

The defendants in this action, Joseph Beckel, Emile H. Roth, and Benjamin F. Beckel, retained the stock and machinery of the firm in their possession, and some of the stock was sold by them.

Upon the trial of this action before the referee, evidence was introduced to show the value of the machinery which was contributed by the Weldons, at the time of the death of Mrs. Weldon. The only persons acquainted with such value, who were examined upon that point, were Mr. Roth and Mr. Menahan. Mr. Roth testified that such machinery was worth from $1,500 to $2,000; which included machinery for which the new firm had expended the sum of nearly $3,000. Mr. Menahan fixed the value at $800. Mr. Straus, who was the book-keeper of the firm, in his testimony, in making up the accounts of the business of the firm during the year that it was in existence, shows that the business was conducted at a loss of some $8,000, besides the depreciation in tool and machinery account; and upon being asked how much in his opinion that depreciation was, he stated over $2,000.

It does not appear that Mr. Straus had any knowledge of machinery, or that he was other than a book-keeper. The learned referee in the decision of this case charged the defendants, as the value of the machinery, the amount at which it was estimated for the purposes of contribution as capital stock irrespective of its actual value, and upon this basis made up the account between the members of the firm, and reported in favor of the plaintiff. From the judgment entered upon his report, the defendants appealed.

Otto Horwitz, for appellants.

John H. Hull, for respondents.

Van Brunt, P. J.—[After stating the facts as above.]—The counsel for the respondents, upon the argument of this case, claimed that the articles of copartnership settled beyond question that the machinery, &c., contributed by the plaintiff and his wife, were to be taken by them at the dissolution at and for the same value and amount it represented in the capital stock of the firm, and that this value was fixed at $10,000; and that as the plaintiff and his wife were to take this machinery at that valuation upon the dissolution of the copartnership,

because the defendants have retained the same, they are chargeable with precisely the same amount; and it would seem that the referee took this view of the case in the settlement of the copartnership accounts. An examination for a moment of the relation of the parties one to the other, of their rights under the copartnership articles, and of the objects which they sought to attain thereby, will show, I think, that this conclusion is based upon erroneous premises. After the contribution of the capital stock, in money, book accounts and machinery, although some contributed much more than others, it is to be observed that the profits and losses are to be divided equally, and that upon the settlement of the copartnership accounts at the end of the copartnership, the profits remaining, after paying to each copartner the amount of capital contributed by him, were to be divided equally between the copartners.

The plaintiff and his wife, however, in the making up of these accounts, instead of receiving cash or the same as the other copartners for their share of the capital stock, agreed to take back the machinery contributed by them, at the same value that it was stated to be in the articles of copartnership. In other words, the machinery was not to be taken by the copartners absolutely at a valuation of $10,000, so that upon the termination of the copartnership the cash capital contributed and the machinery capital contributed should be treated upon the same bases, but the machinery capital and the cash capital were to be kept separate. Those who contributed cash were to get back as capital, cash, and those who contributed machinery were to get back as capital the same machinery (without any additions) which they had contributed as capital; therefore, as far as the interests of the copartners were concerned, if the Weldons took back the machinery, it was entirely immaterial, in the settlement of these copartnership accounts, or in the making of the copartnership agreement, what the actual value of the machinery was. They might have stated it in the articles of copartnership to be $100,000, and upon the settlement of the copartnership accounts it would not have made the slightest difference. It will, therefore, be seen that the fixing

of the value of $10,000 upon this machinery contributed by the plaintiff and his wife was a mere arbitrary valuation, and was of no importance whatever in fixing the rights of the various copartners. It might be true that, in the absence of any evidence in regard to the value of this machinery, it would be assumed that the value fixed in the articles of copartnership was the value for the purpose of settling the copartnership affairs; but in view of the fact that the valuation placed upon this machinery in the articles of copartnership was not of the slightest consequence to the other copartners, and in the face of direct and positive evidence as to its value, which was entirely uncontradicted, the referee was not bound to take, as he seems to believe that he was, the valuation contained in the articles of copartnership. All the evidence shows that this machinery depreciated, and that it was not worth what it was when it was put in. The witness Straus states that the depreciation of the machinery account was over $2,000, and it appears from the testimony of the witness Roth that $3,000 had been expended in new machinery, which must have gone into this machinery account, which had depreciated during the year to the extent of $2,000.

The referee, in considering the testimony, seems to have assumed that, because the Weldons agreed to take back this machinery in the settlement of the capital account for the same amount that it was put in at, therefore, the defendants, having retained that machinery, were bound to account for it at the same value. In this, I cannot but come to the conclusion that the referee has erred.

As has been above stated, in the absence of any testimony in regard to value his finding could have been sustained, but in view of the uncontradicted testimony that there had been a large depreciation in the value of this machinery, the referee could not find that the machinery was of the value at the time of the death of Mrs. Weldon which it was stated to be in the articles of copartnership. The defendants in this action, if they have converted this machinery to their own use, are liable for the value of the machinery and nothing more, as they

did not agree any where in the articles of copartnership to take the machinery at any fixed valuation in case of dissolution.

It is urged that as the defendants *elected* to keep the machinery they have thereby agreed to allow the amount as the value of the machinery which the plaintiff and his wife, in the articles of copartnership, covenanted to do. There is nothing in the articles of copartnership to sustain this proposition. There is nothing in the copartnership articles which gives to the plaintiff and his wife the right to claim the machinery in question upon the settlement of the copartnership accounts; but the clause in question is an agreement upon their part to take and receive the machinery in lieu of cash in the settlement of such accounts. If the machinery was of greater value than the amount stated in the articles of copartnership, the other copartners could have claimed the benefit of such enhanced value: if it was of a less, however, the other copartners had a right to claim that the plaintiff and his wife should take back the machinery at the valuation at which it was put in. These rights did not impose the duty upon the other defendants of paying the value named in the copartnership articles of the machinery in case it was not returned to the plaintiff and his wife upon the dissolution of the firm.

Although in the settlement of the copartnership accounts, for the purpose of determining the amount of capital contributed by each, the valuation of the machinery contained in the copartnership agreement could not be impeached, yet in charging the parties who have possession of that machinery, the actual value only could be adopted.

There were a variety of other exceptions which were argued upon this appeal, but which it is not necessary now to consider, because of the error above mentioned into which the learned referee has fallen.

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

J. F. Daly and Van Hoesen, JJ., concurred.

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

SILAS A. UNDERHILL, Appellant, *against* BENJAMIN W. PALMER, Impleaded, &c., Respondent.

(Decided April 3d, 1882.)

The relinquishment or change, by a creditor, of a security held by him against his debtor, discharges a surety for the latter only to the extent of the value of the security of the benefit of which such surety has been deprived by the act of the creditor. He is not wholly discharged, as in the case of a change in the contract for the performance of which he is responsible.

APPEAL from a judgment of the general term of the Marine Court of the City of New York affirming a judgment of that court entered upon the dismissal of a complaint on a trial by the court without a jury.

The action was brought upon a promissory note made by the defendant John Davis, Jr., to the order of the plaintiff, and indorsed by the defendant Benjamin W. Palmer and delivered to the plaintiff as collateral security to him for an indebtedness of the defendant Davis to him, for which the plaintiff also held, as security, a mortgage by Davis of household furniture owned by the latter. After the note became due, the plaintiff took from Davis a new mortgage of the same property, with the exception of articles worn out or injured, and including other articles not in the original mortgage of greater value than the articles omitted. The new mortgage was payable on demand, and payment thereof was immediately demanded by the plaintiff. The old mortgage was surrendered by the plaintiff to Davis.

At the trial, a jury having been waived by consent, the judge dismissed the complaint as to the defendant Palmer, and judgment in his favor was entered thereupon. From the judgment the plaintiff appealed to the general term of the Marine Court, which affirmed the judgment, and from the decision of the general term the plaintiff appealed to this court.

R. H. Underhill, for appellant.

D. A. Hulett, for respondent.

Van Hoesen, J.—The rule governing this case is thus stated by Mr. Pollock in his work on Contracts, p. 251: a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses or without the consent of the surety parts with such security, the surety is discharged to the extent of the value of such security. The part of the rule especially applicable to this case, is that which limits the discharge of the surety to the extent of the value of the security of which the act of the creditor has wrongfully deprived him. Our own Court of Appeals, in *Vose* v. *The Florida Railroad Co.* (50 N. Y. 375), say: "it would be contrary to equity to discharge the surety *in toto* in consequence of a release by the creditor of a security without reference to its value."

A distinction is drawn between a change in the contract for the performance of which the surety is responsible, and a change in the securities which the creditor holds as collateral to the principal obligation. The slightest change in the contract will release the surety, for when the altered contract is made the foundation of an action against him, he can say, I never assumed any responsibility for the contract you sue upon. The contract, however, is not changed by a change or a release of security. The right of the surety to the securities which the creditor holds, does not rest upon contract, but upon the same principle of natural justice, upon which one surety is entitled to contribution from another (*Hayes* v. *Ward*, 4 Johns. Ch. 131).

That principle is thus enunciated by Messrs. Hare and Wallace in their note to *Rees* v. *Berrington* (Leading Cases in Equity, vol. 2, part 2, p. 370): "whether the surety has made himself directly liable for the performance of the contract, or has merely guaranteed its performance by the principal, and

whether he appears on the face of the contract as surety, or has entered into a primary obligation as a co-contractor or co-obligor, he is equally within the equitable principle, that a party who incurs a liability for the benefit of another, is entitled to an indemnity, and that every one is bound to exercise his own rights, so as not to interfere with those of others. The former principle applies as between the principal and the surety, and the latter as between the surety and the creditor, and protects the rights conferred by the other." Again, at page 373, the annotators say, "the creditor cannot relinquish any hold, which he has actually acquired on the property of the principal, and which might have been made effectual for the payment of the debt, because he cannot arbitrarily shift the burden from the property of a party primarily liable, and impose it on another whose liability is secondary; and a lien acquired cannot be relinquished, without discharging the surety, to an extent corresponding with its value."

The case of *Clarke* v. *Henty* (3 Younge & Coll. 187), is sometimes cited as an authority for the proposition that the taking of a second security in satisfaction of the first will discharge the surety, because it deprives the surety of the opportunity of proceeding upon the first, but the law seems to be settled in accordance with the text of Brandt on Suretyship and Guaranty (§ 373): when by the act of the creditor, the surety has been deprived of the benefit of a fund for the payment of the debt, and the contract by which the surety is bound is not changed, he is only discharged to the extent that he is injured, as in such case it is the fact that he is injured that entitles him to the discharge. But where the creditor, in relinquishing security for the debt, alters the contract, the surety is wholly discharged, whether he is injured or benefited, because in such case it is no longer his contract.

When a security is relinquished, it becomes the duty of the creditor to show affirmatively that such relinquishment has not injured the surety. Satisfactory evidence to that effect was given in this case, and the learned justice who tried the cause has found that some of the chattels covered by the original mortgage had been worn out and had become worthless,

that the new mortgage covered the same chattels that were embraced by the old mortgage save those articles that had become worthless, and that the value of the chattels covered by the new mortgage, including the new articles brought in to replace old articles that had been worn out, exceeded the value of the property covered by the original mortgage. It was proved, therefore, that the surety had not sustained any injury by the substitution of poor articles in place of good ones, or by the substitution of the new mortgage for the old. The time of payment was not extended, nor was the contract of the creditor with the principal changed in any other respect. Upon this state of facts, the surety was not discharged, and the learned justice erred in giving judgment for the defendant.

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

Van Brunt, J., concurred.

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

Charles E. Wemple *et al.*, Appellants, *against* David M. Hildreth, Respondent.

(Decided April 3d, 1882.)

No action can be maintained by vendors of goods upon credit, to recover damages for deceit and fraud of the defendant in making false representations, by which they were induced to extend the term of credit to the purchasers, and thereby lost the price of the goods; where it is not alleged that by reason of such representations the vendors parted with any good, or surrendered any lien, or did anything beyond extending the credit already given.

Appeal from a judgment of this court entered upon the dismissal of a complaint.

The complaint in the action alleged the copartnership of the plaintiffs; the fact that the Urbana Wine Company was a corporation duly organized and that prior to the 18th of November, 1880, the plaintiffs sold and delivered to the corporation certain goods at a price exceeding the sum of $506, and that the same or a portion of said price was on said day due and unpaid, and that the plaintiffs then demanded payment thereof; that on or about the day last mentioned, at the City of New York, the defendant, with intent to deceive and defraud the plaintiffs, falsely and fraudulently represented to them that the corporation was in good credit and safe to be trusted, and worth more than all its debts and liabilities; that the plaintiffs relying on this representation consented to defer immediate payment of said sum and to accept the promissory note in writing of the Urbana Wine Company for such amount, and they so received such note, the same being executed and delivered to them by the defendant as president of said company and made payable four months after date.

The complaint further alleged that at the time of these representations, as the defendant then well knew, the said Urbana Wine Company was insolvent.

The answer admitted the copartnership, the incorporation of the Wine Company, the sale and delivery of the goods, and the making of the note, and denied the other allegations in the complaint, and alleged that the goods were sold upon the understanding that notes were to be given in payment, and that part of the goods never had been delivered.

Upon the trial of the case, the plaintiff Wemple was examined, and proved the order for the merchandise, and that it was agreed that payment should be made one-half in three months and the other half in four months from the time the goods were ready for delivery. After the goods were completed the plaintiffs had conversations with Mr. Hildreth in reference to the payment of the bill. The bill was not paid for a considerable time, and at last Mr. Hildreth paid a portion of the bill, $250, sometime prior to the 1st of November, leaving a balance due, after the payment, of $506, which Mr. Hildreth promised to pay as soon as he heard from the super-

intendent of the company; and also that the bill could not be paid without a meeting of the executive committee, or the officers of the company, and that had to be held at Hammondsport. Subsequently, on the 18th of November, the plaintiff saw Mr. Hildreth, and he said, "I have brought you down a note from the company's office in payment of your bill—the balance of your account;" and Mr. Wemple said to him, "I cannot take a note, this account is long past due;" and Mr. Wemple further testified that it was a note for four months, and that when he declined to take it, Mr. Hildreth then said to him "this note is as good as cash," and Mr. Wemple then took the note.

The plaintiff further testified that at this time he knew nothing particular about the responsibility of the Urbana Wine Company, and that he might have taken the note if Mr. Hildreth had not told him it was as good as cash; that he relied upon his statement when he told him "when I took this note it was as good as cash." He then states if he had not relied upon the defendant's statement concerning the value of the note being true he would not have consented to accept the note or further to have deferred payment.

The witness further testified that since the receipt of the note from Mr. Hildreth they had delivered the other merchandise to the Urbana Wine Company, and then offered testimony tending to show that the Urbana Wine Company at the time of the giving of this note was in embarrassed circumstances.

The plaintiff having rested, a motion was made to dismiss the complaint upon the ground that the plaintiff had not established the facts necessary to constitute a cause of action, particularly in that the loss, if any has been sustained, was not attributable to the misrepresentation. The motion was granted, and from the judgment thereupon entered the plaintiff appealed.

A. B. Smith, for appellant.

Robert T. Green, for respondent.

Van Brunt, P. J.—[After stating the facts as above.]—The complaint in this action proceeds upon the theory that by reason of the false representation of the defendant the plaintiffs were induced to extend the credit to the Urbana Wine Company for goods which had already been sold and delivered, as they allege, and that thereby they were damnified.

There is no intimation in the complaint that by reason of the representation they parted with any goods, or that they surrendered any lien which they had, or that they did anything beyond extending the credit which had already been given to the Urbana Wine Company. That such a condition of affairs will not sustain an action for fraud and deceit is established by the cases of *Austin* v. *Barrows* (41 Conn. 282), and *Lamb* v. *Stone* (11 Pick. 527).

In the first case the court lays down the rule that "to maintain an action for the deceit or fraud of another it is indispensable that the plaintiff should show not only that he has sustained damage, and that the defendant has committed a fraud, but that the damage is the clear and necessary consequence of the fraud, and can be clearly defined and ascertained." The language of the case of *Lamb* v. *Stone* is more significant and to the point. "So far as the declaration shows, at the time when the acts were performed and the representations were made of which the plaintiffs complain, they had not obtained or taken any steps to obtain any lien upon the debtor's property for the security of their debt by contract or negotiation with him; nor had they acquired any claim upon or interest in or right to any part of it by operation of law. They had taken no steps and formed no plan to procure a writ of attachment whereby to obtain security thereon, and no person had moved in the matter of a division of the property among the creditors by either bankrupt or insolvent laws. They therefore lost no lien of any kind in consequence of the acts and representations of the defendants.

"The point of their complaint is this: they now think that if no representations had been made to them they would have obtained a lien by attachment. They cannot make legal proof of this, and we cannot say that such an intent would have

ripened into action—the property might have been destroyed before they could place a lien upon it. The debtors might have sold it to innocent purchasers and disposed of the proceeds in many lawful ways; their attachment might have been anticipated by others. The law does not undertake to grasp or measure such an uncertainty as the value of a mere possibility that a creditor may endeavor at some future time to obtain security from his debtor. . . . But, besides these practical inconveniences, which are of themselves insurmountable, there is another objection fatal to this present action. The injury complained of is too remote, indefinite and contingent. To maintain an action for the deceit or fraud of another it is indispensable that plaintiff should show not only that he has sustained damage, and that the defendant has committed a tort, but that the damage is the clear and necessary consequence of the tort, and that it can be clearly defined and ascertained. What damage has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien, for he had none. No attachment has been defeated, for none has been made. He has not lost the custody of his debtor's body, for he had not arrested him. He has not been prevented from attaching the property or arresting the body of his debtor, for he never had procured any writ of attachment against him. He has lost no claim upon or interest in the property, for he never had acquired either. The most that can be said is that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing this intention. Is this an injury for which an action will lie?

How can the secret intentions of the party be proved?

It may be he would have changed this intention. It may be the debtor would have made a *bona fide* sale of the property to some other person, or that another creditor would have attached it, or that the debtor would have died insolvent before the plaintiff would have executed his intention. It is, therefore, entirely uncertain whether the plaintiff would have secured or obtained payment of his debt, if the defendant never had interfered with the debtor or his property. Besides, his debt remains as valid as it ever was. He may yet obtain satis-

faction from property of his debtor, or his debtor may return and pay him. On the whole, it does not appear that the tort of the defendant caused any damage to the plaintiff. But, even if so; yet it is too remote, indefinite and contingent to be the ground of an action."

The appellant, feeling the force of the decisions above stated, has urged that by the delivery of the goods the plaintiffs had given up their lien on the goods of the defendant; but it is to be observed in the first place that such is not the allegation in the complaint, and in the next place that the representation was not given for the purpose of inducing the plaintiffs to deliver these cards and give up any lien which they had upon them for the purchase price. No such conversation is testified to as between the plaintiffs and the defendant, and no such event seems to have been contemplated by the defendant at the time that he made the representation. There is certainly no evidence that his attention was called to the fact at the time of making this representation that the 26,000 cards were not delivered, nor is there any evidence that he made the representation for the purpose of inducing their delivery. It certainly was not the theory upon which the plaintiffs' complaint was framed, and such complaint having been dismissed we cannot now engraft a new cause of action which is not even borne out by the testimony.

The judgment appealed from must therefore be affirmed with costs.

Van Hoesen and Beach, JJ., concurred.

Judgment affirmed, with costs.

HENRY D. WINANS, Appellant, *against* JAMES M. JAQUES, Respondent.

(Decided April 3d, 1882.)

A broker employed to sell real estate, whose action is in fact the procuring cause of its sale, is entitled to his commission therefor from the vendor, although another broker, upon information derived from the intending purchaser, negotiates a contract of sale from the defendant to a representative of such purchaser, to whom afterwards such contract is assigned and a deed executed, and although such other broker thereupon claims and receives his commissions upon the sale from the vendor, who pays the same in ignorance of the facts, but without making any inquiry.

APPEAL from a judgment of the general term of the Marine Court of the City of New York affirming a judgment of that court entered upon the verdict of a jury and an order denying a new trial.

One Vernon K. Stevenson, jr., who was a real estate broker, was employed by the defendant to sell certain premises in the City of New York. The premises were advertised and offered for sale by Mr. Stevenson to various parties. In December, 1879, one Mrs. Gill called at the office of Mr. Stevenson to make inquiry in respect to houses, she desiring to purchase a residence, and stating that she wanted one on the Fifth Avenue. One of the assistants of Mr. Stevenson called her attention to the house of the defendant and gave her a permit to examine the same, and Mrs. Gill examined the premises in pursuance of that permit and told her husband of the property. Her husband then called the attention of a Mr. Griswold, who was a real estate broker, to the property, and gave him the information that a Mr. Sewell desired to purchase the house. Mr. Griswold called upon the defendant and negotiated a purchase between Mr. Sewell and Mr. Jaques, in pursuance of which a contract was signed. The purchase by Mr. Sewell was made on behalf of Mrs. Gill, whose attention to the house had first been called by the assistant of Mr. Stevenson, and

when the deed was delivered the defendant deeded the premises to Mrs. Gill. When the defendant found that the conveyance was to be made to Mrs. Gill he suggested that some claim might be made for commissions by another broker, and objected to the conveyance to Mrs. Gill, but being assured that no claim could be made, and that the law required him to make the deed to the assignee of the contract, he conveyed the premises to Mrs. Gill. Mr. Stevenson having made an assignment of his claim for commissions in this case to the plaintiff Mr. Winans, this action was brought. The case was submitted to the jury, who found a verdict for the defendant. A motion by the plaintiff for a new trial was denied, and judgment entered on the verdict. From the judgment and the order denying his motion for a new trial, the plaintiff appealed to the general term of the Marine Court, which affirmed both; and from the judgment of affirmance the plaintiff appealed to this court.

A. C. Fransioli, for appellant.

R. H. Huntley, for respondent.

Van Brunt, P. J.—[After stating the facts as above.]—That the knowledge of the existence of the house in question came to Mr. Sewell through the agency of Mr. Stevenson, the foregoing statement of facts seems clearly to indicate: that at the time of the conveyance the defendant in this action supposed that some claim for commissions might exist in favor of Mr. Stevenson seems also to be established. But it is claimed upon the part of the defendant that at the time that he signed the contract with Mr. Sewell he was ignorant of the fact that Mr. Sewell was acting as the attorney of Mrs. Gill, and he was also ignorant of that fact at the time when he paid the broker Griswold his commission.

But I fail to see how that can relieve the defendant Jaques from liability upon the facts as proven upon the trial of this cause, as it is evident that the communication which was made to Mrs. Gill, who was the real purchaser in this case, by the assistant of Mr. Stevenson, was the procuring cause of the sale.

Mrs. Gill examines the house, she tells her husband, her husband tells Mr. Griswold that this house is for sale and that Mr. Sewell, who turns out to be Mrs. Gill's attorney, desires to purchase it, and Mr. Griswold then succeeds in getting the defendant to make a contract for the purchase of the house with Mr. Sewell. It seems from that evidence that the direct agency of Mr. Stevenson's assistant in procuring the sale is established, and it would appear as though it was a scheme upon the part of Mr. Gill to defraud Mr. Stevenson out of his commission, and enable his friend Mr. Griswold to make such commission.

It may be unfortunate that the defendant in this action has been victimized by such a scheme, but that misfortune cannot deprive the plaintiff in this action of his right to recover. The defendant in this action knew at the time that he made this sale that persons from Mr. Stevenson's office had come to examine that house, and if he wanted to protect himself against any possible claim for commission he should have simply asked Mr. Stevenson whether he had any claim, before he so readily paid Mr. Griswold his claim, and I know of no other way in which an owner who places his property in the hands of different real estate brokers, or allows different real estate brokers to intervene, can protect himself from such conflicting claims.

Under the circumstances of this case, therefore, it would appear that Mr. Stevenson showed an employment to sell, and that he was the procuring cause of the sale, and therefore entitled to his commissions.

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

J. F. Daly and Van Hoesen, JJ., concurred.

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

ALFRED WHITMAN *et al.*, Respondents, *against* JOHN D. JAMES, Impleaded, &c., Appellant.

(Decided April 3d, 1882.)

Where, in an action against joint debtors, an order of arrest has been granted and executed against one of them, and judgment has been recovered against all and execution against the property of all returned unsatisfied, an execution against the person of the defendant who was arrested is not irregular, because it does not run, in form, against all the defendants.

APPEAL from an order of this court denying a motion to vacate an execution against the person.

The action was brought against J. G. Wilson and John D. James, as partners, for collecting and appropriating the proceeds of a promissory note entrusted to them by plaintiffs for collection. The collection and appropriation was by James, without the knowledge or consent of Wilson, and the plaintiffs obtained an order of arrest against James only. Judgment was recovered against defendants jointly, and a joint execution was issued against their joint and separate property. On the return of such execution an execution against the person of James only was issued. He moved to vacate the execution on the following grounds: (1) That it did not follow the judgment in the action; (2) That it was not warranted by the judgment; (3) That no order of arrest had been granted against the defendant Wilson or against both defendants.

The execution was as follows:—

"The People of the State of New York to the Sheriff of the County of New York, greeting:

"Whereas judgment was rendered on the fifth day of April, one thousand eight hundred and eighty-one, in an action in the Court of Common Pleas for the City and County of New York, between Alfred Whitman and Edmund S. Whitman, plaintiffs, and John D. James and James G. Wilson,

defendants, in favor of the said plaintiffs, against the said defendants, for the sum of three hundred and seventy-seven $\frac{51}{100}$ dollars, as appears to us by the judgment roll filed in the office of the clerk of said court:

"And whereas a transcript of said judgment was filed, and said judgment was docketed in your county on the fifth day of April, in the year one thousand eight hundred and eighty-one, and the sum of three hundred and seventy-seven $\frac{51}{100}$ dollars is now actually due thereon:

"And whereas an execution against the joint and separate personal and joint and separate real property of the judgment debtors has been duly issued to the sheriff of the County of New York, where they reside, and returned unsatisfied:

"And whereas the defendant John D. James has been arrested in said action, and the order for said arrest has not been vacated:

"Therefore, we command you, that you arrest the said judgment debtor John D. James and commit him to the jail of your county, until he shall pay the said judgment or be discharged according to law, and return this execution within sixty days after its receipt by you, to the clerk of the Court of Common Pleas for the City and County of New York.

"Witness, Hon. Charles H. Van Brunt, Justice of our said court, at New York City, the eleventh day of June, 1881.

"Forbes & Sage,
Plaintiffs' Attorneys,
165 Broadway,
New York City."

The motion was denied, and from the order entered thereon the defendant James appealed.

C. E. Souther, for appellant.

Forbes & Sage, for respondents.

J. F. Daly, J.—[After stating the facts as above.]—The question to be determined is whether, when an order of arrest has been granted against one of several joint debtors and

remains undischarged, an execution against his person only can be issued after return of execution against the property of all. The case is not expressly provided for in the code. The rule is that an execution must be in the name of all the plaintiffs against all the defendants (*Farmers'*, *&c. Nat. Bank* v. *Crane*, 15 Abb. Pr. N. S. 435; Graham's Pr. 411). The Code of Civil Procedure does not require this to be done, except where the judgment is against joint debtors, only one of whom has been served with summons; an execution upon such a judgment must be issued in form against all the defendants, but the attorney for the judgment creditor must indorse thereupon a direction to the sheriff containing the name of each defendant who was not summoned, and restricting the enforcement of the execution to the defendant served (§§ 1932–1936). It must be borne in mind, however, that in such a case the execution is properly issued against all the defendants because their joint property is to be reached. So, the cases holding that where one defendant only is to be taken in execution the execution must be issued against all the defendants with an indorsement directing the sheriff to take that particular defendant only, are cases in which all the defendants were originally liable to execution against the person (*Farmers'*, *&c. Nat. Bank* v. *Crane*, above cited; *Fake* v. *Edgerton*, 5 Duer, 681). I find no authority for holding that, where one defendant only is liable to be taken in execution against the person because an order of arrest was granted and executed against him only, such execution must run, in form, against all the defendants in the action. Such execution would not be warranted by the judgment, and it is essential to the validity of the process that it should be (cases last cited).

The essentials of an execution are prescribed in sections 1366 to 1374 of the code; it must intelligibly describe the judgment, stating the names of the parties in whose favor and against whom, the time when, and the court in which, the judgment was rendered: and if it was rendered in the Supreme Court, the county in which the judgment roll is filed, &c. Where all the parties against whom judgment was rendered are not judgment debtors, the execution must show who is the

judgment debtor (§ 1368). Where a judgment awards different sums of money to or against different parties, a separate execution may be issued to collect each sum so awarded (§ 1374). No provision requires the execution to be issued against all the defendants in the judgment; the tendency of the code legislation is rather towards separate process for separate liability. The execution in this action describes the judgment accurately, and complies with all the requisites of the code; the defect complained of is that after reciting that the judgment is against both defendants it does not command the sheriff to take both, and by indorsement restrict him to taking James only. It recites the facts showing James to be the only party liable to execution and directs the sheriff to take him. In this it does not violate any provision of the code or rule of practice, and is not irregular.

The order should be affirmed, with $10 costs and disbursements.

Beach, J., concurred.

Order affirmed, with costs.

Minnie Cummins, Respondent, *against* Louis Hanson, Appellant.

(Decided April 3d, 1882.)

Where the hirer of rooms with board, under a contract for a definite term at a certain weekly rental, removes from the premises during the term and refuses to pay the rent, and an action to recover damages therefor is brought before the expiration of the term, damages may be recovered up to the time of the trial; not merely to the time of the commencement of the action.

Appeal from a judgment of a district court in the City of New York.

The facts are stated in the opinion.

Samuel Jones, for appellant.

Christopher Fine, for respondent.

Van Brunt, J.—This action was brought to recover damages for the breach of a contract claimed to have been made by the defendant with the plaintiff, for the rental of certain premises, with board, for the period of seven months, commencing on the 1st of October, 1881, at the weekly rent of $45 including board. The defendant occupied the premises up to the 15th day of October and paid therefor up to that time, and then moved from the said premises and refused to pay anything further.

The action was commenced on the 21st day of October and was tried on the 26th day of November, and a recovery was had for $187; and from the judgment thereupon entered this appeal is taken.

It appeared upon the trial that $35 of the price was for rent and $10 for board, and the justice in granting judgment seems to have allowed for seven weeks rent less $48 received as rent for part of the rooms after they were vacated by the defendant.

The main question involved in this case is as to the rule of damages.

The case of *Taylor* v. *Bradley* (39 N. Y. 129), contains *dicta* which support the claim made by the defendant, that the contract not having been terminated by efflux of time, damages could only be recovered up to the time of the commencement of the action; but the reasoning applies as well to damages which are claimed prior to the commencement of the action as to those which are claimed up to the time of the trial; the basis of the *dicta* being, that the defendant cannot be deprived of his reclamation or abatement for earnings which may be subsequently received from other sources because until the termination of the contract it cannot be determined but that the plaintiff may in the future have employment

which will be even more renumerative than that which he was to receive from the defendant.

It is established by numerous authorities that for a breach of a contract of this description, the party may commence his action at once for damages, without waiting until the termination of the contract, and it has been held that in case an action was commenced prior to the termination of the contract, where the contract at the time of the trial was terminated, that the party could recover all the damages which he had sustained by reason of the violation of the contract.

In the case of employment an action will not lie for wages unless proof of performance or continuous readiness to perform is established, but in an action for damages such evidence is not necessary; all that is necessary to establish such an action is a breach of the contract of employment upon the part of the defendant. If a party has the right, in case he brings his action prior to the termination of the contract by efflux of time, to recover his damages up to the time of the commencement of the action, there is no reason why he should not be allowed to recover his damages up to the time of the trial, in the same manner as he would be allowed to do if the action was commenced before the termination of the contract by efflux of time, and the trial took place subsequent thereto.

The objection stated in the case of *Taylor* v. *Bradley* is equally strong against the recovery of damages up to the time of the commencement of the action as it is against the right to recover damages up to the time of the trial. Although this question does not seem to have been directly decided by any authority which I have been able to find in this state, or to which my attention has been directed, I am of the opinion that the tendency of the decisions is to allow the recovery of damages in all cases up to the time of trial irrespective of the time of the commencement of the action. The case of *Hochster* v. *De La Tour* (2 El. & B. 691), seems to expressly sanction the latter view.

In any event, however, the judgment seems to have been too large. The amount of the recovery should have been for

six week's rent at $35 a week, $210, less $48—the amount received—making a balance of $162.

The judgment should therefore be reduced to the sum of $179.50 and affirmed for that amount, without costs to either party.

Van Hoesen, J., concurred.

Judgment accordingly.

John McCloskey, Plaintiff, *against* Henry Stewart *et al.*, Defendants.

[Special Term.]

(Decided April 18th, 1882.)

An action in the nature of a creditor's bill may be maintained by a judgment creditor, to set aside fraudulent conveyances, by the judgment debtor, of personal property as well as of real estate.

Where the property alleged in such an action to have been fraudulently transferred consists of machinery, tools, &c., in use, new tools and machinery purchased by the fraudulent transferee for the purpose of supplying the waste of ordinary wear and tear may be reached by the plaintiff.

Trial by the court without a jury of an action by a judgment creditor to set aside conveyances by his judgment debtor.

The facts are stated in the opinion.

Robert S. Green and *Frank J. Dupignac*, for plaintiff.

Edward H. Hobbs, *E. A. S. Man* and *J. W. Perry*, for defendants.

Van Brunt, J.—This is a creditor's bill filed to reach certain property claimed to have belonged to one Henry Stewart,

and by him transferred in fraud of his creditors. The evidence shows that, prior to January 18th, 1879, the defendant, Henry Stewart, for many years had been a manufacturer of sewing machines in the City of New York, and was at that date in the possession of certain tools, fixtures and machinery, with which he was carrying on business; that on the 19th of November, 1878, a judgment was obtained against said Henry Stewart by the plaintiff for $992.88, and which judgment also established the right of the plaintiff to a share in the profits arising from the use of a certain device which Henry Stewart was using in his business as a sewing-machine manufacturer.

Execution upon this judgment having been stayed, on the 17th of January, 1879, such stay was vacated, and on the 18th of January, 1879, the certificate of incorporation of the Henry Stewart Manufacturing Company was filed, and it took possession of all the machinery, tools and fixtures, and machines manufactured and in course of manufacture, book accounts and good will, which had belonged to Henry Stewart, or with which he had been carrying on business.

The only trustees and incorporators of said company were the said Henry Stewart, Frances Stewart, his wife, and Beatte Mills, his daughter. The capital stock of said company was to be $50,000, and all that was issued was issued to the wife of said Henry Stewart and to his daughters, with the exception of $1,500, which was issued to the said Henry Stewart.

The Henry Stewart Manufacturing Company, under the presidency of Henry Stewart, and under his direction and sole control, carried on business until August of 1860, when a new corporation was formed by Henry Stewart, Erastus Crawford, and William Niemann, the nominal capital being $250,000, the Henry Stewart Manufacturing Company transferring to the Stewart Manufacturing Company the same property with which it had commenced business, including such new tools and machinery as had been bought to replace those which had been worn out in the course of the business; and issued stock to the amount of $150,000 in payment therefor to the stockholders of the Henry Stewart Manufacturing Company, which stock was issued as follows: $100,000 to Frances Stewart,

$40,000 to Beatte Mills, and $1,000 to Henry Stewart. No money was paid upon the transfer; neither was any cash put in the business, with the exception of $2,000 contributed by William Niemann, and all the stock that was issued amounted to $156,600.

On the 29th of July, 1881, the plaintiff recovered a judgment against Henry Stewart upon said contract above mentioned for $13,212.84, and an execution issued to the sheriff was returned unsatisfied.

The defendants claim that no ownership in the property transferred to the Henry Stewart Manufacturing Company has been shown to be in Henry Stewart, and, if there was, the property transferred being personal property, a creditor's bill will not lie to reach it. Various authorities have been cited by the defendants to support the latter proposition, which, although it may seem to be established by certain dicta, has never been sustained by any direct decision; and in the only decisions where the question has come up with reasonable directness, the contrary position has been held. The result of a rule such as has been claimed upon the part of the defendants to have been established, in the case of a creditor who was unable to indemnify the sheriff, would deprive him of every opportunity that he might have to attack a fraudulent conveyance. If the judgment debtor should be so fortunate as to have a creditor who was not able to indemnify the sheriff in order that he might compel him to make a levy, such debtor might make any transfer of his property, no matter how fraudulent, and the judgment creditor would be remediless.

In the case at bar, transfers have been made of the property in question. The property is claimed to have changed possession, and it is for the purpose of establishing the fraudulent character of the conveyances of this property that this action is brought.

It is also urged upon the part of the defense that the evidence in this case shows that the property in question prior to this transfer to the Henry Stewart Manufacturing Company was sold at auction under a chattel mortgage. It is true that

the witness Snyder so testified in answer to a question which did not call for such a response. A motion was at once made by the counsel for the plaintiff to strike out the testimony in regard to the chattel mortgage, upon the ground that the mortgage itself and the person who conducted the sale were the best evidence. The ruling of the court was that it would allow the evidence to stand, and if testimony was not produced which would sustain the evidence given, it should fall.

The case is entirely barren of evidence of the existence of any chattel mortgage. There is not the slightest evidence that any sale was ever made under any chattel mortgage; there is not the slightest evidence by what authority this pretended sale was made; and the case is entirely barren in testimony as to who purchased upon any such sale. By this pretended auction sale under a pretended chattel mortgage (because in view of the circumstances of the case, if such chattel mortgage existed, if such sale had taken place under the mortgage, the defendants would have undoubtedly proved it), Henry Stewart's property, upon the eve of a judgment, in the face of a large unliquidated claim, is sold to somebody, to whom, we are not informed, or at what price. I say it was Henry Stewart's property, because, under the evidence in this case, he being shown to be in possession of it, shown to have carried on business with it, the presumption would be that it belonged to him, unless some evidence to the contrary was shown, especially in view of the fact that shortly prior to this time Henry Stewart had sworn that he was worth $50,000 over and above all his debts and liabilities, and he is not shown to have been possessed of any other property. There is not the slightest evidence that the persons to whom the stock of the Henry Stewart Manufacturing Company was issued ever acquired by such sale the slightest interest in the tools and machinery which it is claimed were sold at such pretended sale. There is no evidence as to any transfer by Henry Stewart of the book accounts to any body for any consideration, and yet they all passed into the hands of the Henry Stewart Manufacturing Company, and stock is issued to the family of Henry Stewart for such book accounts as well as for such tools and machinery.

There does not seem to be the slightest particle of evidence which can possibly sustain the good faith of such a transaction.

Upon the evidence as it stands, it is one of the most slovenly attempts to cover up an alleged fraudulent transfer that has ever come under my observation. There is not a scintilla of evidence to show the slightest good faith upon the part of any body connected with the transaction.

After this pretended disposition of the property, Henry Stewart carries on the business just as before, has the sole control of it—to be sure his wife and daughter draw money out of the business as though it was a copartnership and not a corporation, and after they had received this money, without any authority from the corporation, Henry Stewart, an insolvent, kindly consents to assume the burden of their responsibilities, the amounts are charged to him, and the accounts of the wife and daughter are balanced.

As to the transfer to the Stewart Manufacturing Company, there is no more evidence of good faith than existed in the transfer to the Henry Stewart Manufacturing Company. No money passed, not a dollar was paid, except, perhaps, the paltry $2,000 contributed by Niemann—to be sure, the trustees were different, with the exception of Henry Stewart, and the stock was increased;—but, as usual, the only persons that got the stock were Henry Stewart and his family—Henry Stewart receiving a mere nominal amount of the $150,000 issued and his family receiving the balance. Some $6,600 worth in stock seems to have been issued to other people who were creditors, some of whom were creditors of the corporation, and one of whom—Niemann—seems to have put in the only cash that ever graced any one of these transfers.

Henry Stewart knew of the fraudulent character of the transfer to the Henry Stewart Manufacturing Company, and he is president of the new corporation and knew perfectly well how fraudulent this second transfer was.

There is no direct evidence going to show that the two other trustees were acquainted with the fraudulent character of this

arrangement, but they seem to have been unwilling to go upon the stand and testify as to their good faith, and in view of the suspicious circumstances attending the whole business it must be assumed that such failure to show their good faith was because they did not dare to undergo an examination as to the circumstances attending these transactions.

It is claimed that the creditors of the new corporation will lose their security for their debts in case the plaintiff in this action should be allowed to succeed.

I fail to see the force of such an argument. It applies to every transfer of this description where a party fraudulently transfers his property for the purpose of escaping a liability which he anticipates, although it has not ripened into judgment; and where parties give credit to a fraudulent transferee, upon the faith of his apparent title to the property so fraudulently transferred, it certainly is no greater hardship to have to lose their debt than it would be for the creditor to lose his claim upon the property transferred because of such fraudulent transfer.

It is suggested that the only property that can be reached in this case is the machinery, tools, &c., which were in existence at the time of the first transfer. This may be true as far as the manufactured goods, or goods in the process of manufacture, may be concerned, but it does not apply to such new tools and machinery as may have been purchased for the purpose of supplying the waste of ordinary wear and tear. The parties in possession have had the benefit of the machinery and tools, have worn them to a certain extent in their business, they have had the benefit of such waste, and there is no reason in law or equity why the repairs which may have been made to supply such waste should not follow the property itself.

As well might it be said in the case of a fraudulent transfer of an engine, while in the possession of a fraudulent transferee, the piston rod of which is broken and a new one supplied, that the judgment creditor, when he gets possession of the engine, would not be entitled to take with it the new piston rod which had been placed there to replace the one which had been broken. Or, suppose a ship had been transferred fraudulently,

and when in the possession of the fraudulent transferee some new planks had been put upon her, it could equally well be claimed that the creditor could not take those planks with the ship, but that they must be removed.

Where a fraudulent transferee mingles his own property with that which he has fraudulently received, he cannot claim that the property so mingled shall subsequently be assorted and laid aside for the payment of his creditors (*Hooley* v. *Gieve*, 82 N. Y. 625; 9 Daly, 104).

The plaintiff, therefore, is entitled to judgment, with costs and an extra allowance. Findings of fact to be settled upon two days' notice.

Judgment for plaintiff, with costs.

WRIGHT E. POST, Respondent, *against* ETTA A. MORAN, Impleaded, &c., Appellant.

(Decided May 1st, 1882.)

In an action of ejectment, the answer set up, with other defenses, an equitable counter-claim, which was dismissed upon trial of the issue thereon at an equity term of the court, and subsequently, the other issues were tried before a jury, who found a verdict for the plaintiff. *Held*, that the defendant was not entitled, upon payment of the costs, under 2 R. S. 309, § 37, to a new trial of the equitable issue on the counter-claim, but only to a second trial of the other issues.

APPEAL from a judgment of this court entered upon the verdict of a jury directed by the court, and from an order denying a motion for a new trial.

The facts are stated in the opinion.

G. W. Cotterill, for appellant.

I. Langdon Ward, for respondent.

Beach, J.—This is an action of ejectment, brought to recover the possession of premises in this city, for the violation of a covenant in the lease against under-letting. The defendant's answer, among other averments, contained an equitable counter-claim praying reformation of the lease in regard to this covenant. The latter issue was tried at an equity term of the court, and resulted in its dismissal. The subsequent trial of the remaining issues was had before a jury, who rendered a verdict for the plaintiff. The two trials culminated in a judgment not contained in this record. The defendant thereafter obtained an order vacating the judgment, having paid the taxed costs, under the provisions of 2 R. S. 309, § 37. Upon the second trial, the court directed a verdict for the plaintiff, overruling an objection by defendant's counsel that the equitable issue remained untried, to which ruling an exception was taken.

The confusion in this case in my opinion arises from mistaken practice. The trial of the equitable issue was properly had before the court, without a jury (Code Civ. Pro. § 974). It is there provided that such an issue is to be tried, as if it arose in an action brought by the defendant against the plaintiff, for the cause of action stated in the counter-claim, and demanding the same judgment. This section, in connection with § 967, in my opinion, warrants the entry of a formal judgment. Had that course been taken in the case at bar, there would be no complication, and the defeated party could have reviewed the trial in the usual way.

No judgment seems to have been entered, so far as the record here shows, the recital being, that the court directed a judgment in favor of the plaintiff and dismissing the counter-claim. If, however, a judgment was formally entered as in any equity action, it certainly was not affected by the order of the special term, which could only apply to a judgment rendered in an action of ejectment, and not in one for the reformation of a written instrument. If none was entered, there is still the record of the proceedings had on the trial, containing the decision of the court, which the special term

order could in no wise affect. All remaining to be done is to perfect the record by the entry of judgment.

Under the former system of procedure, had the plaintiff brought this action, and the defendant filed a cross bill in equity, asking a reformation of the lease, and obtained an injunction restraining the prosecution of the original suit, upon the dismissal of the bill, the consequent dissolution of the injunction, and a trial of the first action, each resulting in judgment for plaintiff, it is inconceivable that, under the statute, the defendant could obtain anything more than a re-trial of the ejectment suit.

It may be conceded that the re-entry clause in the lease is inartificially drawn; still it is sufficiently definite and effective. The defendant covenanted not to underlet the premises. The re-entry provision reads: "If default be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom."

The covenant not to underlet was made by the defendant, and though in the negative, was none the less a covenant. Default was made, and the plaintiff was the one to whom the right of re-entry was reserved, in such event.

I am unable to discover from the record any question of fact for submission to the jury. There was no evidence of a consent to the sub-letting by the plaintiff or his attorney in fact, and the statements of the real estate agents, in the absence of the plaintiff or his representative, could have no effect, unless they had authority to bind the plaintiff, which no where appears to have existed.

The judgment and order should be affirmed, with costs.

J. F. Daly, J., concurred.

Judgment and order affirmed, with costs.

M. E. Quin, Plaintiff, *against* Peter Bowe, Sheriff of the City and County of New York, Defendant.

[Special Term.]

(Decided May 8th, 1882.)

The provision of section 3531 of the Code of Civil Procedure, limiting the recovery of costs where two or more actions are brought for the same cause against persons who might have been joined in one action, applies to separate actions for the same cause, brought against a sheriff and his indemnitor; and costs, other than disbursements, can be recovered by the plaintiff in only one of such actions.

Motion for leave to serve a supplemental answer.

The action was brought against the sheriff of the City and County of New York for an alleged trespass. Another action for the same trespass having been brought in the Marine Court of the City of New York by the same plaintiff against an indemnitor of the sheriff, in which satisfaction for the trespass had been made by the indemnitor, the sheriff moved for leave to set up such satisfaction by way of supplemental answer in this action.

J. F. Daly, J.—Before the Code of Civil Procedure, if a plaintiff received satisfaction for the trespass in an action against one party liable for it, he could collect costs and disbursements of any action commenced by him against any other party liable for the same cause of action. But section 3231 seems to embrace actions for wrongs as well as certain actions on contract in the provision that "where two or more actions are brought, in a case specified in section 454 of this act, or otherwise for the same cause of action, against persons who might have been joined as defendants in one action, costs, other than disbursements, cannot be recovered, upon the final judgment, by the plaintiff, in more than one action, which shall be at his election." Section 454 permits the joining in one action of the parties severally liable upon the same written instrument, including the parties to a bill of exchange or

a promissory note. The expression in section 3231, "or otherwise for the same cause of action," cannot, I think, be construed to mean like causes of action, or actions similar to those specified in section 454; the language clearly meaning, I think, that where, in a case specified in section 454, or in any case, two or more actions are brought for the same cause of action, costs other than disbursements cannot be recovered.

The Revised Statutes contained a provision (2 R. S. [Edm. ed.] 638), limiting the collection to disbursements only, where several suits were brought on one bond, recognizance, promissory note, bill of exchange, or other instrument.

The Code is broader than the statute, as it includes actions upon "any written instrument," as well as bills, notes and similar obligations (§ 454), and the language of section 3231, "or otherwise [than section 454] for the same cause of action," is an evident further extension of the law to embrace all actions.

The supplemental answer may be set up, therefore, on payment of disbursements only, as that is all plaintiff could collect.

Order accordingly.

L. C. Alexander, Receiver of The Columbia Life Insurance Company, Plaintiff, *against* W. Katte, Defendant.

[Special Term.]

(Decided May 25th, 1882.)

A complaint alleged a fraudulent transaction between persons not parties to the action, as the result of which promissory notes and securities therefor, given by the defendant in payment of his subscription for certain stock, were delivered back to him, upon the surrender of such stock, and that he, though not a party to the alleged wrongful transaction, had knowledge of it and received the benefit of it; and prayed that the transaction be declared wrongful, the notes and securities restored, and judgment

rendered against the defendant on the notes. *Held*, that the parties to the alleged wrongful scheme were necessary parties to the action, and that a demurrer for defect of parties, in that they were not joined as defendants, should be sustained.

TRIAL upon a demurrer to a complaint.

The facts are stated in the opinion.

Nathaniel Myers, for plaintiff.

Charles B. Alexander, for defendant.

J. F. DALY, J.—The allegations in the complaint are sufficient to warrant a decree for the relief demanded, if the necessary parties to the controversy were before the court. This action is brought by the receiver of the Columbia Life Insurance Company (formerly the St. Louis Life Insurance Company) a Missouri corporation, to have this court declare wrongful a certain transaction, had in or about November, 1875, in the state of Missouri, between one George J. Davis, a director in said company, Alfred M. Britton, the acting president of said company, and the Life Association of America, another Missouri corporation, by which the latter corporation obtained possession of the assets, business and property of the first named company, getting possession, among other assets, of certain notes of defendant and collaterals to secure the same, which notes and collaterals were delivered through said Davis to defendant, who thereupon surrendered to Davis the stock of said St. Louis Insurance Company, which he held as a subscriber, having in payment of his subscription therefor given the said notes and the collaterals to said company.

The complaint prays judgment that defendant produce and bring into court said notes and collaterals, and that they be declared assets of the said company and a trust fund for the payment of its creditors; that the collaterals be sold and applied to the satisfaction of defendant's indebtedness, and that plaintiff have judgment against defendant on said notes.

The complaint does not allege that defendant was a party to the wrongful transaction between the officers of the St. Louis Insurance Company and the Life Association, by which merger of the companies was effected, or by which the latter corporation was enabled to get control of the former, but does allege that he had knowledge of the intention of the parties to that arrangement and of the details of the scheme concocted between them.

That scheme, as alleged, was that the Life Association should make and deliver to Davis its draft on its treasurer, at one day's sight, for $1,111,898.34, with which Davis was to obtain all the securities held by the St. Louis Insurance Company, in payment of stock it had issued; that Davis should exchange with the subscribers for said stock their notes and securities thus obtained, for their stock, and thus practically cancel their subscriptions and relieve them from liability as stockholders; that it was never intended by the parties to the scheme that the said draft of $1,111,898.34 should be paid, but that the same should again come into possession of the Life Association when it obtained possession of the St. Louis company.

None of the parties to the arrangement which the court is asked to set aside is before it, and it seems that they are not only proper, but necessary parties (*Alexander* v. *Horner*, 9 Cent. L. J. 111). Defendant is charged with having received the benefit of the alleged wrongful scheme by the cancellation of his subscription; he is charged with knowledge of a design to get possession of all the securities of the St. Louis Company by a pretended payment therefor with a draft of the Life Association.

Whether the transaction was fraudulent or not depends upon whether the draft was a valid consideration for the securities and could and can be enforced against the drawer. It is for the interest of defendant to have the parties to that scheme, and who made and who received the draft, joined as defendants in this action, that he may have the benefit of their defense, and that any judgment as to the validity of the transaction in question may bind them.

I have looked at the complaint to ascertain if, apart from the demand for equitable relief, there is a cause of action for damages, or upon contract, alleged against the defendant, which would warrant a judgment against him as in an action at law. I find none. The complaint is an application for equitable relief, and as the defendant does not answer, but demurs, the judgment granted could not be more favorable than that demanded in the complaint, even though averments that would be proper in setting forth a legal cause of action are embodied in the pleading (*Kelly* v. *Downing*, 42 N. Y. 71; Code Civ. Pro. § 1207). Part of the relief demanded is judgment for the amount of the defendant's notes, but plaintiff must first obtain his decree, as prayed for, that said notes are part of the assets of the company of which plaintiff is receiver, before judgment for the amount of said notes can be awarded.

Demurrer sustained; judgment accordingly, with costs.

GEORGE W. ALLEN, Appellant, *against* STEPHEN D. AFFLECK, Respondent.

(Decided June 5th, 1882.)

An agreement between a husband and wife and a trustee for the wife provided for a separation of the husband and wife during life, the wife to have the custody of their children, the husband to pay to the trustee a certain sum weekly for the support and maintenance of the wife and children in discharge of the husband's liability therefor, and the trustee to indemnify the husband against any other charge or expense therefor and against all debts thereafter contracted by the wife on her own account or on account of the children. The husband and wife did, afterwards, and pursuant to the agreement, live separate; and the provisions of the agreement were for a time performed, until, the husband having offered to support the wife and children if they would reside with him, and the wife having refused the offer, he thereupon ceased to make the stipulated payment to the trustee. *Held*, that the agreement was valid as to the wife, even if the provision in respect of the custody of the children was invalid; that the husband was liable to the trustee for the sup-

port of the wife and children, so far as the agreement had in good faith been executed, notwithstanding the wife's refusal of his offer; and that the trustee might recover from him the amount stipulated in the agreement.

Appeal from a judgment of the general term of the Marine Court of the City of New York, reversing a judgment of that court entered upon findings by the court on a trial without a jury.

The action was brought to recover for a breach by the defendant of an agreement made between him, his wife, and the plaintiff as trustee for the wife, which was thus alleged in the complaint.

"1. That on the first day of March, A. D. 1879, the defendant made and entered into an agreement with Ida E. Affleck, his wife, and the plaintiff as trustee, whereby, among other things, the defendant, in consideration of the promises and agreements hereinafter mentioned, made by this plaintiff as such trustee, promised and agreed to pay to said trustee, this plaintiff, for the support and maintenance of his said wife and their two children, Irene May Affleck and Elmer W. Affleck, the sum of $12 a week, payable on Monday of each and every week, and to be in full discharge for all liability for the support and maintenance of his said wife and children.

"2. That the plaintiff as such trustee as aforesaid, in consideration of the promises and agreements above mentioned made by the said defendant, among other things covenants and agrees to and with the said defendant to indemnify him and bear him harmless of and from all debts of his said wife, contracted or that may hereafter be contracted by her or on her account, or on account of their two children, and that the said defendant shall not be put to any charge or expense for the support and maintenance of his said wife or the said two children or either of them than the said sum of $12 per week, so to be paid by said defendant, as more fully and at large will appear by said agreement, a copy of which is hereto

annexed marked "A," and which is made a part of this complaint.

"3. That the plaintiff as such trustee, as aforesaid, has fully performed all the conditions of said agreement on his part, but the defendant has neglected and refused to comply with the terms of said agreement on his part, and has not paid the $12 per week as he agreed to do, although the same has often been demanded; but on the contrary thereof, the defendant is now justly indebted to this plaintiff as such trustee, as aforesaid, and in the manner aforesaid, in the sum of $432 for thirty-six weeks at $12 per week, which the defendant has not paid."

The substance of the agreement referred to in the foregoing complaint as annexed thereto is also stated in the opinion.

The defendant's answer was as follows:

"1. That he admits the first and second paragraphs of the complaint.

"2. That he denies upon information and belief that the plaintiff has fully performed all the conditions of the agreement as alleged in the third paragraph, and he admits that he has not paid the sum of $432 as therein alleged, but denies that he is indebted to the plaintiff in any sum whatever.

"As separate and distinct defenses he alleges:

"3. That the contract referred to in the complaint, a copy of which is annexed thereto, is illegal and void, because the same is contrary to public policy.

"4. That Ida E. Affleck, the wife of the defendant, and a party to said contract, violated the letter and spirit of this contract, by alienating the affections of defendant's children from him, and refusing to permit defendant's son to visit the defendant as by said contract provided.

"5. That the defendant, in the month of January, 1880, offered to support said Ida E. Affleck and the said children, if they would reside with the defendant, but that said Ida E. Affleck refused said offer, and still refuses to live and cohabit with the defendant.

"6. That since the execution of said contract the said Ida E. Affleck commenced an action in the Supreme Court of the

State of New York, for a limited divorce on the ground of cruel and inhuman treatment, and further alleging as one of the reasons for said action, that defendant refused to support her, and has abandoned her, and asks judgment for the custody of said children, and that a reasonable provision be made for the support of herself and children out of the defendant's property, and that issue was joined in said action, and the same is now pending in the court aforesaid.

"7. That thereafter the said Ida E. Affleck, by her counsel, applied to said court for a weekly sum of twenty dollars as alimony during the pendency of the action aforesaid, which application was denied, and that the bringing of said action and the application for alimony was made with the consent and knowledge of the plaintiff herein.

"8. That by the said contract, the control, custody and care and education of defendant's children were surrendered to his said wife, and the sum agreed to be paid by the said contract was in part for their support and maintenance, and that such surrender of his children was illegal and void, as against public policy, and that before the commencement of this action the defendant has commenced a habeas corpus proceeding for the possession of his said children, and which proceeding is now pending.

"9. The defendant by answering herein and pleading the defens othereto, does not waive the illegality of said contract or any of its parts, and he reserves the right to himself to object to the sufficiency of the complaint at the trial hereof."

At the trial the parties consented that a jury be waived, and that the case be decided from the pleadings without formal evidence, and the following requests were made by the counsel for the defendant:

"1. That if the complaint did not state facts sufficient to constitute a cause of action, to render judgment for the defendant.

"2. That if the contract upon which the action was based was void, because it contained covenants contrary to public policy, to render judgment for the defendant.

"3. That if the complaint did state facts sufficient to constitute a cause of action, to render judgment for the plaintiff."

The justice found for the plaintiff, and upon his findings judgment in favor of the plaintiff was entered for the amount claimed. From the judgment the defendant appealed to the general term of the Marine Court, which reversed the judgment, and ordered judgment absolute for the defendant. From this decision the plaintiff appealed to this court.

H. T. & J. W. Cleveland, for appellant.

A. Simis, Jr., for respondent.

Charles P. Daly, Chief Justice.—This case was submitted on the pleadings; and where this is done, everything stated in the complaint, or set up in answer to it, may be taken as facts agreed upon between the parties. An agreement of separation between husband and wife is of no effect, unless the parties are separated when the agreement is entered into, or they separate afterwards, in pursuance of the agreement (*Carson* v. *Murray*, 3 Paige, 483; *Nurse* v. *Craig*, 2 Bos. & Pul. 148).

It is not directly averred in the complaint that a separation had taken place, in pursuance of the agreement, but it is inferable from what appears, when the whole of the pleading is taken together. It is averred in the complaint, that the defendant agreed to pay to the trustee $12 a week for the support and maintenance of the defendant's wife and two children; that the plaintiff agreed that the defendant should not be put to any charge or expense for the support and maintenance of the wife and children, beyond this $12 a week; and it appears by the agreement annexed to the complaint, that the wife was to take the $12 a week for the support and maintenance of herself and the two children; that the trustee agreed that she would fulfill that engagement, and that he would hold the husband harmless from any expense but the payment of the $12 a week; that he would indemnify and save him harmless from all debts that the wife might

thereafter contract, either on her own account, or on account of the children; and if the husband was compelled to pay any such debts, that he, the trustee, would repay the sum to him with all damage or loss he might sustain thereby. It is averred that the trustee fully performed all the conditions on his part; which is equivalent to a statement that the defendant was put to no charge or expense for the support of the wife and children beyond the $12 a week, so far as it may have been paid, which was presumably up to January, 1880. It appears by the answer that the defendant offered, in January, 1880, to support his wife and children, if they would reside with him; and that the wife refused his offer, and still refuses to live and cohabit with him; which shows that they were living separate and apart, when this offer was made, and continued so to live apart, up to the time of the commencement of the action. The claim was for 36 weeks, at $12 a week, which is about the time that elapsed from the period when this offer was made, and the commencement of the suit. The recovery was $432 with interest from the 30th of September, which would be 36 weeks, or from about the middle of January to the 30th of September, 1880. It therefore appears that before the commencement of the period for which this claim of $432 was made, the husband and wife were then living separate from each other, and continued to do so, until the suit was brought, which was all that was requisite in this action to show that a separation had taken place in pursuance of the agreement.

It is well settled that an agreement like this between the husband, the wife and a trustee, for a separation during life is valid and effectual, both at law and in equity (*Calkins* v. *Levy*, 22 Barb. 106, 107; *Carson* v. *Murray*, 3 Paige, 483; *Selling* v. *Crowley*, 2 Vern. 386). And as respects the wife, it would not be invalidated, although the provision in the agreement in respect to the children might be void (*Leavitt* v. *Palmer*, 3 N. Y. 19, 37; Parsons on Contracts, 428); nor, if we assume, upon the authorities cited by the appellant, that the provision respecting the children was one that the court would not enforce, being void as against public policy, does it

necessarily follow that the defendant is not answerable to the trustee for the support of the wife and children, so far as the agreement has in good faith been executed. In *Vansittart* v. *Vansittart* (2 De Gex & J. 255), where such a stipulation in respect to the support of the children in an agreement for a separation was held to be void as against public policy, a distinction was made between enforcing the specific performance of an agreement for a separation, containing such a provision, and questions that may arise where such agreements have been executed in whole or in part. It was said in that case that the father has not only a right to his children, but duties to discharge towards them, and that he should not be allowed to fetter and abandon his parental power to the extent that he might do, if agreements of this character were sustained.

But where, under such an agreement, the husband has voluntarily left the care and custody of the children to the wife, and they have been supported by the wife and the trustee, under a stipulation on the part of the husband that he would pay $12 a week to the trustee for the support of them and the wife, there is no reason legal or equitable why, in such a case, the trustee should not recover from him that amount as money expended with his consent and for his benefit. An agreement may be void, but if a party has derived benefit under it by a part performance, he must pay for what he has received, and the stipulated amount which the trustee was to receive and the husband was to pay may be taken as the measure of damages (*King* v. *Brown*, 2 Hill, 485; *Lockwood* v. *Barnes*, 3 Hill, 128; *Nones* v. *Homer*, 2 Hilton, 116; *Broadwell* v. *Getman*, 2 Denio, 87; *Mavor* v. *Pine*, 2 Car. & P. 91; 3 Bing. 285).

If this provision in the agreement was void, and the defendant had afterwards demanded the custody of the children of the wife and the trustee, and they had refused to give them up, he could have had them restored to his custody by a writ of habeas corpus, or if he did not resort to that writ it may be that he would not thereafter be liable to pay the trustee the $12 a week, as they would then be supported by the wife and the trustee against his consent. All, however, that appears

by the pleadings is that he offered to support the wife and children if they would reside with him; and that the wife refused. The wife was under no obligation to do so, as the agreement, so far as it related to her right to live separate and apart, was a valid one. It was not an offer to take the children *without her*, and in no sense can it be regarded as a demand of them alone from her and the trustee. If he wanted the children without her, it was an easy matter simply to so demand them, and if the demand was refused, to have them delivered up to him, by the summary remedy of a writ of habeas corpus. It amounted simply to this—as the wife would not come with the children and live with him, he allowed them to remain with her, and to be supported as they were thereafter by her and the trustee.

This view of the case is taken upon the assumption that the provision in respect to the children is invalid, but it is by no means a settled question that agreements of that nature are absolutely void. In Massachusetts, Maine and New Hampshire, it would seem from the adjudged cases that they are not (*Wodell* v. *Coggeshall*, 2 Metc. 89; *State* v. *Smith*, 6 Maine, 402; *State* v. *Barrett*, 45 N. H. 15).

Judge COWEN and Chancellor WALWORTH, in *The People* v. *Mercein*, (3 Hill, 410, 8 Paige, 67, 68,) were of the opinion that such agreements are void, but the point has never been expressly adjudged in this state, for it was not essential to the ultimate decision of the court in that case, as the agreement for a separation there was not for a separation during life but for a temporary period, a kind of agreement which it has been held is not binding, and which either party is at liberty, at any time, to put an end to (*Calkins* v. *Long*, 22 Barb. 106), and which Barry, the father, in that case did by demanding and recovering the custody of his child.

It is not, in my opinion, necessary to decide whether the agreement in this case was invalid or not; I take occasion, however, to say that I do not see upon what ground it should be deemed void as being against public policy. This instrument declares that divers disputes, unhappy differences and divisions had arisen between the husband and wife, for which

reason they consented to live separate and apart during their lives. That the furniture in the house 79 High Street in Brooklyn was set apart for the use of the wife and children, but was to remain the property of the husband, and was not to be disposed of by the wife. That the husband should pay the trustee $12 a week for the support of the wife and children, which was fixed upon after taking into consideration the value of certain real property which had been conveyed by the husband to the wife. That she was to have the custody and control of the two children and of their education, which was given to her at her request, and against the wish and desire of the husband. That one of the children, the son, should spend his Saturdays with the father; and in addition spend every fourth Sunday at the father's place of business or residence, wherever that might be. And that the other child (the daughter) was to be allowed the privilege of visiting and seeing the father whenever he might wish or desire her to do so; and also that the daughter might visit him from time to time as she might desire; and that in case either of the children should be so ill as to be confined to the house, that the husband should be informed of the fact and have the right and privilege of visiting them or either of them during such sickness; and that, *at all other reasonable times, he might visit them.*

I see nothing in this agreement that is against public policy. So far from indicating any intention, on the part of the husband, to abandon his parental duties, its provisions are carefully drawn to secure, as far as was compatible under the unhappy circumstances of a separation like this, that intercourse between parent and child, which is essential to the parental influence, and also, the exercise on his part, of that care and watchfulness in the event of sickness, which grows out of the paternal anxiety and is the duty of a parent. The care, custody and education of the children are left to the wife; but it may well have been that that was the best arrangement to make; and being so, was assented to by him, reluctantly and against his wishes.

I fully agree that it is against public policy to uphold

agreements by parents, the design or effect of which is to fetter or abandon the parental duties. But it is now well settled that parties may lawfully enter into agreements for a separation during life. Judge COWEN, in *The People* v. *Mercein* (*supra*), calls them "a kind of divorce which the courts cannot very well, at this day, gainsay." This being so, it follows, as incidental to such a separation, that some disposition must be made of the children, if they have any. They cannot be brought up under the mutual superintendence of father and mother as before, and must be left in the custody of one of the separating parties. The law generally leaves the custody of children with the father; but where the custody of them comes in question, as it usually does, upon writs of habeas corpus, it may be denied both to the father and the mother, and given to other relations, or to strangers, the rule being that that disposition is to be made which is best for the child (Kent's Com. 205; Schouler's Domestic Relations, 338). Upon such a separation, the father may be of the opinion that it is best for the interest of the children, that the care of them should be left to the mother, and it by no means follows, that because it is so provided in the agreement, that he has abandoned his parental duty.

It appears to me that the parties have, upon their separation, arranged the delicate matter of the care and bringing up of the children, as well as the law could do it for them; and where there is nothing more objectionable than appears in the provisions in this agreement, that the custody and bringing up of the children had better be left as the parties have arranged it, unless we go back, and hold, as Lord ELDON puts it in *St. John* v. *St. John* (10 Vesey, 530), that the rule upon the policy of the law is that the contract shall be indissoluble, even by the sentence of the law, that people should understand that after entering into the sacred contract of marriage, they should feel it to be their mutual interest to improve their tempers." It might be very well if the law could compel this, but it cannot, the temper being, in many cases, an infirmity of nature which is beyond the power of the party to control. If a husband and wife cannot live together, except by

a life that is intolerable to both, the law should not be used as an instrument to coerce them to do so, a conviction that has slowly gained ground, and gradually led to a recognition of the validity of agreements of this nature for a separation.

I do not propose to pursue this question, which would involve a somewhat critical examination of the cases in which it has been considered, farther than to remark in respect to the two principal ones, that, in *The People* v. *Mercein* (supra), the agreement of Barry, the husband, was that he would relinquish to his wife all his right, accruing at the time of the agreement, and at any future period, to their daughter, provided the wife would require him to do so; and in *Vansittart* v. *Vansittart* (*supra*), it was provided in the agreement, that neither of the two elder sons should be sent to any school without the written consent of both husband and wife (Per Knight Bruce, J., p. 59); in both of which there was more ground for assuming an abandonment of the parental duty, than there is in this case.

This contract was executed, both as respects the wife and the children, up to the period for which the $12 a week was recovered by the trustee. Judge McAdam was therefore right in giving judgment for that amount, and in my opinion, the judgment of the general term should be reversed, and that of the special term affirmed.

Van Brunt and Beach, JJ., concurred.

Judgment of general term reversed, and judgment of special term affirmed.

ALICE M. BARD, Respondent, *against* THE NEW YORK and HARLEM RAILROAD Company, Appellant.

(Decided June 5th, 1882.)

By a lease of a place of public entertainment, the tenant was permitted to make alterations, but was bound to restore the premises to the condition in which he took them. He changed a balcony, subdivided into boxes, containing chairs and tables, into a place for standing room; and, when crowded with people, the balcony fell, not having strength sufficient to support their weight. *Held*, that the owner of the demised premises was not liable for injuries received by a third person from the fall, which was caused wholly by the change in the use by the tenant.

APPEAL from a judgment of this court entered upon the verdict of a jury, and from an order denying a motion for a new trial.

In and prior to March, 1879, the defendants were owners of Gilmore's Garden, and had leased the same to one Kelly for the purpose of having there an international walking match. The tenant had leave to make alterations, but was bound to restore the premises at the end of his term to the same condition they were at the beginning. At the time of the lease, there was a balcony across the westerly end, subdivided into boxes, each containing a table and from four to six chairs. The tenant removed these, and during the exhibition the balcony was crowded with persons, occupying every available space, when it fell, from want of sufficient strength to support the weight. The plaintiff was there at the time, and was injured by the fall.

This action was brought to recover damages for the injuries received. The jury found a verdict for the plaintiff. A motion by the defendants for a new trial was denied, and judgment in favor of the plaintiff was entered on the verdict. From the judgment and the order denying their motion for a new trial the defendants appealed.

Frank Loomis, for appellant.

Oscar Frisbie, for respondent.

Beach, J.—[After stating the facts as above.]—In my opinion the defendants' motion for a non-suit, made at the close of the testimony, should have been granted. The question whether or not the use made of this gallery by the tenant was reasonable and within the contemplation of the defendants, was not for submission to the jury, under the undisputed facts. It plainly appears that the balcony was built for use as boxes, and the lessee changed it to standing room for a large crowd of people. The defendants had nothing to do with this and were not legally responsible for what ensued. There was no proof that the structure was not safe for occupancy as boxes, and indeed it had before stood the test. There is a substantial difference between the requirements for such purposes and a standing room for a crowd filling every available space. Had an orchestra stand been changed to a receptacle for spectators and fallen from the overweight, the defendants would clearly not be responsible. Such a change of use would perhaps be more marked, yet no more potential, than the one in this case. The owner of demised premises is held to third persons only when they are out of repair at time of lease, in particulars which the landlord, as against third persons, is bound not to allow; but not liable in such a case, where the tenant's use produces the injury. The principles controlling this case are correctly stated in *Edwards* v. *The New York & Harlem R. R. Co.* (32 Supr. Ct. 635), which was based upon like facts, and some of the many adjudications are there cited.

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

Van Brunt, J., concurred.

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

WELLS A. BINGHAM, Survivor of the Copartnership of Craft & Bingham, Appellant, *against* RICHARD C. HARRIS *et al.*, Respondents.

(Decided June 5th, 1882.)

In an action for the price of paper alleged by the plaintiffs to have been sold and delivered by them to the defendants, it appeared that an agreement for the manufacture and delivery of paper, like a certain sample, had been negotiated by one G., on behalf of the plaintiffs, with the defendants, who wanted such paper to supply customers at B., and that the defendants gave to the plaintiffs personally a written order for the paper in accordance with the agreement. Evidence was given on the part of the defendants that G. subsequently came to them, with a sample of the paper manufactured, which they refused to accept, because not according to sample; that G. then said, in substance, "if you will send it to your customers in B. we will take the risk of their accepting it;" whereupon the defendants consented to send it, and did send it, to their customers at B., who refused to accept and returned it. On the part of the plaintiffs, G. testified that he made no such agreement in respect to the delivery; and as to his authority to make such an agreement, the plaintiffs and G. himself testified that he was employed by them as a broker to solicit orders, subject to their approval, at a commission upon sales, and had no authority in any transaction without submitting the matter to them, though one of the plaintiffs testified that if G. had no other work to do, he was to make himself generally useful; while the defendants and their witnesses testified that numbers of previous purchases of paper had been made by the defendants from the plaintiffs through G. in the same way, bills for which had been collected by G., sometimes before they became due; and that it was generally understood that G. worked for the plaintiffs, and he had been frequently seen in their place of business engaged in the work of a general clerk in the business. The judge instructed the jury that if G. was merely a broker, and plaintiffs did nothing which could lead defendants to suppose that he held any other relation to them, the plaintiffs were entitled to a verdict; but that if G. occupied substantially the relation of a clerk to the plaintiffs, and was held out by them for the uses to which they devoted him, and if the persons dealing with plaintiffs' house had a right to suppose that he was their clerk, and if he in fact made the conditional agreement testified to, the defendants were entitled to a verdict, unless the jury should find that the paper was according to sample. The jury found for the defendants. *Held*, that they must be presumed to have found the facts to be as stated in the last proposition submitted to them; that there was sufficient evidence to require the submission to the jury

of the question involved in that proposition, and that, as matter of law, the instruction given was correct.

Held, also, that under the circumstances the defendants were entitled to recover, as damages, the amount they had paid for freight, and the profits they would have made by the sale, if the paper had been as ordered.

Appeal from a judgment of this court entered upon the verdict of a jury, and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Albert A. Abbott, for appellant.

David Crawford, for respondents.

Charles P. Daly, Chief Justice.—The former judgment for the plaintiffs was reversed by the general term, upon the ground that it involved questions of fact, which it was for the jury and not for the court to pass upon.

In the present trial, the jury were instructed, that if Goodenough was merely a broker, and had no other connection with the plaintiffs than that of soliciting orders, and receiving commissions therefor, and if the plaintiffs did nothing which would lead the defendants to suppose that he held any other relation to them, the plaintiffs were entitled to a verdict; but that, if Goodenough occupied substantially the relation of a clerk to the plaintiffs, and was held out by them for the uses to which they devoted him; and if the persons dealing with the plaintiff's house had a right to suppose that he was their clerk; and if Goodenough came to the defendants with a sample of the paper manufactured; and if Benjamin H. Harris, one of the defendants, said that the sale did not correspond with the sample and that he would not accept it; and if Goodenough said, "If you will send it to your customers in Buffalo, we (the plaintiffs) will take the risk of their accepting it," the defendants were entitled to a verdict, unless the jury should find that the paper corres-

ponded with the sample which was attached to the order at the time when the order was given. And as the jury gave a verdict for the defendants, we must assume that they found the facts to be as stated in the last proposition submitted to them.

The plaintiff's counsel excepted to the instruction, that if Goodenough was permitted to occupy the position of a clerk, and made the agreement claimed by the defendants, the plaintiffs were responsible for it.

The question therefore is whether there was sufficient evidence in the case, to submit the question involved in the second proposition of the judge to the jury, and whether, as matter of law, the instruction he gave was correct.

The evidence as to the relation between Goodenough and the plaintiffs, or in what capacity he acted for them, was conflicting. The plaintiff Bingham testified that he was employed by their firm, from February to November, 1879, as a broker, to solicit orders for them, and to work up the city trade; that the orders he obtained had to be submitted to them for their approval or disapproval, and that he received a commission upon sales that were made through his efforts; that if the plaintiffs approved the order and the sale was made, that was all he had to do with the transaction; that he was employed soliciting orders from 9 to 10 o'clock in the morning, and from 3 to 4 in the afternoon, and that, when he was not so engaged, he was usually at plaintiff's store; that the plaintiffs never authorized him to close sales on behalf of their firm; that their dealings after the order was accepted were with the parties from whom the order was obtained; that he had no authority to make any such agreement with the defendants as testified to, nor authority in any transaction, large or small, without submitting the matter to them. The other plaintiff, Craft, who is now dead, testified upon the former trial to the same general effect; but in addition, that if he, Goodenough, had no other work to do, he was to make himself generally useful, in respect to which part of Craft's testimony, the plaintiff Bingham testified that Craft was wrong; that he, Bingham made the original arrangement with Goodenough,

Goodenough testified that all that he was employed to do, was to solicit orders, and that whilst he was with the plaintiffs, he did other business for them, but that it was voluntary.

On the part of the defendants, Benjamin H. Harris testified that Goodenough worked for Craft & Bingham in selling paper for them, he could not say how long, but that he dealt with him a number of times; that he knew him to be connected with the plaintiffs for six months before this transaction, and that defendants purchased "some numbers of papers" through him from the plaintiffs' house, and that he collected the bills. But, upon cross-examination, he testified that, of his personal knowledge, he did not know of his collecting more than one bill for the plaintiffs. That in making sales for the plaintiffs to the defendants, he solicited the orders, agreed upon the price, and agreed to make the quality of paper like the sample; and that it was the defendants' course to follow up what Goodenough did, by making out a written order upon the terms arranged with Goodenough, and take it to the plaintiffs.

Hefferman, a paper dealer, testified that it was generally understood, as he believed, that Goodenough worked for Craft & Bingham; that he only knew, however, what Goodenough told him about it; that he never heard anything about it from the plaintiffs; that he had seen Goodenough in their store, more times than he could tell; that he was writing in their books sometimes, sometimes talking to customers, other times sorting samples, and doing various other work, such as the witness often did himself when he was a clerk. And in respect to the qualified acceptance of the paper, on the part of the defendants, a salesman of the defendants—Daniels—testified, that when Goodenough told Benjamin H. Harris, that if he would send the paper to the defendants' customers, and it did not answer, that the plaintiffs would take it back, Mr. Harris asked him whether he had authority to do that, and he said, "whatever I do for Craft & Bingham, I have authority from them to do"—which was a statement on the part of Goodenough in direct conflict with his testimony as a witness on the trial.

Another clerk of the defendants—Conrad—testified that three or four months before this transaction, he noticed Goodenough coming to the defendants' store, trying to get orders for the plaintiffs, and to collect money for them, sometime before it was due.

The defendants' book-keeper—Lyon—testified that he saw Goodenough coming to the defendants' store a number of times to solicit orders and collect bills for the plaintiffs; that he had seen him probably two or three months before that transaction, and saw him collect two or three bills; two, certainly.

The question in this case was not what the understanding or agreement between Goodenough and the plaintiffs was, but what the defendants were entitled, as business men, to assume in respect to Goodenough's authority in making sales in behalf of the plaintiffs, from what, in the previous dealings, and in this, with the defendants, he had done with the plaintiffs' approbation as their agents; and especially his authority when he came there with the sample of the paper that had been made, and which was then on the dock, ready for delivery, to justify the defendants in acting upon his statement, that he was authorized by the plaintiffs to deliver the goods subject to the condition which he proposed, and upon which alone the defendants consented to receive the paper, and send it to their customer; and, in my opinion, there was sufficient in the evidence to entitle the judge to leave the question to the jury, in the form which he did.

Among the conflicting questions of fact, was a very important one, the statement of one of the plaintiffs—Craft—that if Goodenough had no other work to do, he was to make himself generally useful, especially when it is viewed in connection with the statement of the witness Hefferman, that he saw Goodenough in the plaintiffs' store, more times than he could tell, writing in the plaintiffs' books, talking to customers, sorting samples and doing various other work such as the witness, who was a paper dealer, often did himself when he was a clerk. It was for the jury to determine between the statement of the plaintiff Craft, who was dead, and the

plaintiff Bingham's testimony that Craft was wrong in making this statement, especially when there was uncontradicted testimony in the case that Goodenough was frequently seen in the plaintiffs' store, doing the kind of work that is done by a clerk. As Goodenough swore that he made no such agreement in respect to the delivery of the paper as the defendant Benjamin H. Harris testified to, the credibility of the whole of Goodenough's testimony was a question solely for the jury.

When the person who came to solicit orders for the plaintiffs, and with whom the defendants arranged as to the amount, quality and price of the paper to be manufactured, for which they gave a written order to the plaintiffs, came afterwards to the defendants' store, and said to the defendant Benjamin H. Harris, "Here is a sample of the paper that is down on the dock," the defendant had, I think, a right to assume that he came from the plaintiffs to announce that the paper was on the dock, ready for delivery to the defendants, and to show them a sample of it as manufactured. Goodenough contradicted this. He testified that he brought a sample of the goods as manufactured, which he got out of Craft's office, to the defendants, for the purpose of obtaining another order; that this was without the plaintiffs' knowledge, and was about three weeks before the paper arrived in New York, and that he took no other samples of the paper afterwards to the defendants; in which he is contradicted by the defendant Benjamin H. Harris, by the defendants' two book-keepers, Lyons and Conrad, and their salesman Daniels, all of whom were present, four witnesses, who testify to this interview, and several of them, that it was after the arrival of the paper in New York. Harris testified that it was whilst the paper was on the dock; Conrad, the book-keeper, that he thought the truckman got the papers to get the paper from the cars, the day after Goodenough was there; and the other book-keeper (Lyons), that Goodenough said to him: "Here is a sample of the paper which is down on the dock;" upon which he took the sample in to Mr. Harris, who came out, and the interview occurred as testified to by these four wit-

nesses. Harris testified that it took place on the 24th of May, 1879; that he was sure that that was the date; and that it occurred before the paper was sent to Buffalo; that he was positive of that—absolutely certain.

When this case was formerly before the general term, Judge J. F. Daly was of the opinion that the plaintiff was entitled to recover, because the goods had been already delivered to the defendants' cartman, and were on their way to Buffalo, when Goodenough brought the samples to the defendants, and the defendants had the understanding with him, that the acceptance of the goods was to be conditional on the approval of the defendants' customers in Buffalo. If this appeared on the former trial, it is not the case now; for the evidence is distinct and positive that this qualified acceptance took place before the paper was delivered, when it was still on the dock before its shipment to Buffalo.

As respects the fact of this interview, when it occurred, and what took place at it, we must assume that the jury believed the four witnesses for the defendants.

According to their testimony, what occurred was substantially this: that after the paper had arrived, and was on the dock, ready for delivery to the defendants, Goodenough came to the defendants' store, as already detailed, and exhibited to Harris a sample, saying, "This is the kind of paper." That Harris told him it would not do, either in color or quality; that it was not according to sample; that it was an unsized paper, and as it had to be pasted upon, it would not answer the defendants' purpose nor the party's who was to purchase it; and that he, Harris, would not take it; upon which Goodenough remarked that he knew the customer to whom Harris was selling the paper, and knew that it would suit him. Harris replied: "You seem to know more about my customers and what they want, than myself, but anyhow, I will not take it; I would not send it to my customer for what I would make off the paper, for ten times the amount." That Goodenough then tried to persuade Harris to take it, or to try and get his customer to take it; but Harris refused, upon which Goodenough said, "If you will send it to your customer, and

it does not answer, and they send it back, we will take it back, or as some of these witnesses testified, "Craft & Bingham will take it back." Harris then asked him, as before stated, whether he had authority to do that; and he made the reply already given, "Whatever I do for Craft & Bingham, I have got the authority from them to do." Upon which, Harris said, "Well, upon that condition, I will let the paper go," but that he would have to bear the expense of transportation; and Goodenough said that that was all right. The paper was then shipped by the defendants' truckman, to the defendants' customer, in Buffalo, who refused it, and sent it back to the defendants, whereby they were put to the expense of its transportation to Buffalo and back, and lost the profit they would have made by the sale of the paper, if it had been of the kind and quality ordered.

Upon this state of facts, the defendants, in my opinion, were entitled to recover, assuming upon the evidence submitted to the jury, that they might, if they believed the defendants' witnesses, and discredited those of the plaintiffs, find that Goodenough had, from what he was allowed by the plaintiffs to do, in and about their business, the general authority of a clerk, in making sales; and that the defendant Harris had a right to assume that he had the general authority of a clerk, from the previous dealing the defendants had with the plaintiffs through Goodenough's instrumentality; and the arrangement with him, as to the quantity, quality and price of the paper to be manufactured, the written order for which Harris afterwards took to the deceased plaintiff, Craft, and which Craft accepted and agreed to furnish; and that when Goodenough came with an announcement to Harris that the paper had arrived, and showed him a sample of it, Harris had a right to assume that he came from the plaintiffs, to deliver the paper that had been ordered, and that he could, as their agent, especially after what he said, arrange for a conditional delivery of it.

If Goodenough had been simply a broker, who followed the business solely of soliciting sales for the plaintiffs, or whoever employed him, the defendants would perhaps not have

been warranted in assuming that he had any other authority than attaches to such an occupation, but he was in the plaintiffs' store, performing, as it was proved, the general duties of a clerk; and Harris was not only in the habit of making purchases of paper through his instrumentality, but he came to the defendants' store to collect bills for the plaintiffs, sometimes before they were due; and though Harris had only personal knowledge of his doing so in one instance, it was proved by the defendants' clerks that he did so in other instances, a general fact in respect to the defendants' business which Harris necessarily knew from his statement, that they had previously purchased "some numbers of papers" through him, and that he collected the bills, as their receipt-book would show.

Significance is attached by the appellants to the fact that Harris testified that he took the written order personally to the plaintiffs' store and thought it necessary to do so. On this point, what he testified to was this: He said that their course was to make out a written order and take it to the plaintiffs' office. He was asked by the plaintiffs' counsel, with reference to the particular transaction, if he thought it necessary to deal directly with the house, in closing it. He replied that Goodenough had told him that he would be over there, (at the plaintiffs' store) that day, and that his, Harris' customers were complaining, and in reply to a further question; if he thought it necessary to take the order to the house, he answered that he did. This may have been susceptible of the construction that Harris treated Goodenough merely as a broker who came to solicit orders; and that if he gave an order, all further transaction, in respect to it, was had by him with the principals. But it was not the only inference of which it was susceptible, when taken in connection with all that was testified to by the defendants' witnesses. It may have been, notwithstanding that Harris took the written order himself to the principals, that he understood, and had a right to assume from what had previously occurred, that Goodenough was clothed with the general authority of ordinary clerks, in making sales, as he not only solicited orders, but

was like other clerks, in the plaintiffs' store, and that he collected bills for them, upon sales made by him, when the bills matured. In my opinion, it was for the jury, and not for the court, to judge what inference should be drawn from this piece of evidence;—the court could not say, as matter of law, that the facts sworn to by the defendants admitted of but one conclusion, that the defendants in this and the other transaction dealt directly with the principals, and showed that they regarded Goodenough solely as a broker who came to them, the same as any other broker might do, to solicit orders for the plaintiffs, and nothing more, leaving them to negotiate and consummate the sales with the plaintiffs, without any further interference or instrumentality on his part. The question therefore in the case, and upon which, in my judgment, the case turns, was a question for the jury, on all the facts, and not for the court.

Oakley, Ch. J., in *Clark* v. *The Metropolitan Bank* (3 Duer, 248), observes that in many cases a principal is responsible for the act of his agent, although in abuse or excess of the authority given him, where the question arises between the principal and a third person, who, believing and having a right to believe, that the agent was acting within, and not exceeding or abusing his authority, would sustain a loss if the act were not considered the act of the principal, and where the sole question is by which of two innocent parties a loss, resulting from the fraud or misconduct of an agent, ought to be borne.

In *Pickering* v. *Busk* (15 East, 38), Bayley, J., said, "If the servant of a horse-dealer with express directions not to warrant, do warrant, the master is bound, because the servant having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed." And in the same case, Lord Ellenborough says, "strangers can only look to the acts of parties and to the external indicia of property, and not to the private communications between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it

must be presumed that the apparent authority is the real authority; and that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject matter; and that there would be no safety in mercantile transactions if this were not so."

The defendants were entitled to recover as their damages, the amount they had paid for freight, and the profit they would have made by the sale, if the paper had been as ordered; which, with the freight, amounted to $313.98, being the sum for which the jury rendered a verdict for the defendants.

The jury first came in and announced that they had agreed upon a verdict in favor of the defendants for the amount paid by them for freight from Buffalo to New York, and interest; which verdict the judge refused to receive, telling the jury, that if the defendants were entitled to a verdict, they were entitled to a verdict for freight and profits; and that they must reconsider their verdict; to which direction, the plaintiffs excepted; upon which the jury returned a verdict for the defendants, for $313.98.

The judge, in my opinion, was right. If the defendants were entitled to recover at all, they were entitled to recover their damages, which embraced, not only the expense of the transportation of the paper from New York to Buffalo and back, but the amount they would have received on the sale if the paper had been of the quality and kind the plaintiffs had contracted to furnish.

The plaintiffs were not entitled to the instruction asked, that if an agreement was made that the acceptance should be conditional, they were not required to fulfill it, because when the paper was returned to New York and offered to them, it was in a damaged condition, having been subjected to bad usage and improper handling; the evidence being that when the paper was taken to the dock by the defendants' truckman to be shipped to Buffalo, it was, according to his testimony, in the worst condition he had ever seen; the strings were cut; it was not half tied up, and had no wrappers on it; whereas, for carriage, according to the testimony of this witness, who had

been long in the carting business, and knew it thoroughly, the paper ought to have been wrapped up and tied with good strong ropes, not less than six strings to a bundle. He testified that it was in such a condition that he could not carry it on his cart; that he had to take it to the cars in a two-wheeled truck carried by hand; that he had to take it in that way to get it aboard the cars; it was so badly done up, that he told Goodenough after he came back that it was in the worst condition he had ever seen; and that Goodenough said he knew that and laughed. There being no evidence to show that it sustained any greater damage in its transportation from New York to Buffalo and back, than was incident to its carriage in such a condition, the judge could not charge, as matter of law, as he was required to do in the proposition submitted, that the plaintiffs, if they were bound by the conditional acceptance, were not required, when the paper was offered to them upon its return, to receive it, because it was in a damaged condition, and had been submitted to bad usage and improper handling. Nor were the plaintiffs, for the reasons already stated, entitled to the direction, that the delivery of the paper by the plaintiffs was absolute and unconditional.

The exceptions taken at the close of the judge's charge are answered by the reasons already given. Nor was the instruction in respect to Harris' testimony, upon the question of color, at the close of the charge, material. The objection to the paper was not on the ground of the color alone, but mainly on account of the quality; not having been sized, which was required by the sample, as the paper had to be pasted upon. This was the test, the defendant Harris having called the salesman to ask his opinion, and he, after wetting the paper with his tongue, declared it to be unfit for the purpose for which it was to be sold to the defendants' customer.

None of the exceptions to the admission or exclusion of testimony were well taken.

The first was as to the interview with Goodenough, which was clearly admissible, as it was the interview in which he came to solicit the sale. What took place when Goodenough came

afterwards to the defendants to announce that the paper had arrived, and to exhibit a sample of it, was admissible, for reasons already given.

As respects the exception, to strike out what transpired between the Buffalo and the New York houses, because it was in writing, the objection was removed by the defendants' offer to produce the correspondence; and as nothing further transpired, it is to be assumed that the plaintiffs were satisfied, and did not require the production of the written evidence in place of the oral testimony; which may very well have been, as the inquiry, in respect to what transpired between the defendants and their customer in Buffalo, was called out by a question put by a juror.

The question objected to, on the examination of Hefferman, as immaterial and irrelevant—what he saw Goodenough doing in the plaintiffs' store, having seen him there many times—was competent to show what Goodenough was allowed to do in and about the business with the plaintiffs' knowledge and authority.

The same remark applies to the question put by the juror to the plaintiff Bingham, whether Goodenough did any other work in their store, or out of it, than soliciting orders.

The question whether there is a general custom in the paper trade of New York city, to employ brokers, and the extent of their authority, was properly excluded.

The objection immediately following this, is not insisted upon in the points; and I therefore assume, has been abandoned.

The judgment should be affirmed.

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

Judgment affirmed.

JOHN S. DAVENPORT, Respondent, *against* THE LONG ISLAND INSURANCE COMPANY, Appellant.

(Decided June 5th, 1882.)

A policy of insurance against fire provided that, in case of loss, if the parties failed to agree as to the amount of damage, it should be ascertained by appraisal by two appraisers, one selected by each party, and an umpire to be selected by the appraisers. A loss having occurred, and the parties not agreeing as to the amount of damage, each appointed an appraiser in pursuance of the policy; the appraisers, however, failed to agree as to the choice of an umpire, but for this, it did not appear that either of the parties was in any way responsible. *Held*, that the insured was not thereupon entitled to bring an action for the insurance against the insurance company; that before resorting to an action he should do everything in his power to have the damage ascertained in the mode provided for in the contract; and that it was his duty at least to propose the selection of new appraisers.

APPEAL from a judgment of this court entered upon the verdict of a jury, and from an order denying a motion for a new trial.

The facts are stated in the opinion.

F. W. Hubbard, for appellant.

Bangs & Stetson, for respondents.

CHARLES P. DALY, Chief Justice.—It was provided by the terms of the policy, that in case of loss the amount of damage might be determined by mutual agreement between the company and the assured, or, failing to agree as to the amount of damage, that the same should, at the written request of either party, be ascertained by an appraisal and estimate by competent and impartial appraisers, one to be selected by each party; and that the two so chosen should first select an umpire to act with them in case of their disagreement; and that if the appraisers failed to agree, they should refer the

difficulties to the umpire; and the award of any two, in writing, under oath, should be binding and conclusive, as to the amount of such loss or damage, but should not decide as to the validity of the contract or to any other question, except the amount of such loss or damage.

The plaintiff and the defendant having failed to agree, a determination of the amount of damage by arbitration in the mode provided for by the contract was a condition precedent, the parties having by their contract provided how, in an event that has occurred, the damage was to be ascertained.

It is well settled that this is a condition to which the courts will give full effect, and that before the assured can bring an action at law to have the amount of damage determined by the ordinary legal tribunals, he must show that he has done everything on his part, which could be done by him, to carry this condition into effect.

Indeed, it has been said, that under such a contract, there is, in the absence of fraud, no cause of action, either in law or in equity, unless the award is made (*President of Delaware, &c., Canal Co.* v. *Pennsylvania Coal Co.*, 50 N. Y. 267; Story's Equity Jurisprudence, 1457a; *Herrick* v. *Belknap*, 27 Vt. 673), which is probably going too far. Some of the cases even go to the length of holding that no action lies until the award is made (*Scott* v. *Avery*, 5 H. L. 811; 8 Exch. 417; *Braunstein* v. *Accidental Death Ins. Co.*, 1 Best & S. 782; *Treadman* v. *Holman*, 1 Hurls. & C. 72).

I think, however, that the true rule is the one laid down in *United States* v. *Robeson* (9 Pet. 327) that where the parties, in their contract, fix upon a certain mode by which the amount to be paid shall be ascertained, the party who seeks to enforce the agreement by an action in the ordinary legal tribunals must show that he has done every thing on his part which could be done to carry this provision of the agreement into effect, and this, in my judgment, has not been shown in this case.

There is no contradiction as to the facts. The plaintiff and company could not agree as to the amount of damage, and the company notified him in writing that there must be an

appraisement. Thereupon the plaintiff appointed an appraiser and the defendant appointed another, the duty of the two thus appointed being first to select an umpire in the event of disagreement. They met together for that purpose, and it was agreed between them that the umpire should be a machinist, because the property injured or destroyed consisted largely of the machinery of a paper mill; and the appraiser selected by the plaintiff was acquainted with machinery, being a paper manufacturer, whilst the one selected by the defendant was not, being simply a builder. It was further agreed between them that each should send the names of three machinists, and that Young, the appraiser selected by the plaintiff, might name machinists who had been employed by him. Dobbs, the defendant's appraiser, not being acquainted with any machinist, had an interview with Dr. Kendrick, who acted as an appraiser for some of the companies in interest, who furnished Dobbs with the names of some machinists from which Dobbs selected four, the names of which he was about to send to Young, when he received a letter from Young, in which the latter stated that in looking over the lists of machinists with whom he was acquainted he found it "hard to name a list of machine men" that he had not dealt with, and that Dobbs would probably object to; that he could not see that it was material that the third man should be a machinist; that all that was necessary was that he should be a fair and unprejudiced man; and he gave Dobbs five names—the president of a bank, a manufacturer of axes, a dealer in machinery, and two paper manufacturers. Dobbs then withheld his submission of names and replied by letter that he understood that a machinist should be selected; that he had prepared a list and had it ready to send to Young that day; that he could not accept the parties named by Young and do justice to the parties for whom he was acting; that it might as well then be understood that he would not accept for the third man any one but a practical machinist who was satisfactory to him; that he had his list ready to submit when Young was ready to submit his list to him. Four days afterward Young wrote Dobbs, stating that he had deferred answering, thinking

Dobbs might reconsider his refusal and forward him (Young) a list of the gentlemen whom he nominated for an umpire; and that he understood his letter as practically refusing to agree upon any one, unless it should be a man of Dobbs' own selection; that he had sent Dobbs a list of gentlemen who were all acquainted with machinery; that as he had written to him he was unable to send him a list of men who were then in the trade, and that Dobbs refused any others; that he had notified the plaintiff that Dobbs refused to join him in the appointment of an umpire, and that he would consider himself discharged from any further connection in the matter. Upon the receipt of which letter all further communication between the two ceased, Dobbs doing nothing further after the receipt of this letter.

All that appears from these facts is that the two appraisers failed to agree upon a third, for which failure neither the plaintiff nor the defendant were in any way responsible, from anything that appears in the evidence. The failure of the appraisers selected by the respective parties to agree upon a third as the umpire is one of those incidents that sometimes occur, and it does not follow, because this takes place, that this provision in the contract is at an end, and that the plaintiff may at once resort to his action to have the damages determined by the ordinary legal tribunal.

In *Altman* v. *Altman* (5 Daly, 436), each of the parties selected an arbitrator, and the arbitrators so selected had several meetings to consider the subject submitted to them, but failed to agree as to the amount of the award, or as to the choice of the third arbitrator. In that as in this case the plaintiff brought his action, and upon the trial his complaint was dismissed. He appealed to the general term, and the judgment given against him was affirmed.

I said in that case what is equally applicable in this, that it did not follow, because the two arbitrators selected could not agree upon a third, that an arbitration was impossible; that if they could not agree, it was for the plaintiff, before resorting to his action, to propose to the defendant the selection of two others in place of those who could not agree upon

a third; that if the defendant had then refused to do so, or if the plaintiff could show that the disagreement was brought about by the defendant's instrumentality, for the purpose of preventing an award, or anything from which it appeared that he was acting in bad faith, or interposing obstacles, so that no award might be had, the position of the plaintiff would be different; that as the defendant, in that case, was to pay such sum as the good will of the business was decided by the arbitrators to be worth, the law would not allow the defendant to evade his responsibility by preventing the making of any award; recognizing that if, through his acts or bad faith, or from any other cause, an arbitration became impossible, the plaintiff would have a right to resort to his action.

In the present case, I do not think that the plaintiff has complied with the rule above referred to, which requires him to do everything in his power to have the agreement carried into effect and the damage ascertained, in the mode provided for in the contract.

Having been notified by the appraiser selected by him of the failure of the two selected to agree upon a third as an umpire, it was his duty at least to propose to the defendants that they should each select new appraisers, that the condition precedent might, in good faith, be complied with, instead of which he at once resorted to his action, upon, I suppose, the assumption that this provision in the contract was at an end, so that an arbitration in compliance with it was impossible, a conclusion that by no means followed.

The failure of the two appraisers selected to agree upon a third was not an extraordinary or unusual occurrence. It occurred in *Altman* v. *Altman* (supra), and I have known several other cases in this court where this difficulty arose.

It is an obstacle for which neither of the principals are answerable, unless they have had something to do in bringing it about, and where an unanticipated event like this takes place the obligation is upon both of them to do what they can to remove it by substituting others for the disagreeing appraisers.

I am of opinion, therefore, that, as in *Altman* v. *Altman* (supra), the defendant's motion to dismiss the complaint should

have been granted, and for this error that the judgment should be reversed and a new trial ordered; costs to abide the event.

Van Brunt and J. F. Daly, JJ., concurred.

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

William McCarthy, Plaintiff, *against* The Christopher & Tenth Street Railroad Company, Defendant.

[Special Term.]

(Decided June, 1882.)

The court has power, on motion of a defendant, after a verdict against him, to set aside the verdict as against the weight of evidence, although he did not move, at the close of the testimony, for a direction in his favor, or for a dismissal of the complaint.

Upon the trial of an action to recover damages for injuries to the person of the plaintiff, alleged to have been caused by the defendant's negligence, the plaintiff and two witnesses on his behalf, both connected with him in some way, testified to circumstances showing negligence on the part of the defendant, and freedom from negligence on the part of the plaintiff; the main features of their testimony bearing a striking resemblance. They were directly contradicted by five witnesses on behalf of the defendant, four of whom were disinterested, and no one of whom was impeached or shaken by cross-examination; all of them were spectators of the occurrence in question, and gave an account of it that was clear, consistent, and reasonable; and two other persons, both disinterested and respectable, testified that the plaintiff himself, on two different occasions, before suit brought, made to them statements that not only contradicted his testimony at the trial, but confirmed with great circumstantiality and exactness the testimony given by the other witnesses for the defendant. *Held*, that a verdict for the plaintiff was in conflict with the overwhelming weight of evidence, and should be set aside.

Motion to set aside the verdict of a jury, and grant a new trial.

The action was brought to recover the sum of $25,000 as damages for personal injuries alleged to have been sustained by the plaintiff by reason of negligence on the part of the defendant. The jury found a verdict for the plaintiff for $4,500, which the defendant moved to set aside as against the weight of evidence.

Van Hoesen, J.—This court has already decided that the Code of Civil Procedure was not intended to deprive the courts of the power to set aside verdicts that are against the weight of evidence (*Clark* v. *Mechanics' Bank*, 8 Daly, 501). It is not proper for me to enter into any discussion as to the correctness of that decision, but I must not be understood as doubting it. It is said, however, that the verdict cannot be set aside, inasmuch as the defendant did not move, at the close of all the testimony, for a direction in his favor, or for the dismissal of the complaint. There is one case in the Supreme Court, and there are several cases in the Superior Court, that so lay down the law, but these are innovations upon the settled practice in this state and cannot be recognized as of any authority.

The case in the Supreme Court (*Peake* v. *Bell*, 7 Hun, 454) has been directly overruled by the more recent and much better considered case of *Shearman* v. *Henderson* (12 Hun, 170). The cases in the Superior Court seem to me to overlook the obvious distinction between the right to a judgment upon evidence that is virtually all one way, and the right to a fair, unbiassed and honest decision by a jury upon testimony that is conflicting. When a verdict is set aside as against the weight of evidence, the court gives no final judgment, but simply orders a new trial. It does not dispose of the case, nor adjudge that as matter of law either party is entitled to judgment, but it decides that the party against whom the verdict was rendered has not had his case properly considered by the jury, because bias, passion, mistake or corruption has led the jury to give a verdict that offends common sense or common honesty. Where a court, at the trial, directs a verdict or dismisses a complaint, it is because all the evidence worthy of consideration is in favor of the prevailing party. Where the

evidence is contradictory, of what avail is it to move the court to direct a verdict or to dismiss a complaint? The court cannot lawfully grant the motion; it is bound to submit the conflicting evidence to the jury. The utmost it can do is to set aside the verdict if it be obvious that the evidence was so improperly weighed that there will be a gross miscarriage of justice if a new trial be not had. It is said that the evidence is the same before the verdict as after, and that if the verdict will be against the evidence if the jury find in a certain way, why should not the attention of the court be called to that fact before the parties take the chances of the jury's finding? The answer is that the court is powerless to direct a verdict, even though it should consider it clear that the jury ought to find in a certain way. It is bound to submit conflicting testimony to the jury. A motion to direct a verdict where the evidence is contradictory is idle. Why should a party be compelled to submit to a verdict that is the result of passion or prejudice because he fails to make a motion that the court has no power to grant?

I know that a judge has no right to set aside a verdict merely because he would have found differently if the decision of the case had fallen to him. It is the judgment of the jury, not the judgment of the judge, that suitors are entitled to, when a question of fact arises in an action at law. This our courts have always recognized. The infrequency of interference by the courts with verdicts attests at once the value of the jury system for the determination of questions of fact, and the reluctance of judges to trench upon the domain allotted to juries. I can recall only two cases in which judges of this court, in the last seven years, have felt it their duty to set aside verdicts—the case of *Hermann* v. *Kreppel*, reported in 8 Weekly Digest, and the case of *Clark* v. *The Mechanics' Bank*, reported in 8 Daly.

To those two it is my duty to add a third. I do so with firm confidence that I am arresting, for the time at least, a most iniquitous proceeding.

When the motion to set aside the verdict was made, I said that the case seemed to me to have been fabricated by a

lawyer. It seemed so because it was built with great attention to details, and in a workmanlike manner. No point was left uncovered. The absence of contributory negligence was proved by testimony that before attempting to cross the street, the plaintiff, a boy of thirteen, with a caution that his elders seldom possess, looked carefully both ways. There was nothing, he said, to prevent him from crossing at his ease, and he described the situation of the car that ran over him as near to Broadway at the time that he began to cross the street in front of Aberle's Theatre. The car was then so far away that he might have crossed two or three times at least before it reached the spot at which he was injured. The next objective point was to prove gross negligence on the part of the railroad company itself. The pavement adjacent to the track was, it was said, so much out of repair, through the fault of the company, that the plaintiff's foot was caught between the rail and a stone, and held as if in a vise, so that in endeavoring to extricate himself the plaintiff was thrown down. This testimony, it is evident, established negligence on the part of the company itself. But the negligence of the driver of the car was also to be proved, and this was done by testimony that he was driving his horse at a fast gallop, and not this alone, but also that he had his back turned from his horse, and his eyes fixed upon the interior of his car. So negligent was the driver said to have been that though the plaintiff struggled and squirmed in his efforts to get up, and called loudly on the driver to stop, no heed was given to him, but he was wantonly run over and crippled for life. The galloping of the horse accounted for the rapidity with which the car came to the place where the plaintiff was caught in the trap. The position of the driver and his preoccupation with the cash box or with a passenger accounted for his failure to see the plaintiff or hear his cries. Here again was negligence conclusively shown; an unlawful rate of speed and neglect on the part of the driver to look after his horse. Now, it is not impossible that such preternatural care on the part of the boy, and such uncommon negligence on the part of the driver, and such a strange trapping of the boy's foot, may all have coexisted, but such a concurrence of circumstan-

ces favorable to a recovery is so unusual that it suggests scrutiny of the witnesses by whom the case is proved.

The plaintiff was the chief witness on his own behalf. He was a keen, cunning, plausible boy, and he told the story of his injury in the manner I have already described. His next witness was a man named McGinn, who married his (the plaintiff's) cousin. This witness did not swear that he had seen the accident, but he did swear that he saw the boy trip and fall on the track, though he saw no car until after the boy had received his injuries. The other witness was a woman named Kelly, who lived in the same house with the plaintiff. This woman swore that at the time of the accident she was engaged at washing windows at Clinton Hall. She said she was sitting in one of the windows, and was in the act of cleaning it. In answer to a question put by me, she said that her back was to the street, and that she was facing the window. She saw the boy leave the theatre, start across the street, trip on the pavement, fall, struggle, shout and disappear beneath the car, just as he himself described the occurrence. She saw the horse that drew the car come at a fast gallop, and in everything she corroborated the plaintiff.

In the main features of their testimony, there is a striking resemblance. Undoubtedly, if this testimony be true, the plaintiff was entitled to a verdict. Now it is to be observed that all the witnesses are connected in some way. The woman Kelly lived in the same house with the plaintiff. The man McGinn married his cousin. Both fortunately happened to be on the spot in such a position as see the boy fall. This is not impossible, but it is noticeable as a conjuncture of circumstances that supplied the plaintiff with witnesses from the circle of his immediate friends. No other witnesses of the accident were called by the plaintiff, though many persons were spectators of it.

On the part of the defendant there were four witnesses who saw the accident beside the driver of the car, Henshaw. These witnesses gave an account of the occurrence that was clear, consistent and reasonable throughout. Except the driver, they were all disinterested; and the remarkable fact in this

case is that the plaintiff himself, when in the hospital, before the idea of bringing a suit was suggested to his mind, gave to Dr. Burke, the attending physician, a history of the accident that agrees perfectly with the story told by the witnesses for the defendant. In the smallest details the history of the occurrence given by the plaintiff while he was in the hospital tallies with the testimony of Lynch, Giles, Murphy, Schwenger and Henshaw, the defendant's witnesses. The plaintiff told Dr. Burke that he and some other boys were standing on the steps of Aberle's Theatre "grubbing checks;" that some one of them said, "Cheese it; here comes a cop;" that they all ran across the street to elude the policeman; that he started to return to the side of the street from which he had run; that he had recrossed the track when he saw a policeman; that turning he saw Giles's truck; that he determined to screen himself behind it, and attempted to go in front of Giles's horses, and did not see the horse-car that was close upon him; that he ran accidentally against the horse of the car, and was knocked down and injured. This story is told by the plaintiff himself in the hospital, and by the defendant's witnesses on the trial. But this is not all. On the day after the accident the driver was taken to the hospital by policeman Moffitt, and then the boy said, "It was all my own fault; you could not help it." To this both the driver and the policeman, Moffitt, swore. How could he have said this if the driver was running his horse at a fast gallop, and keeping his face turned away from the track?

The only explanation that the plaintiff attempted to make was that at the hospital he was unconscious and "didn't know nothing."

Now, here we have a case in which the plaintiff is contradicted by five witnesses, four of whom are disinterested, and no one of whom was impeached or was shaken by the cross-examination; and we have the further and controlling fact that the plaintiff himself, on two different occasions, *ante litem motam*, made to different persons, both disinterested and respectable, a statement that not only contradicts his testimony at the trial, but confirms with great circumstantiality and ex-

actness the testimony given by the five witnesses for the defendant that were spectators of the accident.

There could have been no mistake on the part of Dr. Burke, or on the part of policeman Moffitt. Either they fabricated the statements that the plaintiff made to them, or else the plaintiff told the truth at the hospital. If he spoke the truth at the hospital his testimony at the trial was willfully false. If he swore truly at the trial, not only did Lynch, Giles, Murphy, Schwenger and Hernshaw commit willful perjury, but Moffitt and Dr. Burke deliberately concocted the most wicked falsehoods, by putting into the mouth of the plaintiff a story that he never told.

The verdict of the jury may well have been affected by certain proceedings that occurred at the trial. On the morning of the day on which the trial closed, the counsel for the defendant came to me out of court, bringing with him the counsel for the plaintiff, and disclosed the fact that one of the jury had called at his office and made proposals as to the verdict to be rendered. The counsel for the defendant drove the juror from his office, and then communicated the facts to the counsel for the plaintiff. It was agreed in my presence that the juror should be ordered to leave the box. The counsel for plaintiff asked that he might be permitted to move for the dismissal of the offending juror, and to this the counsel for the defendant imprudently, as I thought at the time, consented. Thereafter the counsel for the plaintiff, in the course of his address to the jury, strongly insinuated, though he did not clearly charge, that the defendant had attempted to corrupt that juror, and that providentially he had discovered the contemplated crime. It is highly probable that some of the jurymen went into the jury room with the conviction that the defendant was resorting to the heinous crime of embracery to compass the defeat of an honest and meritorious claim. Whatever the cause may have been, the jury clearly rendered a verdict that is in conflict with the overwhelming weight of evidence and with the story of the accident that the plaintiff himself told at the hospital to Dr. Burke and policeman Moffitt.

It would be most unjust to allow the verdict to stand. Another jury may better administer justice. The jury were governed by partiality and prejudice, and were not guided by their reason, in giving the verdict, and I shall set it aside and order a new trial on the payment by the defendant of the costs of the last trial.

This is a fit occasion for repeating the words of Judge Bronson, in *Conrad* v. *Williams* (6 Hill, 451): "We do not often disturb the verdict of a jury on the ground that it is against evidence, but if it should not be done in a case like this, there is reason to fear that trial by jury would soon cease to be a blessing, and fall into discredit with the people."

Order accordingly.

George Leiegne, Plaintiff, *against* Joseph Schwarzler *et al.*, Defendants.

[Special Term.]

(Decided April 25th, 1884.)

Where, in the notice of claim of a mechanic's lien, the name of the owner of the building has been, by mistake, incorrectly stated, the error may be cured in a proceeding to enforce the lien, by setting forth in the complaint the mistake and averring the true owner, if no injury to him can arise thereby.

The complaint in an action brought by a subcontractor to foreclose a mechanic's lien, must contain an allegation that something was due from the owner to the contractor, under the contract, when the action was brought; but the omission of such an averment may be cured by amendment.

Trial of action to foreclose a mechanic's lien.

The facts are stated in the opinion.

George F. Langbein, for plaintiff.

Julius Lippman, for defendants.

CHARLES P. DALY, Chief Justice.—The question in this case is whether an error in the name of the owner in the notice of claim can be corrected in the complaint, by setting forth the mistake and averring the true owner. Formerly this could not be done; but now, I think, it can be.

We held in *Beals* v. *Congregation B'nai Jeshurun* (1 E. D. Smith, 654) that all the particulars which the claimant was required to specify in the notice creating the lien were material; that these particulars, in the language of my former colleague, the late Judge WOODRUFF, "were wisely provided for, to enable the county clerk to make the proper docket; to give early notice to owners that their property was sought to be charged; and to protect third persons (purchasers or mortgagees) by apprising them of the alleged claim; and that, among these requisites of the notice, no one was more important for these purposes than that the name of the owner should be stated." And in *Conklin* v. *Wood* (3 E. D. Smith, 662), we held that the omission of any of the particulars required by the statute in the notice of the claim was fatal and could not be amended. In accordance with these early cases it was therefore repeatedly held afterwards, in this court and in other States (*Hoffman* v. *Walton*, 36 Mo. 613; *Hicks* v. *Murry*, 43 Cal. 515; Philips on Mechanics' Liens, p. 484, § 347), that the facts required in the notice must be averred in the complaint to show a cause of action, the action being founded upon the lien; and that if the notice was defective by the omission of the name of the owner or of any thing which the statute required, it was not amendable, and the action could not be maintained.

When these decisions, however, were rendered, the lien laws then in force required the county clerk to docket all the particulars contained in the notice of the claim, in a book to be kept in his office called the lien docket. The acts required this docket to be suitably ruled in columns headed "claimants,

"against whom claimed," "owners," "building," "amount claimed," "date of notices," "hour and minute," and "what proceedings have been had," and that the names of owners and persons against whom the claim was made should be inserted in alphabetical order. As early as 1851, among the particulars required to be stated in the notice was "the name of the owner of the building" (L. 1851, c. 513, § 4). And this was required in all subsequent acts down to the enactment of the lien law of 1863, by which act this was dispensed with, and other material changes were made. All that was required by this act of 1863, in the notices, was the name and residence of the claimant, the amount claimed, from whom and to whom due, and with a brief description of the premises by street number, diagram, or boundary, or by reference to maps open to the public, "so as to furnish information to persons examining titles and the supposed owner." This act also declared (§ 6) that no error in the owner's name should impair the validity of the lien; and no entry was required by it of the owner's name in the docket as in the previous acts. It simply provided that the docket should contain—1st, the name and residence of the claimant; 2d, the person against whom the claim was made; 3d, the amount; 4th, the date of filing; 5th, and the street and particular place where the premises were located, in such manner as to be convenient in searching for the liens, by street or block. The lien law was amended further in 1875 by an act still in force (L. 1875, c. 379), which act (§ 8) required a statement in the notice of the name of the owner or reputed owner, if known (§ 7); but did not require any entry of the owner's or reputed owner's name in the lien docket; the provisions in this respect being substantially the same as under the preceding act of 1863.

Since 1863, therefore, the name of the owner had not been required in the lien docket, the entry of it being no longer deemed necessary to give notice to the owner or to protect third persons purchasing, or mortgagees, and, in accordance with that and the subsequent act of 1875, the principal docket now, or first column, is a representation of the street and block where the property is situated and the street number,

that being considered, with the other particulars, sufficient to give notice to all persons who can possibly be affected by the creation of the lien. The omission therefore, now, of the owner's name in the docket, as also the provision of the act of 1863, that no error in the owner's name should impair the validity of the lien, shows very clearly that the intention was to relieve mechanics and material-men from the obligation they were previously under—which it was sometimes difficult to comply with—of obtaining the name of the owner, and inserting it in the notice, that it might be incorporated in and form part of the docket of the lien, before they could file the notice which created the lien. As the law now is, the mechanic or material-man may insert the name of the owner or, if he does not know who the owner or reputed owner is, he may state that fact, which dispenses with the name of any owner in the notice; and as no entry of the owner's name in the docket is now required, I see no reason why the lienor should not be allowed to correct any mistake or error in the name of the owner in the notice, by proper averments in the complaint, as no injury can arise to anyone thereby (*Hubbell* v. *Schreyer*, 15 Abb. Pr. N. S. 304, per ALLEN, J.; *Young* v. *Doying*, N. Y. Com. Pl. Sp. T., April, 1884; Kneeland on Mechanics' Liens, 208, § 191; Phillips on Mechanics' Liens, 10).

In the case first cited, of *Hubbell* v. *Schreyer*, which was a review by the Court of Appeals of a judgment of this court, it was declared by ALLEN, J., who delivered the opinion of the court, that the lien law was a remedial statute, as furnishing a summary remedy for the recovery of the claims provided for; and while it was to be strictly construed, so far as to require a substantial compliance with every material provision by which the property of a third person may be incumbered, and a cloud put upon the title, by the mere act of the claimant, it was not to be so strictly and hypercritically interpreted as to deprive creditors of the benefit intended to be conferred; that it was to be construed in the same spirit with which it was enacted, and so as to carry out the benign intent of the legislature, by which nothing was to be taken by im-

plication against the owner, or to the prejudice of his substantial rights, or so as to extend to persons or claims not clearly within its terms; and that the framers of the statute have, in a measure, indicated the spirit with which they would have the statute interpreted, and effect given to it. In that case, although the contract for the work was made by the claimant jointly with two others, and he united in the notice that the claim was due to him as the sole creditor, it was held that this did not affect the validity of the lien, as neither the owner nor anyone else could be misled thereby as to the particular claim intended to be inserted, and as to which a lien was sought to be created. If this was held in respect to the name of the claimant, which then, and as the law now stands, must be inserted in the notice of the claim and entered in the docket, what was said in respect to the liberal construction of the statute in connection with and as explanatory of this decision, is especially applicable in support of the conclusion I have arrived at—that an error in the owner's name in the notice may be cured by proper averments in the complaint, where no injury to the owner can arise thereby.

In this case it appears by the complaint that Joseph Schwarzler represented and stated that he was the owner of the building, to Joseph C. Adams, who did the carpenter work, and with whom the plaintiffs contracted for the work done by them; that Adams repeated to the plaintiffs the statement that Joseph Schwarzler made to him, that he was the owner; and they, believing this to be true, inserted his name in the notice and swore to the fact as of their own knowledge; that after they had filed their notice they discovered that the representation of Schwarzler was untrue; and that his brother, August Schwarzler, was the owner, Joseph Schwarzler being the builder or contractor with his brother, and that therefore they had made him (August Schwarzler) a party defendant in the action brought for the enforcement of the lien. I think they may do this, as I have already said; the statement of the ownership being no longer material to the extent that it was in the prior acts, when the name of the owner was not only inserted in the notice of the lien, but had to be

incorporated with and formed a part of the lien docket, which is no longer necessary.

In respect to the case of *McElwee* v. *Sanford* (53 How. Pr. 89), which the defendant relies upon, it will be sufficient to say that the changes which I have pointed out as having been made in the lien law are not referred to in the opinion, and I suppose were not considered.

The remaining objection, however, is well taken. There is no allegation in the complaint that there was anything due by the owner to the contractor, Joseph Schwarzler, under the contract when the action was brought to enforce the lien.

It has been held that this is a necessary averment in the complaint (*Bailey* v. *Johnson*, 1 Daly, 67, and cases there cited). In this respect, however, the complaint can be amended.

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In making a mortgage of personal property a printed form was used, in which a blank space was left for the description of the mortgaged property to be written in, followed by the printed words "and all other goods and chattels mentioned in the schedule hereunto annexed, and now in possession of the said party of the first part." Nothing was written in the blank space. The schedule annexed contained a very particular description of 90 distinct soda water apparatuses, and concluded with the words "and all of the above apparatuses and all other manufacturing and dispensing apparatus owned by me, whether in my place, or at my customers." *Held*, that a soda water apparatus, not in the possession of the mortgagor and not specifically described in the schedule, although in the possession of a customer of the mortgagor, was not embraced in the mortgage. *Matthews* v. *Sniffen*, 200

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CLAIM AND DELIVERY.

1. Goods having been replevied in an action therefor against the assignors and assignee in a general assignment for the benefit of creditors, they, to procure the return of the goods to them, gave the requisite undertaking for the delivery of the property to the plaintiff in replevin, if such delivery should be adjudged, and for the payment to him of such sum as might be recovered against them in the action. Upon trial of the replevin suit, the complaint was dismissed as against the assignee, but judgment for the delivery of the goods or their value was recovered by the plaintiff against the assignors; execution upon which was returned unsatisfied. *Held*, in an action upon the undertaking against the sureties therein, that they were not entitled to show, as a defense thereto, that the property when replevied was in the sole possession of the assignee, and that they executed the undertaking only on his behalf, and to procure a return of the property to him. *Auerbach* v. *Marks*, 171

2. In May and June, 1879, goods were purchased or ordered from the plaintiff, without any note or memorandum subscribed by the parties, or any acceptance of the goods or payment of purchase-money, within the requirements of the Statute of Frauds. The goods remained in the plaintiff's possession until August 14th, 1879, when, the purchasers having sent for them on the preceding day, they were delivered. Between the dates of the purchase and the delivery, the purchasers had become financially embarrassed, and on August 20th, 1879, made a general assignment for the benefit of creditors, with preferences. *Held*, in an action of replevin for the goods by the vendor against the assignee, that the circumstances warranted an inference by the jury of fraud on the part of the purchasers in obtaining the delivery of the goods on August 14th, 1879; and that, as there was no valid contract of sale before such delivery, a verdict for the plaintiff should be sustained. *Talcott* v. *Einstein*, 210

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1. In an action for the recovery of personal property, the plaintiffs, three in number, claimed the property under a mortgage of it to a firm whose name was identical with that of one of them, but there was no evidence that the plaintiffs composed such firm, or that any interest in the mortgage had been assigned to the other two of them. *Held*, that the defense of misjoinder of parties having been set up, judgment was properly given for the defendants. *Matthews* v. *Sniffen*, 200

2. A complaint alleged a fraudulent transaction between persons not parties to the action, as the result of which promissory notes and securities therefor, given by the defendant in payment of his subscription for certain stock, were delivered back to him, upon the surrender of such stock, and that he, though not a party to the alleged wrongful transaction, had knowledge of it and received the benefit of it; and prayed that the transaction be declared wrongful, the notes and securities restored, and judgment rendered against the defendant on the notes. *Held*, that the parties to the alleged wrongful scheme were necessary parties to the action, and that a demurrer for defect of parties, in that they were not joined as defendants, should be sustained. *Alexander* v. *Katte*, 506

PARTNERSHIP.

1. Where, after an insolvent limited partnership has made an assignment for benefit of creditors, general creditors of the partnership have brought an action to set aside the assignment, and for a receiver of the copartnership property and an injunction restraining any disposition of such property, without first proceeding to judgment and execution against the debtors, a receiver may, nevertheless, be appointed and an injunction granted, in order to prevent a dissipation of the copartnership assets. *Whitcomb* v. *Fowle*, 23

2. An assignment, by members of an insolvent copartnership, of the firm property, for the benefit of creditors, is rendered fraudulent and void by the preference of an individual indebtedness of one copartner. *Schiele* v. *Healy*, 92

3. Under an assignment, by members of an insolvent copartnership, of their copartnership and individual estate, for the benefit of creditors, if the individual estate of one of the assignors is more than sufficient to pay his individual indebtedness, the claims of his individual creditors are to be paid in full, with interest to the date of distribution. *Matter of Duncan*, 95

4. A judgment that the copartnership of which an imprisoned debtor was a member has been guilty of a fraudulent disposition of their firm property does not necessarily preclude his discharge from imprisonment under an execution on such judgment, if his personal participation in the fraud is not shown. *Matter of Benson*, 166

5. Articles of copartnership between the plaintiff, his wife, and the defendants, recited that the plaintiff and his wife had each contributed certain machinery, tools, &c., of a specified value, and that each of the defendants had contributed cash in various amounts to the capital stock; and it was agreed that on the termination of the copartnership the assets should be distributed by repaying to each the amount of capital contributed by him, and dividing the balance equally; and the plaintiff and his wife agreed, in such distribution, to receive the machinery, tools, &c., contributed by them, at the same value it represented in the