This is a Key-Numbered Volume

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THE

NEW YORK SUPPLEMENT

WITH KEY-NUMBER ANNOTATIONS

VOLUME 143

PERMANENT EDITION

(NEW YORK STATE REPORTER, VOL. 177)

CONTAINING THE DECISIONS OF THE

SUPREME AND LOWER COURTS OF RECORD OF NEW YORK STATE

WITH TABLE OF NEW YORK SUPPLEMENT CASES THAT HAVE BEEN PASSED UPON BY THE COURT OF APPEALS

SEPTEMBER 1 — DECEMBER 8, 1913

ST. PAUL
WEST PUBLISHING CO.
1914

(143 N.Y.S.)

JUDGES

OF

THE COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

SUPREME COURT—First Department.

Justices of the Appellate Division.

GEORGE L. INGRAHAM, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

CHESTER B. McLAUGHLIN.
FRANK C. LAUGHLIN.
JOHN PROCTOR CLARKE.
FRANCIS M. SCOTT.
VICTOR J. DOWLING.
HENRY D. HOTCHKISS.

Justices of the Appellate Term, 1913.

January.

SAMUEL SEABURY, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

IRVING LEHMAN.
ALFRED R. PAGE.

February.

SAMUEL SEABURY, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

JAMES W. GERARD.[1]
NATHAN BIJUR.

March.

IRVING LEHMAN, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

JAMES W. GERARD.[1]
JOHN J. DELANY.

April.

CHARLES L. GUY, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

JAMES W. GERARD.[1]
ALFRED R. PAGE.

[1] Resigned.

First Department—Cont'd.

Justices of the Appellate Term, 1913—Cont'd.

May.

IRVING LEHMAN, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

NATHAN BIJUR. EDWARD C. WHITAKER.

June.

SAMUEL SEABURY, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

ALFRED R. PAGE. NATHAN BIJUR.

October.

SAMUEL SEABURY, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

CHARLES L. GUY. NATHAN BIJUR.

November.

IRVING LEHMAN, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

ALFRED R. PAGE. EDWARD C. WHITAKER.

December.

SAMUEL SEABURY, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

CHARLES L. GUY. NATHAN BIJUR.

Justices of the First District.

P. HENRY DUGRO.
JAMES A. BLANCHARD.
SAMUEL GREENBAUM.
EDWARD B. AMEND.
VERNON M. DAVIS.
JOSEPH E. NEWBURGER.
JOHN J. BRADY.
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JOHN FORD.
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JOHN W. GOFF.
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M. WARLEY PLATZEK.
SAMUEL SEABURY.
JAMES W. GERARD.[1]
IRVING LEHMAN.
NATHAN BIJUR.
EDWARD J. GAVEGAN.
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JOHN J. DELANY.
DANIEL F. COHALAN.
FRANCIS K. PENDLETON.
THOMAS F. DONNELLY.
EDWARD C. WHITAKER.
EUGENE A. PHILBIN.[2]
BARTOW S. WEEKS.[3]
BENJAMIN N. CARDOZA.[4]

[1] Resigned.
[2] Re-elected November, 1913.
[3] Term expired December 31, 1913.
[4] Elected November, 1913.

Second Department.

Justices of the Appellate Division.

ALMET F. JENKS, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

MICHAEL H. HIRSCHBERG.[5] WILLIAM J. CARR.
JOSEPH A. BURR. ADELBERT P. RICH.
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HARRINGTON PUTNAM.[6]

Justices of the Appellate Term, 1913.

March.

GARRET J. GARRETSON. ABEL E. BLACKMAR.
ISAAC M. KAPPER.

May.

GARRET J. GARRETSON. FREDERICK E. CRANE.
ISAAC M. KAPPER.

October.

SAMUEL T. MADDOX. WILLIAM J. KELLY.
LUKE J. STAPLETON.

December.

SAMUEL T. MADDOX. WALTER H. JAYCOX.
JOSEPH ASPINALL.

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JOSEPH ASPINALL. HARRINGTON PUTNAM.[6]
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FREDERICK E. CRANE. GARRET J. GARRETSON.
WALTER H. JAYCOX. CHARLES H. KELBY.
TOWNSEND SCUDDER. RUSSELL BENEDICT.
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DAVID F. MANNING.

Justices of the Ninth District.

MARTIN J. KEOGH. ISAAC N. MILLS.
MICHAEL H. HIRSCHBERG.[5] JOSEPH MORSCHAUSER.
ARTHUR S. TOMPKINS.

[5] Given six months' leave of absence on account of sickness.
[6] Appointed to Appellate Division, Second Department, March 1, 1913, in place of Michael H. Hirschberg.

Third Department.

Justices of the Appellate Division.

WALTER LLOYD SMITH, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

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GEORGE F. LYON.
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Justices of the Fourth District.

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Justices of the Sixth District.

ALBERT H. SEWELL.
ALBERT F. GLADDING.
M. H. KILEY.

Fourth Department.

Justices of the Appellate Division.

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NATHANIEL FOOTE.
JOHN S. LAMBERT.
EDGAR S. K. MERRELL.

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IRVING R. DEVENDORF.
PASCAL C. J. DE ANGELIS.
EDGAR S. K. MERRELL.
IRVING G. HUBBS.
E. C. EMERSON.
LEONARD C. CROUCH.

Justices of the Seventh District.

ARTHUR E. SUTHERLAND.
WILLIAM W. CLARK.
GEORGE A. BENTON.
SAMUEL N. SAWYER.

Fourth Department—Cont'd.

Justices of the Eighth District.

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LOUIS W. MARCUS.
CUTHBERT W. POUND.
CHARLES B. WHEELER.
EDWARD K. EMERY.
CHARLES H. BROWN.
CHARLES A. POOLEY.
HERBERT BISSELL.

CITY COURT OF NEW YORK.

EDWARD F. O'DWYER, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

FRANCIS B. DELEHANTY.
JOSEPH I. GREEN.
JOHN V. McAVOY.
ALEXANDER FINELITE.
PETER SCHMUCK.
EDWARD B. LA FETRA.
RICHARD T. LYNCH.
RICHARD H. SMITH.
ROBERT L. LUCE.

*

CASES REPORTED

CASES

IN THE NEW YORK SUPPLEMENT WHICH HAVE BEEN PASSED UPON BY THE COURT OF APPEALS

THE

NEW YORK SUPPLEMENT

VOLUME 143

NORTHLAND RUBBER CO., Inc., v. INTERNATIONAL AUTOMOBILE LEAGUE et al.

(Supreme Court, Equity Term, Erie County. August, 1913.)

1. INJUNCTION (§ 57*)—VIOLATION OF CONTRACT—CANCELLATION.
An injunction will not be granted to restrain defendant's alleged violation of certain written contracts, where it appeared that before suit brought the parties on a sufficient consideration had agreed to cancel the contracts and terminate their relations by a settlement, in the absence of evidence that the settlement agreement had been modified or waived.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111–113, 130; Dec. Dig. § 57.*]

2. SPECIFIC PERFORMANCE (§ 61*)—PARTIAL TERMINATION OF CONTRACT—ENFORCEMENT.
Plaintiff, after terminating and canceling part of a contract, cannot enforce its remaining provisions in equity.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 183–187; Dec. Dig. § 61.*]

Suit by the Northland Rubber Company, Incorporated, against the International Automobile League and others, for continuance of a temporary injunction. Denied.

George C. Riley, of Buffalo, for the motion.
Henry W. Killeen, of Buffalo, opposed.

LAUGHLIN, J. This is a suit in equity to enjoin violations of certain contracts made in writing on the 6th day of December, 1911, and the 30th day of September, 1912, respectively, by the plaintiff and the defendant the International Automobile League, which for brevity will be alluded to as the "League," and for damages for such violations and for the sum of $26,306.93, alleged to be a balance due and owing to the plaintiff from the League by virtue of another contract in writing bearing date September 30, 1912, executed by the plaintiff and the League on an accounting in and by which it was agreed that the balance then owing from the League to the plaintiff was the sum of $61,306.93.

The allegations of the complaint in so far as they relate to the plaintiff's claim to be entitled to said sum of $26,306.93 may be elimi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nated from consideration on this motion, for they merely show a cause of action at law, and no facts are alleged on which the plaintiff would be entitled to equitable relief with respect to that item.

The plaintiff is a domestic corporation. It was incorporated in August, 1910, under the name International Automobile League Tire & Rubber Company, to manufacture and deal in automobile tires, tubes, and accessories. Its name was duly changed to Northland Rubber Company, Inc., by order of the court on the 20th day of January, 1913. The League is also a domestic corporation, and it was incorporated, about a year prior to the incorporation of the plaintiff, to sell automobile tires and accessories to holders of contracts with it at or below dealers' prices, and ever since its incorporation it has been and is, in effect, owned and controlled by the defendant Alfred C. Bidwell, its president, who was instrumental in incorporating the plaintiff for the purpose of co-operating with the League in furnishing automobile tires, tubes, and accessories to the stockholders of the League holding its contracts for such supplies at manufacturers' prices. At the outset Bidwell dominated and controlled both corporations. After the plaintiff and the League had established and continued business relations for some time pursuant to various contracts, they entered into a contract in writing on the 6th day of December, 1911, by which the former agreements were readjusted, modified, and merged in that contract, and the provisions of the former agreements not incorporated in that contract were expressly abrogated.

The contract of December 6, 1911, recites that about one-half of the capital stock of the plaintiff had been sold by the League at par and its commissions for sales theretofore made were agreed upon; and it was provided that in an accounting for such sales the League should be allowed a specified amount for the premises No. 270 North Division street and a factory site on Northland avenue, title to which, it was recited, was then in the plaintiff, and the League was constituted plaintiff's sole sales agent, on a specified commission basis, for the unsold capital stock of the plaintiff until 9,500 shares of a total authorized issue of 10,000 shares were sold. It was provided that such sales should be made through the agencies theretofore employed by the League and on a general prospectus to be authorized and approved by it, and that all payments of stock subscriptions should be by checks, drafts, or money orders to the order of the plaintiff and should be immediately delivered by the League to the plaintiff. The plaintiff agreed to issue to each subscriber to its capital stock whose subscription was fully paid a contract obligating it to furnish the tires manufactured by it at cost, and agreed to build and equip a plant to manufacture tires and tubes, and the League agreed to adopt plaintiff's tires and tubes as the official tires and tubes of the League and to advertise the same by pamphlets and circulars and in its official catalogues and journals in all editions sent out to members, and endeavor to advance the sale thereof, and agreed to give plaintiff's officers access to its membership files. Paragraph 12 of that contract provides as follows:

"It is further agreed that the said League will, by means of its agency forces established throughout the United States and Canada, and consisting

of about three hundred representatives and established agencies, do all things necessary and proper to promote the publicity and sale of the tires, tubes and products manufactured by the tire company, and will use its utmost endeavor to induce all of the contract holders of said League to purchase and use the products of the said tire company; and the said tire company likewise agrees to sell to the said League so long as said League remains in business, all styles of tires and tubes to be manufactured by said company at prevailing automobile manufacture's market prices."

With an exception, which need not be considered, it was agreed that not more than ten shares of the capital stock of the plaintiff should be sold to any one party. It was further expressly agreed that the obligation of the League to sell plaintiff's tires and tubes as the official tires and tubes should be operative *only* while said Bidwell remained president or general manager of the plaintiff and general manager or in any way connected with the League. On August 24, 1912, Bidwell was removed as general manager of the plaintiff, and it appears by affidavit that on the 13th day of February, 1913, he resigned as its president. It is alleged in the complaint that at the time the agreements of September 30, 1912, were made Bidwell placed his resignation as president and director of the plaintiff in the hands of his attorney under an agreement "that the same should be delivered in the event that he again violated his obligations to the plaintiff, or did anything inimicable to its interests"; and it is further alleged, in effect, that on the discovery by the plaintiff of the fact that the League and Bidwell falsely and fraudulently misrepresented the amounts paid by the League for certain of the tires delivered to the plaintiff under the accounting contract of September 30, 1912, Bidwell tendered his resignation as president and director of the plaintiff and the same was duly accepted.

The agreement of September 30, 1912, recites that the agreement of December 6, 1911, provided, among other things, "for the exclusive services of the League in the sale of the first nine thousand five hundred (9,500) shares of the capital stock of the tire company, and for the services of the League in disposing of the output or product of the factory of the tire company," and that the League had, "or will shortly have," disposed of the amount of the capital stock of the plaintiff which it was authorized by said agreement to sell, and that the subscriptions had been turned over to the plaintiff and were in process of collection, and that the total of 10,000 shares of capital stock of the plaintiff "has been at this time substantially disposed of," and that the parties desired "to arrange for the continuance of the exclusive agency" provided for in the contract of December 6, 1911, "in the sale of at least seven thousand five hundred shares," and desired to provide for the compensation to be paid to the League for such services. The parties thereupon agreed, so far as material to this motion, that the League should act as agent for the plaintiff in selling its capital stock to the extent of 7,500 shares more on substantially the same terms as those embraced in the former contract, but with provisions regulating more definitely the obligations of the respective parties; but the provisions of the former contract with respect to the manufacture and sale of tires was "supplemented and amended" by a provision prescribing that the tires manufactured by the plaintiff should be adopted and

sold by the League as its official tires and should be sold by the plaintiff to the League "at such price as the League shall be able to purchase a tire of equal or better quality of any other manufacturer," and the plaintiff agreed to sell to the League at such prices the entire output of its factory not required to supply its own stockholders, and "to have all orders or requests for tires from its stockholders turned over to the League, to be filled as its distributing agent," and to use its best endeavors to have its stockholders continue as members of the League, and it was provided that, if the League should not render efficient service in filling orders for tires, the plaintiff was to be at liberty "to fill such orders direct," and in the distribution of such tires to the said stockholders the cost of distribution by said League "shall be considered an item of the cost of manufacture, and shall be paid to the League from such cost price obtained from the stockholders."

It was further provided that the prices at which tires were to be furnished by the tire company to the League to meet "the demands of its members" should be fixed by mutual agreement, and that if the League should claim, as therein provided, that the prices so fixed were in excess of the price at which tires of equal quality could be obtained by the League in sufficient quantity, or if the plaintiff should claim that the prices were inadequate, and the parties should fail to agree upon a new schedule of prices as therein provided, the question should be arbitrated. It was further provided, in effect, that the output of the plaintiff's factory should be furnished to the League to the extent required to meet its demands, and that the surplus, if any, should not be sold, except to be resold by manufacturers as part of their product, for a price less than that paid by the League. It was mutually agreed that the League should be at liberty to buy and sell other makes of tires "under their respective names," and plaintiff agreed not to establish or maintain any sales agents for the distribution or sale of tires without the approval of the League while the contract remained in force, and the League agreed that it would not promote the organization "of other tire manufacturing companies during the continuance of this contract." The plaintiff also agreed that it would not create or form a league membership, association, or organization, or furnish its stockholders with automobile accessories other than tires. It is alleged that the parties did agree upon the prices at which the tires were to be furnished to the stockholders of the plaintiff and to the stockholders of the League.

The theory upon which the plaintiff seeks equitable relief is that it has not an adequate remedy at law, and the complaint and affidavits contain appropriate allegations to entitle the plaintiff to a temporary injunction on that theory. The complaint contains allegations tending to show that the defendants have violated these contracts in many respects, and particularly by making changes in the printed forms of subscriptions for plaintiff's stock by which the subscriptions were to be made payable to the order of the League, in misappropriating such subscriptions when received, in causing misrepresentations to be made in the use thereof and with respect to the relations between the plaintiff and the League, and in causing its agents to accept checks pay-

able to the order of the League in payment of subscriptions to the capital stock of the plaintiff, and by failing and refusing to adopt and sell tires manufactured by the plaintiff as the official tires of the League, and by promoting the organization of other corporations for the purpose of manufacturing tires and in not performing the functions which it was contemplated by the agreements for co-operation between the plaintiff and the League should be performed by the League, and in inducing, by false and fraudulent representations, stockholders of plaintiff to assign their certificates of stock to Bidwell or others in exchange for stock in other corporations the organization of which was promoted by said Bidwell and the defendant League, and in inducing plaintiff's stockholders to believe that they would obtain like and more advantageous privileges by so doing, and by failing to continue the sale of the capital stock of the plaintiff, and by failing and neglecting to advertise and send out announcements to promote the publicity and sale of the plaintiff's tires, and by failing to deliver to the plaintiff orders for its tires received by the League and by placing such orders elsewhere, and by failing to afford plaintiff access to the correspondence files of the League, and by falsely and fraudulently representing to the stockholders of the plaintiff and the League that orders for the plaintiff's tires must be placed through the League, and by representing to the stockholders of the League that the output of the plaintiff's factory is inadequate to supply their requirements.

The complaint contains numerous allegations charging the League and Bidwell with having made false and fraudulent representations with respect to the assets of the League and its ability to promote the organization of another corporation to manufacture tires and representing that the plant of the plaintiff was the plant of another corporation so formed, and calculated to mislead the public into thinking that relations with the plaintiff were continued; whereas the League was attempting to promote the interests of other corporations. It is further alleged in the complaint that the plaintiff established its plant and commenced to manufacture tires about April 1, 1913, and has a capacity for turning out upwards of 100 tires per day. It is also alleged that, on account of repeated violations by the League of its contract obligations with the plaintiff concerning the sale of the plaintiff's capital stock, "the plaintiff finally advised the League that on and after a date named the authority of said League to act as the agent of the plaintiff in such stock sales would be terminated and that further subscriptions taken after May 10, 1913, would not be received, and thereupon the said League discontinued all sales of the stock of the plaintiff and has in many other respects failed to carry out and perform the terms and conditions of said contract in respect thereto." Plaintiff evidently is apprehensive that the League and Bidwell and their business associates will obtain stock control of the plaintiff, but that is no basis for injunctive relief. The stockholders of the plaintiff are at liberty to dispose of their stock as they see fit. There are other allegations of the complaint which have no material bearing on the relief demanded.

The defendants League and O'Shea appeared in opposition to the motion, and their counsel read certain affidavits and the answer of the

League. Their position is, in substance, that prior to the commencement of the action the contract relations of the plaintiff and the League were terminated by notices from the League to the plaintiff of its election to terminate the contracts on account of alleged violations thereof by the plaintiff. The principal item of evidence relied upon in support of this contention is a letter from the plaintiff to the League under date of April 26, 1913, which was received by the League on or about that date. By that letter the plaintiff complained that the League was not acting in good faith in carrying out the provisions of the two contracts to which reference is first made in this opinion, and reference is made to negotiations theretofore had between the parties and their attorneys with a view to adjusting their differences. Reference is then made to the settlement contract of September 30th, and the League is charged with fraud in inducing the execution thereof, and the plaintiff gave notice that on account of such fraud it elected to abrogate that contract and would call the League to account for the matters which purported to be adjusted thereby. After reciting the plaintiff's grievances, the letter contains the following:

"This and almost innumerable other reasons require that this company advise you of the termination to-day of your agency for the sale of capital stock of this company and that, in view of your attitude, this company will look to you for damages for failure to perform the contract in various particulars.

"Owing to the distances at which some of the agents now engaged in stock sales operate, and in view of the fact that they should in fairness receive some notice of the termination of your agency and authority to sell the stock of this company, we will accept from you such subscriptions as are obtained from such of your agents as may be still operating up to May 10th next, and you will be allowed the contract commission on all of such subscriptions that may be turned in before said date. * * *

"Regretting that your actions and attitude have necessitated this termination of your agency, and that you thus lightly treat the obligations imposed by your contracts and your relation to this company. * * *"

By a letter under date of May 23, 1913, addressed to the League, the plaintiff reiterated, by express reference, its attitude with respect to the cancellation of the League's agency for selling its stock. Under date of June 3, 1913, the plaintiff addressed a letter to one of its stockholders, in answer to an inquiry made by him concerning the relations between the plaintiff and the League, saying, among other things:

"The rubber company has severed all relations with the League, and will not be responsible for any statements they may make or the character of the goods furnished by them. We will not sell to the International Automobile League any part of our product, nor can they make delivery of our tires to their members unless they get such tires without our knowledge. * * *

"We are not advertising and never have. At the present time, the stockholders are taking all our product.

"Later we will sell to dealers at the manufacturer's profit any surplus that we may have. We could not consider at the present writing any agency proposition in regard to selling our tires."

Theretofore and on April 19, 1913, the attorney for the League had addressed the attorney for the plaintiff in writing with respect to negotiations, evidently theretofore had verbally between them, saying, among other things:

"The rubber company is thoroughly convinced that there is no longer any alternative than for it to terminate the contract relations between the companies on account of the persistent breaches of contract and failures to perform on the part of the League. * * * Having arrived at this conclusion, but still anxious to obtain those benefits, with the least possible friction, we propose to allow the contract arrangements to continue and to waive the failure to perform, for which we now have a cause of action against the League, upon which I believe substantial damages may be recovered, if it may be agreed: (1) That the tire company may proceed at once to sell the $250,000.00 of stock not covered by the League's contract, upon the same terms and conditions as to prices and stockholders' privileges as apply to League stock sales, such sales by the rubber company to cease when the League has brought its stock sales back to the average monthly amount of the sales for the year ending June 1, 1912; (2) that tire depot agencies may be established at such points as the rubber company may select upon the general basis adopted and agreed upon for the Denver agency; (3) and that upon the execution in writing of such modifications or additional agreement that the League reimburse the tire company for the amounts due on account of the L. & M. and Michilin tire discrepancies, concerning which between ourselves, you and I have practically reached an agreement."

The letter indicates that the League had manifested a desire to have plaintiff postpone action terminating the contract, and it was asserted that the plaintiff was desirous that its stockholders might enjoy the advantages which it was sought by the contracts to secure; and reference is made to a suggestion made by the attorney for the League concerning a proposal made by the attorney for the plaintiff of terms for the cancellation of the contracts, and assurance was given that the plaintiff had no desire to embarrass the League and would prefer to have the provisions of the contract carried out in good faith, and it was asserted that the plaintiff has, "to a great extent, fulfilled the obligations which it assumed under the contracts and the League and Mr. Bidwell have received upwards of $335,000.00 on commissions under the stock sale agreement, and all of the benefits which the tire manufacturing scheme gave the League in membership and patronage," and that the League had failed to advertise the plaintiff's tires as the official tire of the League, and that the plaintiff intended to obtain the benefit secured by the contract in that regard, "or substantial damages in lieu thereof." Allusion is then made to the provision of the contract by which the League was to take over from the plaintiff certain property on the 1st of January, 1914, which, it asserted, must be carried out in accordance with the agreement, and the letter then continues as follows:

"If your client desires to terminate the contract and be relieved of all obligation thereunder, I am authorized to advise you that the same may be done upon this basis: (1) Reimbursement of the rubber company for the L. & M. damage suit upon the basis already offered you; (2) reimbursement for the Michilin discrepancy for the amount agreed, already adjusted; (3) payment of back taxes on No. 270 North Division street, and execution of a lease for the future, if desired; (4) indemnity against any judgment in the Anderson suit; (5) reimbursement of L. & M. tire discrepancy, amounting to $2,237.28; (6) all the obligations of the League, including contract to purchase North Division street property, adoption of official tire, advertising of product, etc., to be canceled; (7) the balance due under the September 30th contract to be extended until such time as all the commissions for stock sales shall be credited to the account, and if there is a balance due the tire company, the same to be paid within thirty days after adjustment. If commissions are due the League, payment to be made on the same basis.

"If the League desires to buy the products of the rubber company, an arrangement for such supply may be made upon a basis approximately ten (10) per cent. below the retail price of the rubber company.

"We are submitting the two propositions above stated with the idea of reaching an understanding and allowing Mr. Bidwell to follow which course he deems the most advantageous."

By letter under date of May 8th, the League through its attorney accepted the proposition contained in said letter of April 19th, and, although it is not expressly stated which proposition is accepted, it fairly appears by other provisions of the letter that the second proposition for terminating the contract relations between the parties was intended to be accepted. That letter also contained various suggestions with respect to carrying into effect the acceptance of the proposition. It appears that the adjustment was not made as contemplated; but the acceptance of the proposition was unconditional and would seem to constitute a binding contract. Considerable other correspondence between the parties was presented, and it appears that there were negotiations subsequent to the letters to which express reference has been made between the attorneys for the respective parties, the effect of which is not fully presented by the record now before the court. There is also evidence from which it is claimed that the continuance of the contracts in full force was subsequently recognized by both parties; but I do not think that it has been so shown. I therefore refrain from expressing an opinion on the merits as they may be developed on a further application or on the trial of the case by common law evidence. It is, however, incumbent upon the plaintiff in order to entitle it to a temporary injunction to establish a prima facie case for equitable relief by the final judgment of the court.

[1] I am of opinion that on the record now before the court it presumptively appears that the contracts, the violations of which the plaintiff seeks to restrain, have been terminated and are no longer binding on the defendants. It may be argued that it should not be held that it was within the power of Bidwell by resigning to terminate the contracts and deprive the plaintiff of the fruits thereof, and yet such is the contract of the parties if it be literally construed; but it is unnecessary to decide whether the continuation of the injunction should be denied on that ground alone, for the plaintiff elected, on account of alleged violations of the contract by the League, to cancel the selling agency of the League, which was a material provision of the contract, and the parties apparently agreed to terminate their contract relations by a settlement contract which apparently rested on a good consideration. In the absence of evidence by negotiations or otherwise of a withdrawal of such election or of a waiver on the part of the League to accept and regard the same as a cancellation of the entire contract, or of a recognition subsequently by both of the continuance of the contract, it must be held that plaintiff is not in a position to invoke the aid of a court of equity in enforcing the contracts. The other letters of the plaintiff to which reference has been made indicate that its action was deliberate, and they are not susceptible of the construction urged by the learned counsel for the plaintiff that the plaintiff merely

intended to suspend temporarily the right of the League to sell its stock on account of violations of the contract by the League.

[2] The plaintiff cannot, after terminating and canceling part of the contract, enforce in equity its remaining provisions. It presumptively appears that it has elected to stand upon its remedy at law for damages.

It follows, therefore, that the motion for the continuance of the injunction should be denied, but without prejudice to a renewal on further proof as indicated herein, and, inasmuch as it appears that both the League and O'Shea have violated the injunction, the denial of the motion is without costs.

NORTHLAND RUBBER CO., Inc., v. INTERNATIONAL AUTOMOBILE LEAGUE et al.

(Supreme Court, Equity Term, Erie County. August, 1913.)

1. INJUNCTION (§ 219*)—VIOLATION—CONTEMPT—PUNISHMENT.
It is essential to sustain a conviction for civil contempt in violating an injunction that plaintiff show a cause of action for equitable relief.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 439–441; Dec. Dig. § 219.*]

2. INJUNCTION (§ 219*)—CRIMINAL CONTEMPT—VIOLATION OF INJUNCTION—PLAINTIFF'S RIGHT TO RELIEF.
Since punishment as for criminal contempt is imposed for violation of an injunction to maintain the dignity of the court, and the fine imposed inures to the public and not to the complaining party in the action, it is not essential to a conviction for a criminal contempt in violating an injunction that plaintiff should be entitled to equitable relief in the action.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 439–441; Dec. Dig. § 219.*]

3. INJUNCTION (§ 229*)—CRIMINAL CONTEMPT—PUNISHMENT.
Under Judiciary Law (Consol. Laws 1909, c. 30) § 750, subd. 3, authorizing a court to punish for a criminal contempt a person guilty of willful disobedience of the court's lawful mandate, and Code Civ. Proc. §§ 603, 606, authorizing the issuance of injunctions and the enforcement thereof, as an order of court, where a complaint for an injunction was sufficient to give the court jurisdiction of the subject-matter, and summons had been served on defendants, the court had jurisdiction to punish them as for a criminal contempt for violating the injunction of which they had notice.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 496–501; Dec. Dig. § 229.*]

Action by the Northland Rubber Company, incorporated, against the International Automobile League and others, on return of an order to show cause why the defendants International Automobile League, James J. O'Shea, and others, should not be punished for contempt for violating a temporary injunction, granted ex parte July 9, 1913. Defendants found guilty and punished.

George C. Riley, of Buffalo, for the motion.
Henry W. Killeen, of Buffalo, opposed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LAUGHLIN, J. The nature of the action is sufficiently stated in the opinion filed concurrently herewith, on a motion for the continuance of the injunction. The plaintiff demands relief, among other things, enjoining the defendants from either directly or indirectly, personally or otherwise, promoting the organization of, or dealing in, exchanging, offering to exchange, offering for sale, or engaging in the sale of the stock of the Western I. A. L. Purchasing Corporation, or the International Automobile League Tire Company, or the League of Canadian Automobilists, Limited, and from circularizing the stockholders of the plaintiff with a view to inducing them to surrender their certificates of capital stock in exchange for certificates of capital stock in other corporations.

The evidence satisfactorily shows that the injunction order was duly granted, and was duly served on the defendants International Automobile League and O'Shea, who was in the employ of said corporation, and that thereafter circulars were mailed by said defendant corporation to stockholders of the plaintiff in violation of said injunction order. Although the evidence does not expressly show that the defendant O'Shea committed any affirmative act in violation of the injunction order after it was served upon him or came to his knowledge, it satisfactorily shows that he knowingly suffered and permitted the violation of said order by agents and employés of said corporation who were subordinate to him and under his direction and control, and failed to take steps, as was clearly his duty, to have the injunction order observed both in letter and in spirit.

The order to show cause, on which the motion was brought on, does not recite that the alleged violations of the injunction order were calculated to or did defeat, impair, impede, or prejudice any right or remedy of the plaintiff, and it does not appear by the moving papers whether it was claimed that the alleged violations constituted a criminal or a civil contempt, nor did it appear on the argument.

The motion to punish for contempt was heard first, and after the court announced its views thereon to the effect that said International Automobile League and O'Shea were guilty of a willful violation of the injunction order, and at the close of the hearing on the motion for the continuance of the injunction, in answer to an inquiry to the attorney for the plaintiff by the court as to whether it was claimed that the said defendants were guilty of a criminal or a civil contempt, the attorney answered that he contended that they were guilty of a civil contempt.

It is extremely doubtful, as indicated in the other opinion, whether the complaint states a cause of action, inasmuch as it shows an attempt on the part of the plaintiff to cancel and terminate material parts of the contracts to restrain the violation of which the suit is brought.

[1] It is essential, to sustain a conviction for a civil contempt, that the plaintiff should show a cause of action for equitable relief. People ex rel. Gaynor v. McKane, 78 Hun, 154, 28 N. Y. Supp. 981; Bachman v. Harrington, 184 N. Y. 458, 77 N. E. 657.

I am of opinion, therefore, that said defendants cannot be punished as for a civil contempt.

[2] The court, however, is not limited in deciding the motion, by the request of the plaintiff's attorney, that the defendants be punished as for a civil contempt. The rule with respect to an adjudication for a criminal contempt is different. In such case punishment is imposed for the purpose of maintaining the dignity of the court representing the people of the state, and the fine imposed inures to the public, and not, as in the case of a civil contempt, to the party to the action who is aggrieved. People ex rel. Stearns v. Marr, 181 N. Y. 463, 74 N. E. 431, 106 Am. St. Rep. 562, 3 Ann. Cas. 25.

[3] Section 750, subd. 3, of the Judiciary Law (chapter 35 of the Laws of 1909; chapter 30 of the Consolidated Laws) authorizes a court of record to punish for a criminal contempt a person guilty of a "willful disobedience of its lawful mandate." The complaint in this action gave the court jurisdiction of the subject-matter, and service of the summons on said defendants gave the court jurisdiction over them. A justice of the court was authorized and empowered, by sections 603 and 606 of the Code of Civil Procedure, to issue the injunction order, and it is expressly provided by said section 606 that such an order "may be enforced as the order of the court." The court therefore is authorized to punish a willful violation of the order as a criminal contempt. Erie R. Co. v. Ramsey, 45 N. Y. 637; Tremain et al. v. Richardson, 68 N. Y. 617; People ex rel. Illingworth v. Oyer & Terminer, 10 App. Div. 25, 41 N. Y. Supp. 702; People ex rel. Drake v. Andrews, 197 N. Y. 53, 90 N. E. 347, 18 Ann. Cas. 317; Wicker v. Dresser, 13 How. Prac. 331.

Section 751 of the Judiciary Law provides that punishment for a criminal contempt may be by fine not exceeding $250, or by imprisonment, not exceeding 30 days in the jail of the county where the court is sitting, or both, in the discretion of the court; but the court is not authorized in such case to allow costs. People ex rel. Stearns v. Marr, supra.

When the injunction order was served upon said defendants, or was brought to their attention, it was their duty to obey its provisions, both in letter and in spirit, and to take active steps to prevent its violation by any one acting in behalf of, or subject to the order or control of, either of them. It was not for either of them to question the authority of the court, or to be influenced by what they or either of them deemed to be the merits of the case. If they deemed themselves aggrieved by the order, they were at liberty to apply forthwith, ex parte, to the justice who granted it to request that the propriety of granting it be reconsidered and that it be vacated on the moving papers, or they were at liberty to move at Special Term, on notice, to have it vacated; but, so long as it remained in force, the dignity of the people of the state, and of the court, required that it be fairly and honestly observed. Therefore, notwithstanding the fact that the order is to be vacated, said defendants must be punished. The corporation cannot be imprisoned, but it may be fined, and it is adjudged guilty of a criminal contempt, and fined $250. The evidence renders it quite probable that the defendant O'Shea did not fully realize his duty, and that, in suffering the violation of the injunction order by others subordinate to him, he was influenced by the defendant Bidwell, who was president of the

corporation and his superior officer, and therefore a lighter punishment should be imposed upon him. He is adjudged guilty of a criminal contempt and fined $50.

Let an order in appropriate and usual form be entered accordingly.

DEAN v. CARROLL et al.

(Supreme Court, Equity Term, Erie County. July, 1913.)

1. HIGHWAYS (§ 7*)—ESTABLISHMENT BY USER.
A road never laid out and established by the town authorities, but traveled by the public for 20 years, and either kept in repair by or taken in charge of the public authorities, is a highway.
[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 10, 12–14, 16, 18; Dec. Dig. § 7.*]

2. HIGHWAYS (§ 14*)—ESTABLISHMENT BY USER—LOCATION.
Location of a highway established by user for 50 years is defined by substantial fences erected on both sides by the abutting owners and maintained for the last 40 years of such period.
[Ed. Note.—For other cases, see Highways, Cent. Dig. § 21; Dec. Dig. § 14.*]

3. HIGHWAYS (§ 83*)—ABUTTING OWNERS—QUARRYING STONE.
The owner of the abutting lands and the fee of a country highway has the right to quarry the stone under it; he constructing and maintaining a good temporary road during the time of removal and thereafter restoring the highway.
[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 292, 293; Dec. Dig. § 83.*]

Action by Mary Dean against William E. Carroll and another. Judgment for plaintiff.

William D. Van Pelt, of Buffalo, for plaintiff.
Clinton, Clinton & Striker, of Buffalo, for defendants.

POOLEY, J. This is an action to abate a nuisance, to compel defendants to restore a highway, and for damages.

Plaintiff for many years has been, and now is, the owner in fee of a farm of about 41 acres, fronting upon the Sulphur Spring Road, otherwise known as the Fogelsonger Road, in the town of Amherst, Erie county, N. Y., and distant northerly about one-half mile from the main road leading from Buffalo to Williamsville, and beyond. On this farm is located a gristmill patronized by farmers in the vicinity.

The defendants for several years have been the owners in fee of the premises fronting on this main road and extending both sides and including the Sulphur Spring Road, subject to the right of the public to use it.

[1] It does not appear that this road was ever laid out and established by the town authorities, but it does appear that it has been used as a public highway for over 50 years in the sense that people have freely passed over it. To make it a public highway, it must have been traveled by the public for 20 years, and either kept in repair by or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

taken in charge of the public authorities (Speir v. Town of Utrecht, 121 N. Y. 420, 24 N. E. 692), and, where it appears that there has been such a user by the public for more than 20 years as would have justified the record of the road as a highway by the proper authorities, "their failure to perform their duty does not change the mandate of the statute that the road shall be deemed a public highway." Lewis v. N. Y., L. E. & W. Ry. Co., 123 N. Y. 496, 501, 26 N. E. 357, 359.

There is some recognition of it by the defendants in that they applied to the commissioners of highways of the town for permission to construct and maintain a railroad switch upon and across this road, and contracted with them for the temporary changing of the road, and they do not dispute the contention that it is a public highway.

[2] Assuming then that it is established as a highway, the next proposition is to correctly locate it. A road that has not been recorded or accurately defined by public authority can best be located by physical conditions on the ground. It is contended by plaintiff that taking as a fixed point the location of certain iron pipes in this road at the north end of defendants' land, defining the center line, this line extended southerly from this point to the main road would constitute the center line throughout its length. Defendants contend differently, and both sides have called expert surveyors to solve the problem, the solution of which involves the location of a stone crusher, and the question as to whether or not it encroaches upon this road.

The defendants have shown that the former owners of this property had a large stone house on the west side of this road, and facing the main road; and that they had erected and maintained substantial picket fences on both sides of the road in question for 40 years, and up to the time when defendants commenced the excavations complained of, and which will be later referred to. These picket fences were 33 feet apart with the roadway practically midway between. These facts are not disputed, and, inasmuch as they define the road as used for 40 years, they must be regarded as conclusive. The road as thus defined is not encroached upon by the structure used as a stone crusher.

[3] The defendants, being owners of the fee, subject to the right of the public to use the surface of the road as a highway, the right of the owner to excavate within its bounds is next to be considered. It appears without dispute that a large part of defendants' land, including the portion used as a highway, was underlaid by valuable stone suitable for building and other purposes. They had quarried this stone up to the north line of said road, and then applied to the town board for permission to take out the stone beneath the road. The board authorized the making of a contract between the defendants and the town, the terms of which were that the removal of the stone was permitted on consideration that they restore the road to its original condition, and that they build a road, macadamized with stone to the satisfaction of the highway commissioners of the town. The only point of difference regarding the contract was that of the time within which the road was to be restored. Mr. Ouchie, town clerk, testifies that it was to be within two years from the date of the contract, while Mr. Carroll, one of the defendants, testifies that it was to be

within two years of the time they began to make the excavation. The contract was executed in the summer of 1909, and the excavation began in the summer of 1910. This action was commenced April 2, 1912. The temporary road was made and maintained, starting about 450 feet north of the main road between Buffalo and Williamsville, and curving to the east, and striking said main road about 350 feet east of the original road, and it so continues, notwithstanding the expiration of the two years. The defendants have testified that it was their intention to fill the excavation and restore the road within the time agreed upon, but owing to labor conditions they were unable to do so, but that they intended to do so as soon as conditions permitted. The temporary road so constructed was and is as good a road as the old; the difference being that it is not straight. The defendants ceased operating the stone crusher in 1911.

The evidence warrants the conclusion that, during the operation of excavation, the temporary roadway was shifted several times as the work progressed, and the road therefore could not be and continue a good road for travel. Since the operation was discontinued, the road has come to be as good as the remaining part of this highway.

At the suggestion of counsel on both sides, and in their company, I visited the property, and am satisfied as to this fact. It cannot be said, however, that the method adopted, of shifting the road from time to time, conformed to the contract. If the road, as now maintained and used, had been laid before any excavation within the old highway lines had been made, and which was fairly within the contemplation of the contract, the plaintiff would have had little, if any, cause to complain. It is out in the open country, and, while the property in the vicinity is used for farming purposes, the stone beneath the surface of the ground upon this property of the defendants is probably of far greater value than the land would be for farming purposes.

In Town of Clarendon v. Medina Quarry Co., 102 App. Div. 217, 92 N. Y. Supp. 530, almost the identical situation and conditions are presented, and it was held that the defendant had the right to remove the stone. See, also, Dygert v. Schenck, 23 Wend. 446, 35 Am. Dec. 575; Sweet v. Perkins, 115 App. Div. 784, 101 N. Y. Supp. 163; Tinker v. N. Y., O. & W. Ry., 157 N. Y. 312, 51 N. E. 1031.

This case narrows down to the question whether or not the defendants, in making this excavation, have done so with due regard to the rights of the public and in a manner to not unreasonably interfere with those rights. The reason offered for their failure to fill and restore the road, while forceful, is not conclusive. Laborers are employed on other work, public and private, and so could have been put upon this work. It is clear, of course, that with laborers scarce a prudent man would place them to his best advantage; but here is a duty to the public, and, while perhaps unremunerative to defendants, it should be done. The public are entitled to have the road restored.

The plaintiff contends that she has been damaged. Whether the road strikes the main road at one point, or 350 feet eastward, except for the fact of the turn, is of little consequence. Roads deviating from a straight line are not confined to the country, and even in cities

and villages they are common, and occasion little, if any, inconvenience, and the damage from this cause would, at best, be nominal. But I think the shifting of the road from place to place would result in inconvenience, and the evidence fairly indicates that for some considerable time the road was bad and not in accord with the contract.

The conditions, however, are temporary, and not permanent, and, when the road is restored, it cannot be said that the land of the plaintiff will be less valuable than before, or its rental value decreased.

I think $100 is ample to cover all damages sustained, and judgment may be entered for that amount, with costs. Findings may be prepared covering also the restoration of the road within one year, and the maintenance of the temporary road in the meantime.

HILLAS et al. v. FULLER.

(Supreme Court, Trial Term, Saratoga County. March, 1913.)

1. RELEASE (§ 28*)—OPERATION—JOINT DEBTORS.
Under the common-law rule that the release of the liability of one or more joint or joint and several obligors discharges the liability of all, the instrument must be a technical release, without any valid limitation or restriction, and must be under seal.
[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 57–62; Dec. Dig. § 28.*]

2. RELEASE (§ 6*)—"PAROL RELEASE."
Any release not under seal is a "parol release."
[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 12–14, 16; Dec. Dig. § 6.*]

3. RELEASE (§ 28*)—OPERATION—JOINT DEBTORS.
Under Debtor and Creditor Law (Consol. Laws 1909, c. 12) § 230, providing that a joint debtor may make a separate composition with his creditor, and that such composition discharges only the debtor making it, and section 231, providing that an instrument making a composition with a creditor does not impair the creditor's right of action against any other joint debtor, or his right to proceed against another joint debtor, unless an intent to release or exonerate him appears affirmatively on the face of the instrument, where one of 13 makers of a note for $2,600, given for the purchase price of a horse, paid the payee $200 and received a receipt, not under seal, stating that this was in full payment of his share in the horse, the other makers were not released, since, not being under seal, it would not have the effect of releasing the other makers, even at common law, and no intent to release or exonerate any one else was apparent.
[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 57–62; Dec. Dig. § 28.*]

4. RELEASE (§ 25*)—CONSTRUCTION AND OPERATION.
Under the equitable rule, now prevailing, a release is to be construed according to the intent of the parties, and its object, purpose, and intent will control and limit its operation.
[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 47, 48; Dec. Dig. § 25.*]

5. CONTRIBUTION (§ 6*)—PAYMENT OR DISCHARGE OF COMMON LIABILITY.
Where 11 of 13 joint and several makers of a note paid the note, 8 of them paying their share in cash and 3 by discounting their individual

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

notes, which were accepted as payment, the original note being surrendered, those paying the note were entitled to recover, from another maker, his proportionate share of the amount, whether or not the notes given by such 3 makers had been paid, since the defendant was no longer liable on the original note, which had been surrendered.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 10–12; Dec. Dig. § 6.*]

Action by Robert R. Hillas and others against William G. Fuller. Judgment for plaintiffs.

Robert Frazier, of Mechanicsville, for plaintiffs.
Leary & Fullerton, of Saratoga Springs, for defendant.

WHITMYER, J. A joint and several promissory note in the sum of $2,600 was made and delivered by plaintiffs, together with one Herbert B. Brown and defendant, to Otto Hoag Importing Company, on August 13, 1910, for the purchase price of a horse. One-third of the amount thereof, with interest at 6 per cent., was payable on March 1st in each year, until fully paid. It contained an agreement that the whole amount should become immediately due and collectible, if any payment or part payment, or if any interest, should become due and remain unpaid for 30 days. The said Brown made a payment of $200 thereon on the day of and immediately after its delivery to the payee. This was indorsed generally, but the receipt given to Brown stated that the amount was in full payment of his one share in the horse. The receipt was not under seal. The note was thereupon discounted for the payee, without recourse, by the Manufacturers' National Bank at Mechanicsville, which then became the owner and holder thereof, and so remained until it was paid. No payment, other than that by Brown, was made prior to March 1, 1912, and the one then due was not made on that day, nor was it made within 30 days thereafter, but the whole amount unpaid, having become due, was paid by plaintiffs April 2, 1912, each one paying one-eleventh thereof. Eight paid in cash and three by discounting notes, made and delivered to and by the bank, accepted in payment of their several proportionate shares of the joint and several note, which was thereupon surrendered to the plaintiffs. The teller of the bank believes that the individual notes were subsequently paid, but is not entirely clear about it. Defendant refused to pay any portion of the joint and several note, although demand for the payment of his share was duly made upon him.

[1] It is the rule under the common law that the release of the liability of one or more joint or joint and several obligors discharges the liability of the other or others; but the rule requires for its full operation that the instrument should be a technical release, without any valid limitation or restriction. Hood v. Hayward, 124 N. Y. 12, 26 N. E. 331; Whittemore v. J. L. & S. O. Co. et al., 124 N. Y. 573, 27 N. E. 244, 21 Am. St. Rep. 708.

[2] A release by parol, which is any release not under seal, of one joint debtor, does not discharge the other, and can be pleaded only by the one to whom it was given. Marx v. Jones, 36 Hun, 292; Morgan

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

v. Smith, 70 N. Y. 537. Equity gives to a release operation according to the intention of the parties and the justice of the case.

[3] Section 230 of the Debtor and Creditor Law expressly provides that a joint debtor may make a separate composition with his creditor and that such composition discharges only the debtor making it. And section 231 of that law provides that an instrument making a composition with a creditor does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter, unless an intent to release or exonerate him appears affirmatively upon the face of the instrument.

[4] The equitable rule now prevails, and a release is to be construed according to the intent of the parties and the object and purpose of the instrument, and that intent will control and limit its operation. Whittemore v. J. L. & S. O. Co. et al., supra. The receipt to Brown was not under seal, so that its effect, even at common law, is to release him and no one else. It was for "$200 in full payment of his one share in horse." It was merely a release of Brown "for his one share," and no intent to release or exonerate any one else is apparent, so that defendant cannot claim a discharge on this account.

[5] Eight of the plaintiffs paid their shares of the joint and several note in cash, and three of them by discounting their individual notes at the bank, which held the joint and several note. There is some evidence that these individual notes were paid, but the teller of the bank was not absolutely certain about it at the trial. However, they were given and accepted in payment, and the joint and several note was surrendered, so that defendant is no longer liable thereupon. The case, under these circumstances, is distinguishable from Lee v. Larkin, 125 App. Div. 303, 109 N. Y. Supp. 480, where the renewal note was made as a renewal, without any agreement as to its effect.

The action, therefore, is not premature, and plaintiffs are entitled to judgment, with costs.

Findings may be prepared accordingly.

EQUITABLE TRUST CO. OF NEW YORK v. CHILDS et al.

(Supreme Court, Special Term, Orleans County. July, 1913.)

1. RECEIVERS (§ 142*)—SALES—PAYMENT OF BID—LIABILITY OF PURCHASER.

Where, on a judicial sale of the property of a gas company, the purchaser was directed to pay a specified amount to the company's receiver, with which to pay certain items of indebtedness, including taxes, which were liens on the property, in order that it could be turned over to the purchaser free from claims and incumbrances, and it subsequently appeared that the receiver, in computing the amount necessary for this purpose, made a mistake, and that a larger amount was required, the purchaser, who had paid all that he agreed to pay, could not be charged with the deficiency, and it would be charged against the party who made the mistake.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 248–251; Dec. Dig. § 142.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. RECEIVERS (§ 204*)—DISCHARGE.

Under such circumstances the receiver would not be discharged, or his bond canceled, until he had made the payments as required by the order directing the purchaser to pay such sum to the receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 319, 407, 408; Dec. Dig. § 204.*]

Action by the Equitable Trust Company of New York against Milford W. Childs, as permanent receiver of the Medina Gas Company, and another. On application to open and modify an order previously made. Motion denied.

BISSELL, J. [1, 2] This is an application by the defendant Milford W. Childs, as receiver, etc., for an order to open, amend, and modify an order heretofore made in the above-entitled action by Hon. Warren B. Hooker, Justice presiding, on the 10th day of January, 1913, which provided for the payment of a specified amount in cash to the said Milford W. Childs, as receiver, by the purchaser at a public sale of the property of the Medina Gas Company, the said specified amount of cash to be used by the said receiver for the payment of certain specified items of indebtedness, including taxes, which were liens upon the property of the Medina Gas Company, for the purpose of turning the plant of the Medina Gas Company over to the said purchaser free from all claims and incumbrances, except a mortgage securing certain bonds.

It appears that a mistake was made in the proofs of amounts actually due for certain taxes, and that the total amount specified in the order made by Mr. Justice Hooker was not sufficient to pay all of the items of the taxes in full, for the reason that additions had been made to such amounts through the existence of tax sales which were not ascertained and added to the amounts at the time the proofs were made, and therefore the said amounts were not correctly proved before the referee, and that an item of $36.41, ordered to be paid to Thomas A. Kirby, one of the attorneys has not been paid, because the funds in the hands of the receiver were not sufficient to pay said amount and the taxes in full, as aforesaid.

The purchaser at the public sale should not, and cannot, be charged with these items. He has paid all that he agreed to pay when he purchased the property at the public sale. Whatever loss there may be, due to a mistake in computation, or in ascertaining and proving the amounts due, should be charged against the party who made the mistake. The failure to ascertain and prove the amount due was apparently due to the receiver above named, and he cannot, therefore, be discharged, and his bond canceled, until he has performed the duties devolved upon him pursuant to the said order of Mr. Justice Hooker. As soon as he has paid in full the taxes, so that the property shall be free from the lien of those taxes as ordered, and the item to the attorney above mentioned, he will be entitled to an order discharging him as receiver, and canceling his bond.

The motion to open, amend, and modify said order is denied, with $10 costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(158 App. Div. 192)

RICHIE v. SHEPARD et al.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. INSANE PERSONS (§ 26*)—INQUISITION—CONCLUSIVENESS.
In an action on notes executed about two months before the presentation of a petition for an inquisition into the mental competency of the maker and within the period covered by the finding of incompetency, such finding was presumptive evidence of the maker's incompetency at the time of the making of the notes.
[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

2. APPEAL AND ERROR (§ 203*)—RESERVATION OF GROUNDS OF REVIEW—NECESSITY.
In an action against executors, where no formal objection was made to the testimony of a legatee concerning the testator's physical and mental condition on the ground that she was incompetent to testify, such objection was unavailing upon appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1064; Dec. Dig. § 203.*]

3. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
A judgment for defendant would not be reversed for technical errors in the admission of questions asked defendant's witnesses, where there was a complete failure of proof on plaintiff's part.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171–4177; Dec. Dig. § 1052.*]

4. INSANE PERSONS (§ 97*)—ACTIONS—PLEADING.
In an action on notes in which the answer alleged that the maker was incompetent at the time of making the notes, the record of proceedings instituted and carried out by plaintiff shortly after the execution of the notes to have the maker declared incompetent, in which it was found that she had been incompetent for seven years, was admissible against plaintiff, although not specifically pleaded.
[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 169–171; Dec. Dig. § 97.*]

Burr, J., dissenting.

Appeal from Trial Term, Kings County.

Action by William N. Richie against Winifred K. Shepard and another, as executors of Lottie N. Palmer, deceased. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Adolph Ruger, of Brooklyn, for appellant.

Burt D. Whedon, of New York City, for respondents.

CARR, J. The plaintiff in this action sued the defendants, who are the executors of the last will of Lottie N. Palmer, deceased, to recover on two promissory notes, alleged to have been made by the decedent in favor of the plaintiff, each in the sum of $4,000, payable six months after date, and dated respectively June 11, 1907, and August 23, 1909. The answer set up various defenses, together with a denial of the making of the notes by the decedent. There was no proof of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any consideration for the notes except such as may rest upon the fact that each note contained the words "value received." A defense was set up to each note, that at the time of the alleged making thereof the decedent was an old woman who was wholly incompetent to manage her business affairs, that she was easily induced to part with her money and property, and that said notes had been procured from her by undue influence on the part of the plaintiff, who was her pastor and spiritual adviser at the time of the alleged making of the notes in question.

[1] It appears that on October 7, 1909, about two months after the date of the last note, the plaintiff presented a petition to the Supreme Court in Kings county asking for an inquisition into the mental competency of the deceased, in which petition he set forth that during the past eight years she had been unable to manage her affairs, and that designing persons had taken from her at least the sum of $20,000. On this petition an order was made directing the taking of an inquisition before three commissioners and a jury. An inquisition was taken, in which it was found by the commissioners and the jury that the decedent was incompetent to manage her affairs, and that such incompetency dated from January 1, 1902. This inquisition was confirmed, and the petitioner, who is the plaintiff here, was appointed as the committee of the person and property of the alleged incompetent. After her death he turns up with these notes, and seeks to enforce them against the estate, although they were given within the period "overreached" by the inquisition in the proceeding which he himself initiated and carried to completion, and which if paid would practically exhaust the estate. The finding of the jury on this inquisition is presumptive evidence of the decedent's incompetency at the time of the making of the notes upon which plaintiff now sues. Van Deusen v. Sweet, 51 N. Y. 378, 386. In addition to this, we have the facts set forth by plaintiff in his petition as aforesaid, that he was the spiritual adviser of this very old and mentally weak woman. On the trial he offered no evidence beyond an attempt to prove the signature of the decedent and thus establish the making of the notes. The jury found a verdict for the defendants.

[2] On this appeal it is argued that certain prejudicial errors were committed on the trial which require a reversal of the judgment. The defendants offered in evidence the deposition of one Mrs. Hunter, which had been taken out of court, in the presence of the attorney for plaintiff; the witness being ill. Mrs. Hunter was a legatee under the will of the testator. She was examined as to the physical and mental condition of the decedent during the years in question. It is now urged that it was error to permit this evidence, as she was an interested party, and therefore her testimony was incompetent under section 829 of the Code. No formal objection was made to her testimony on this ground; hence such objection was unavailing, according to settled rules.

[3] Some of the questions put to this witness as to the mental condition of the decedent at the time the notes were made were too broad, as the witness was a lay person; but we do not consider these technical errors as presenting reversible error, for, even if the entire testimony

of this witness be disregarded, there was a complete failure of proof on the part of the plaintiff to meet the presumption raised by the inquisition.

[4] It is argued further that it was error to allow defendants to offer in evidence the record in the incompetency proceedings, as the same were not specifically pleaded in the answer. As before stated, the answer did set up that decedent was incompetent to attend to her affairs at the time of the making of these notes, and I think that the incompetency proceedings, which had been initiated and carried out by the plaintiff in this action, were admissible against him on that issue, without being specifically pleaded. In any event, there is no authority to the contrary presented by the appellant in his brief.

The judgment and order should be affirmed, with costs.

JENKS, P. J., and THOMAS and PUTNAM, JJ., concur. BURR, J., dissents upon the ground that the testimony appearing at folios 77 to 84 inclusive was incompetent.

(158 App. Div. 293)

PEOPLE v. JACOBS.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.
On a trial for burglary and grand larceny, evidence of other thefts in no way connected with the crimes charged was inadmissible.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

2. CRIMINAL LAW (§ 370*)—EVIDENCE—OTHER OFFENSES.
On a trial for burglary, grand larceny, and receiving stolen goods, evidence of other thefts at different times and places and from different persons was not admissible under the count for receiving stolen goods, where there was no proof that the property was stolen by the same thief or brought to the same receiver.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 825–829; Dec. Dig. § 370.*]

3. INDICTMENT AND INFORMATION (§ 144*)—DISMISSAL OF COUNT—EVIDENCE ADMISSIBLE ONLY ON COUNT DISMISSED.
Where, on a trial for burglary, grand larceny, and receiving stolen goods, a verdict of guilty of all the charges was returned, whereupon the court directed the amendment of the verdict by omitting the finding as to receiving stolen goods, thereby in effect dismissing that count, it was error to permit to remain in the case evidence which was relevant only on that count.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. § 144.*]

4. CRIMINAL LAW (§ 424*)—EVIDENCE—DECLARATION OF CO-CONSPIRATOR.
On a trial for burglary and grand larceny, if the evidence had been sufficient to show a conspiracy between accused and another, evidence that, when detectives called at a room where accused, the alleged co-conspirator, and others were, the co-conspirator told one of the other persons to "get that stuff out of the way; I think the bulls are wise; we made a bum job of it," would not have been incompetent as being

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

subsequent to the ending of the common enterprise; it appearing that the stolen goods were held for further disposition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002–1010; Dec. Dig. § 424.*]

5. CRIMINAL LAW (§ 407*)—EVIDENCE—DECLARATIONS OF THIRD PERSON NOT REPLIED TO.

On a trial for burglary and grand larceny, evidence that, when detectives called at a room where accused and others were, one of the others, between whom and accused there was no sufficient proof of any conspiracy, told a third person to "get that stuff out of the way; I think the bulls are wise; we made a bum job of it," was not admissible, on the principle that accused was silent when he should have spoken, when it did not plainly appear that he heard the words or comprehended them, since this character of proof is dangerous, receivable with great caution, and inadmissible unless the statements testified to naturally call for contradiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898–902, 949, 968, 970, 971; Dec. Dig. § 407.*]

6. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

On a trial for burglary and grand larceny, where the evidence was entirely circumstantial, and chiefly confined to the possession of the stolen property, the erroneous admission of evidence of other offenses and of incriminatory statements of a third person was not harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

Appeal from Kings County Court.

Morris Jacobs, alias Jacob Morris, was convicted of burglary in the third degree and grand larceny in the first degree as a second offense, and he appeals. Reversed, and new trial ordered.

See, also, 143 N. Y. Supp. 1135.

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

Robert H. Roy, of Brooklyn, for appellant.

Edward A. Freshman, Asst. Dist. Atty., of Brooklyn (James C. Cropsey, Dist. Atty., of Brooklyn, and Harry G. Anderson, Asst. Dist. Atty., of New York City, on the brief), for the People.

JENKS, P. J. The defendant, his brother, H. Jacobs, and Skelsky were indicted for burglary in the third degree, grand larceny in the first degree as a second offense, and for receiving stolen goods. Separate trials were demanded, and the defendant was tried first. He appeals from a judgment of conviction of the first two crimes named.

[1, 2] The indictment charges commission of these crimes on October 31, 1912, that the burglary was committed upon the premises of H. Gruskin, and his was the property taken and received. Several witnesses were permitted to testify that certain goods not specified in the indictment, and in no way connected with the crimes charged therein, had been stolen from them at different times, and that their respective places had been burglarized. Such evidence was not admissible upon the counts for burglary or grand larceny. People

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

v. Sekeson, 111 App. Div. 490, 97 N. Y. Supp. 917; People v. Molineux, 168 N. Y. 305, 61 N. E. 286, 62 L. R. A. 193. The rule is well expressed by Brooks, J., writing for the Court of Criminal Appeals of Texas, in Hunt v. State, 60 S. W. 965, that evidence of a separate burglary is not admissible when it "has no connection with, dependence upon, or does not illustrate the offense on trial." It is but just to the trial court to say that its sole theory of admissibility as stated in its charge was "the purpose of showing to you whether the accused here upon trial had guilty knowledge of the act," and it will be remembered that the defendant was then upon trial for the crime of receiving stolen goods, as well as for the other crimes. But I think the learned court, in admitting this proof upon the charge of receiving, fell into error, inasmuch as there was no proof that the property was taken by the same thief and brought to the same receiver. People v. Doty, 175 N. Y. 164, 67 N. E. 303.

[3] The jury returned its verdict as "guilty of all the charges, burglary in the third degree, grand larceny in the first degree, and receiving stolen goods," whereupon the court said:

"Mr. Foreman, I think I will permit you to omit the last. We will just take the burglary and the grand larceny. As amended, that is your verdict, all of you?

"The Foreman: Yes, sir.

"The Court: As a second offender?

"The Foreman: Yes, sir."

And the verdict was recorded in accord. In effect, the court dismissed the count for receiving stolen goods, and therefore in no event should evidence which, if admissible at all, was relevant only upon that count, have been permitted to remain in the case.

[4] Two detectives of the police force went to the abode of the defendant at 7:45 p. m. H. Jacobs, his brother, opened the door to them. The appellant, who was found in bed, explained his position by statement that he was suffering from a recent stab wound. Skelsky and two women were found in that room at this time. One of these detectives was allowed to testify that H. Jacobs said to one of the women:

"For God's sake, get that stuff out of the way, and the fur coat. I think the bulls are wise. We made a bum job of it."

The witness testifies that when he heard the remark he was two feet away from the defendant. It does not appear that the defendant said anything. The three men were taken away by the detectives, who returned for a search that revealed various garments, including a fur coat, which was owned by the prosecuting witness, and which was specified in the indictment. It seems to be conceded that these words meant that the police had some knowledge pointing to the particulars of the crime, and that the speaker and at least another had not covered their tracks. I think that there was not sufficient proof of any conspiracy to make the testimony competent upon the theory of a declaration of a co-conspirator; but, if there had been such proof, the testimony was not incompetent upon the ground urged by the learned

counsel for the appellant, in that it was subsequent to the ending of the common enterprise, provided that it appeared that the stolen goods were held for further disposition. People v. Storrs, 207 N. Y. 147, 100 N. E. 730, and cases cited.

[5] I have grave doubts whether the proof made this testimony evidence against the defendant upon the principle that he was shown to be silent when he should have spoken. Proof of this character is not receivable as evidence of the truth of the accusation, but to show that it called for reply, and hence the acquiescence of the accused if he made none. People v. Kennedy, 164 N. Y. 456, 58 N. E. 652; People v. Koerner, 154 N. Y. 355, 48 N. E. 730; Wharton's Criminal Ev. (16th Ed., Hilton) §§ 679, 680. It does not plainly appear that the defendant heard the words, or comprehended them, or that they involved his conduct, or that they were of a character which would naturally call for a reply from him; and, moreover, it appears that they were addressed, not to him, but to a third person. See Wharton, supra, § 680, citing inter alia Kelley v. People, 55 N. Y. 565–571, 14 Am. Rep. 342; People v. Koerner, supra. This kind of proof is characterized as most dangerous, receivable with great caution, and inadmissible, unless the statements testified to naturally call for contradiction. People v. Cascone, 185 N. Y. 329, 78 N. E. 287. It may well be that this testimony may be made competent evidence upon a new trial, but upon the present record I think that it was inadmissible.

[6] The learned assistant district attorney contends that the court should disregard any errors, inasmuch as the proof of guilt is cogent and uncontradicted. But I think that we cannot conclude that the errors were not harmful in this case. Of course, if competent evidence pointed distinctly to the guilt of the defendant, if he had been caught red-handed, mere errors in the admission of evidence might be disregarded; but, as the learned court said to the jury, the evidence was "all circumstantial," and it was chiefly confined to the possession of the stolen property.

The judgment of the County Court must be reversed, and a new trial is ordered. All concur.

(158 App. Div. 169)

FLYNN v. NEW YORK & L. I. TRACTION CO.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

CARRIERS (§ 320*)—STREET RAILROADS—INJURY—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff while alighting from a street car, caused by the bell rope being pulled by some boys causing the car to start and thereby injuring plaintiff, *held*, that under the evidence the question whether the conductor was negligent should have been submitted to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. § 320.*]

Jenks, P. J., dissenting.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Nassau County.

Action for personal injuries by Mary Flynn against the New York & Long Island Traction Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Stephen J. Marsh, of Hempstead, for appellant.

B. H. Ames, of New York City (Walter Henry Wood, of New York City, on the brief), for respondent.

THOMAS, J. During one evening in July the plaintiff, a passenger, was in the act of alighting from the step of defendant's car when it started and she was thrown and hurt. The car started because some boys on the back platform pulled the bell cord. What induced them to do it? One boy stated that the conductor was within the car, and said:

"'Is it all right there?' They said, 'Yes,' and the fellows pulled the bell in the back of the car. * * * There were a whole lot of boys in the back there." (74.)

One of the boys testified:

"I saw Mrs. Flynn when she went to get off the car. She had her hand on the thing, and at the same time the conductor was quarreling with the colored boy, and as she went to get off some of the boys pulled the bell. The conductor said, 'Is it all right there?' and they said, 'Yes.' The conductor said that. He was up in the middle of the car. Said, 'Is it all right there?' and a whole lot of the kids grabbed for the bell, and when they grabbed for the bell Mrs. Flynn fell off." (60.)

The conductor was so engaged with the colored boy that he did not hear or heed the plaintiff's request to be let off at Ninth street (38, 42), and at Tenth street the car was stopped by a passenger ringing the bell at her request (51, 56). The jury could infer that the conductor was so absorbed in discussion with the colored man as to be oblivious of the duty to stop and start the car as the needs of the passengers required, and to have remitted that duty in whole or in part to the passengers, or at least to have suffered them to exercise it. One of the boys gives evidence tending to show that he countenanced their aid, for he says:

"There was a lot of boys there, and they would pull the bell, and the conductor would say, 'Is it all right there?' and they would be looking and say, 'Yes,' and they all grabbed for the bell, and it goes ahead."

This indicates a practice encouraged by the conductor, and without explanation cannot be limited to the instance when the plantiff fell. The question whether the conductor was negligent in his duty to the passenger, whereby the car was unduly started, was fairly raised, and as the case stood it should not have been dismissed.

The judgment should be reversed, and a new trial granted; costs to abide the event.

BURR, CARR, and PUTNAM, JJ., concur. JENKS, P. J., dissents upon the ground that the evidence was not sufficient to warrant the jury in finding that a passenger on the rear platform had any authority, express or implied, to start the car by ringing the bell.

(158 App. Div. 297)

VANDERBORG v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

MUNICIPAL CORPORATIONS (§ 768*)—DEFECTIVE SIDEWALK—NATURE OF DEFECT—INJURIES TO PEDESTRIANS.

A depression or hole 2¼ inches deep about the center of a flag sidewalk in a city was not such a defect as would render the city liable for injuries to a pedestrian while traversing the walk in the daytime, on the theory that the city was negligent in permitting it to remain.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.*]

Appeal from Trial Term, Kings County.

Action by Abraham Vanderborg against the City of New York. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, STAPLETON, and PUTNAM, JJ.

James D. Bell, of Brooklyn (P. E. Callahan, of Brooklyn, on the brief), for appellant.

Adolph Feldblum, of Brooklyn, for respondent.

JENKS, P. J. The court refused, under exception by the defendant, to charge:

"If the jury finds that this depression between the sidewalk and the dirt space did not exceed 3 inches in depth, and the plaintiff fell, assuming that he did fall, by simply putting his foot into a depression 3 inches in depth, and so received his injury; the city is not liable."

I think that the exception was well taken and is fatal to the judgment. The plaintiff, a man 46 years old, testifies that about 7 p. m. of November 7, 1910, when walking on a flagstone sidewalk of a street in the borough of Brooklyn, city of New York, he suddenly put his foot into a hole pretty near the center of the sidewalk and went down, or, in his own words:

"I felt my foot go down and I fell. * * * I don't know anything further about what caused me to fall, other than that I felt my foot go down on something, and I fell."

There is no proof of any former accidents at this point. The proof presented by the defendant, that the depression was but 2¼ inches deep or less, was not the estimate of mere eye inspection, or of guess or surmise, but was the result of measurements or calculation. In Lalor v. City of New York, 208 N. Y. 431, 433, 102 N. E. 558, 559, Collin, J., writing for the Court of Appeals, says:

"There are no circumstances revealed by the evidence which lessen or mitigate the effect of our decisions as authority that as matter of law the existence of the hole, as described by the witness, did not charge the defendant with negligence. Hamilton v. City of Buffalo, 173 N. Y. 72 [65 N. E. 944]; Beltz v. City of Yonkers, 148 N. Y. 67 [42 N. E. 401]; Butler v. Village of Oxford, 186 N. Y. 444 [79 N. E. 712]; Terry v. Village of Perry, 199 N. Y. 79 [92 N. E. 91, 35 L. R. A. (N. S.) 666, 20 Ann. Cas. 796]."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Examination of these cases cited shows that the depression in Hamilton's Case was about 4 inches in depth, that in Beltz's Case the hole caused by a break in the flagstone was 2½ inches in depth, that in Butler's Case the surface of one walk was higher than that of the other by from 2½ inches at the center to 5 inches at the edge, and that in Terry's Case the difference in grade was ⅜ of an inch to 1¾ inches. The depth of the hole in Lalor's Case, supra, as determined by the credible evidence, was 4 inches.

The limit named in the request in the case at bar is certainly within that in Lalor's Case, in Hamilton's Case, within the variance in Butler's Case, and but exceeds that in Beltz's Case by ½ of an inch. While it is declared in Terry's Case that "each case must stand upon its own peculiar facts," yet, if I read the opinion in Lalor's Case right, that case and the cases cited supra, are instances where the size or extent of the hole in each case was not sufficient in law to charge the respective defendants, on the principle that the defects were so slight as not to bring home negligence to the various municipalities.

In Lalor's Case, Collin, J., as we have read, says that "there are no circumstances revealed which lessen or mitigate the effect of the decisions" which he cites; i. e., Hamilton's Case and the other cases that follow in citation ut supra. Are there such circumstances in the case at bar? The character of such circumstances is not indicated in the opinion of the learned judge; but we have indication in the opinion in Terry's Case, supra, in that there are therein enumerated certain cases of exception. But none of such exceptional cases is analogous to the case at bar, save perhaps Gastel's Case, 194 N. Y. 15, 86 N. E. 833, 128 Am. St. Rep. 540, 16 Ann. Cas. 635, which, however, was placed expressly within the exceptions, because there was proof of other accidents, not as notice of the defect, but as indication of the danger of the defect. But in the case at bar the plaintiff, when walking in the evening of the day, fell into the depression or hole, as did Butler, Terry, and Beltz, respectively. In Hamilton's Case the accident happened in the daytime.

The judgment and order must be reversed, and a new trial must be granted; costs to abide the event. All concur.

(158 App. Div. 149)

GREENE v. FABER.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. APPEAL AND ERROR (§ 954*)—REVIEW—QUESTIONS OF FACT.
On appeal from an order granting a temporary injunction, where there is a substantial dispute as to the facts, the Special Term's discretion will not be disturbed; but where, accepting plaintiff's version of the facts, he is not entitled to the relief sought, the order will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818–3821; Dec. Dig. § 954.*]

2. PLEDGES (§ 56*)—ENFORCEMENT—SALE OF PROPERTY.
Plaintiff pledged certain stock of the K. Co. as collateral security for the payment of a note, under an agreement that the pledgee might sell

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the stock upon default in the payment of the note. He had previously pledged, as security for other notes, other stock claimed to have been delivered to him for such purpose by F. In supplementary proceedings against F., the pledgee was ordered to transfer the notes and stock to the receiver of F., upon payment of the amount due, which was done. *Held*, that the receiver could not be enjoined from selling the K. Co. stock upon plaintiff's default in the payment of his note, whether or not the order in the supplementary proceedings was based upon the false representation and pretense that F. was the owner of all the stock, except the K. Co. stock, and whether or not F. was the owner of such other stock; the receiver not deriving his title from the order, but from the assignment by the pledgee, and the ownership of the other stock being immaterial.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 152–183; Dec. Dig. § 56.*]

3. PLEDGES (§ 56*)—ENFORCEMENT—SALE OF PROPERTY.

The assignee of a pledgee of stock and bonds, delivered by the owner to the pledgor for the express purpose of so pledging them, could sell them in accordance with the terms of the hypothecation contract; there having been no diversion or improper use thereof.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 152–183; Dec. Dig. § 50.*]

4. PLEDGES (§ 56*)—ENFORCEMENT—SALE OF PROPERTY.

Where stock was pledged as collateral security under an agreement that, upon default by the pledgor, the pledgee might sell it at broker's board, or at private or public sale, at its option, without advertisement or notice, which were expressly waived, the pledgee could not be enjoined from so selling the stock, on the ground that it was not a favorable time for selling it, since the court could not alter the contract.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 152–183; Dec. Dig. § 56.*]

Appeal from Special Term, Kings County.

Action by Everett Greene against Leander B. Faber, individually and as receiver, etc., of Patrick H. Flynn. From an order granting a temporary injunction, defendant appeals. Reversed, and motion for injunction denied.

Argued before BURR, THOMAS, CARR, RICH, and PUTNAM, JJ.

Charles L. Craig, of New York City, for appellant.

Robert H. Elder, of New York City, for respondent.

BURR, J. [1]. If there was substantial dispute as to the material facts upon which this controversy depends, following the usual policy of this court, we should decline, upon an appeal from an order granting an injunction during the pendency of an action, to review the discretion exercised by the Special Term. But in this case, even if we accept plaintiff's version of the facts, so far as there is dispute respecting the same, it seems clear that he is not entitled to the relief sought, and that the order appealed from should be reversed.

[2] On December 27, 1911, plaintiff borrowed from the Hamilton Trust Company the sum of $20,500, and executed and delivered to it his promissory note for that amount, payable on demand. As collateral security for the payment thereof, he pledged to said company 393

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shares of stock of the Kings County Lighting Company, belonging to him. The stock note contained the usual provision that the pledgee, upon failure of the maker of the note to pay the same according to the terms thereof, might sell, assign, and deliver said security, or any part thereof, or any substitute therefor, or any additions thereto, or any other securities or property given unto or left in possession of said pledgee, at any broker's board, or at private or public sale, at the option of said pledgee, without either advertisement or notice, which was expressly waived. On previous occasions plaintiff had borrowed other sums of money from said trust company, for which he had executed seven other promissory notes, and as security for the payment thereof had hypothecated other stocks and bonds then in his possession, which had been delivered to him for such purpose. The stock notes by which such securities were pledged contained like provisions. The entire amount of plaintiff's indebtedness to the trust company aggregated $46,000.

On February 11, 1913, in a proceeding then pending in the Supreme Court, entitled "In the Matter of the Supplementary Proceedings of Patrick H. Flynn," to which proceeding plaintiff became a party, Mr. Justice Jaycox made an order to the effect that upon certain conditions, and upon tender by defendant to said trust company of the principal and interest due upon the said eight promissory notes of plaintiff, it should deliver and assign to him the said notes, together with all the securities and property held in pledge for the payment thereof, including the 393 shares of stock of the Kings County Lighting Company and the certificates therefor. On March 7, 1913, an order was made at a Special Term of this court (140 N. Y. Supp. 799), vacating and setting aside the order of Mr. Justice Jaycox, but upon appeal, and on May 16, 1913, this latter order was reversed and the original order was reinstated (In re Flynn, 141 N. Y. Supp. 807). Thereafter, and on May 26, 1913, the conditions precedent recited in said order having been performed, defendant tendered to the Hamilton Trust Company the amount then due upon said notes for principal and interest, and said trust company assigned and transferred the notes and the securities collateral to secure payment thereof, including the lighting company stock. Demand having been made upon plaintiff for the payment of his note for $20,500, which was refused, notice was thereupon given to him that on June 11, 1913, at the salesroom of Adrian H. Muller & Son, Nos. 14 and 16 Vesey street, in the borough of Manhattan, and city of New York, the said stock would be sold at public auction. Notice of the intended sale was also published in the Wall Street Journal, the New York Evening Post, and the New York Times. By consent of plaintiff, but reserving all his rights to object to said sale, an adjournment was taken to June 18, 1913, at the same time and place.

On the morning of that day this action was commenced. The relief sought was, among other things, that plaintiff be adjudged to be the owner of the Kings County Lighting Company stock, free from any claim of defendant thereto, and that the latter be restrained from selling or disposing of the same. On June 25, 1913, the order ap-

pealed from was made. This order enjoined defendant during the pendency of this action, or until the further order of this court, from selling or disposing of said lighting company stock.

That the Hamilton Trust Company could have sold said stock in default by plaintiff of his note is unquestioned. Defendant as its assignee has equal rights. Plaintiff alleges in his complaint that the order above referred to, directing the trust company to assign plaintiff's notes and the collateral thereto to defendant, was based upon the false and fraudulent representation and pretense that Patrick H. Flynn was the owner of all the collateral stock and bonds, except the Kings County Lighting Company stock. Whether this is the case or not, and whether defendant was entitled to the order which was made, said order is still in force, and the trust company is not complaining of it. Moreover, defendant does not claim title to the notes, and the collateral securities, through the order, but through the assignment to him by the trust company. The order may have been the inducing cause for its action, but it is not the source of defendant's title.

[3] In his brief the learned counsel for plaintiff and respondent says that the question in this case is as to the title of Patrick H. Flynn to certain of the securities thus assigned. It seems to us that this question is not involved at all. Concededly the Kings County Lighting Company stock belonged to plaintiff, and defendant, as the assignee of the pledgee of said stock, is seeking to realize upon the same in payment of plaintiff's debts. The other stocks and bonds, according to the allegations in plaintiff's moving papers, were delivered to him for the express purpose of pledging the same as collateral to his notes, and there is no suggestion of any diversion from such purpose, or any improper use of the same. That being so, no matter who owns these various securities, defendant, as the assignee of the trust company, is authorized to sell the same in accordance with the terms of the hypothecation contract to pay the debt. If there is a surplus, it may be that the question of title will become important. But there is no question of plaintiff's title as to the Kings County Lighting Company stock, and there is no person present in this controversy claiming title to any other of the securities, nor as yet has the defendant attempted to realize upon these.

[4] Plaintiff contends that this is not a favorable time to sell the lighting company stock. Whether this is so or not, the court has no power upon that ground alone to alter the contract between plaintiff and his pledgee. So far from there being anything unconscionable in defendant's method of procedure, he might have pursued, under the provisions of the contract, more drastic measures than he has employed.

The order continuing the injunction should be reversed, with $10 costs and disbursements, and the motion for an injunction denied, with $10 costs. All concur.

(158 App. Div. 159.)

TIFFANY v. HARVEY, Sheriff.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. SHERIFFS AND CONSTABLES (§ 103*)—LIABILITY AS BAIL—CASH BAIL—PAYMENT INTO COURT.

Where a sheriff, having received an order for the arrest of defendant in a civil action, accepted cash bail, the sheriff was required by Code Civ. Proc. § 583, to pay the bail so received into court within five days after receiving it, and for failure to do so he became liable as bail, provided plaintiff was injured thereby.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 220; Dec. Dig. § 103.*]

2. SHERIFFS AND CONSTABLES (§ 103*)—LIABILITY AS BAIL—CASH BAIL—PAYMENT INTO COURT—EXCUSE FOR FAILURE.

It was no excuse for a sheriff's failure to pay cash bail into court, as required by Code Civ. Proc. § 583, that neither the county clerk nor the chamberlain of the city of New York wished to receive it; since, it being their official duty to do so, they might be compelled to perform the same.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 220; Dec. Dig. § 103.*]

3. SHERIFFS AND CONSTABLES (§ 121*)—CASH BAIL—UNDERTAKING—NOTICE OF JUSTIFICATION.

Where cash is deposited with a sheriff in lieu of bail, and thereafter an undertaking is given, the sheriff is bound to serve notice of justification on plaintiff's attorney without waiting for an exception to be taken to the sureties, and until such notice is given and the sureties justify, and the judge before whom the justification is had so directs, the sheriff is not authorized to return the deposit, and, if he does so, so that the money may not be applied to a judgment subsequently recovered in the action, he is liable therefor as provided by Code Civ. Proc. § 585.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 219, 221; Dec. Dig. § 121.*]

4. SHERIFFS AND CONSTABLES (§ 133*)—CASH BAIL—SURRENDER—STATUTORY LIABILITY—LIMITATIONS.

Where a sheriff, having taken cash bail, surrendered the same on receiving an undertaking, without giving notice to plaintiff's attorney of the justification of sureties, or without an order authorizing the return of the deposit, plaintiff's right of action against the sheriff did not accrue until plaintiff recovered judgment in the action, so that an action against the sheriff within a year from the date of such recovery was not barred by limitations.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 274; Dec. Dig. § 133.*]

5. SHERIFFS AND CONSTABLES (§ 129*)—SURRENDER OF BAIL—ACTIONS—CONDITIONS PRECEDENT—PAYMENT OF JUDGMENT.

Where a sheriff illegally surrendered cash bail and took an undertaking, he thereby rendered himself amenable to any mandate which might be issued to enforce a final judgment against defendant in the action, as provided by Code Civ. Proc. §§ 575, 595, and, an execution against the debtor's person having been returned "not found," plaintiff was not required to prove that the judgment against the debtor remained unpaid, in order to establish a cause of action against the sheriff.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 264–266; Dec. Dig. § 129.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. PLEADING (§ 67*)—CASH BAIL—ILLEGAL SURRENDER—DEFENSES.
Where a sheriff illegally surrendered cash bail and thereafter plaintiff recovered judgment against the debtor, and an execution against his person was returned "not found," payment of the judgment was an affirmative defense which plaintiff was not required to negative.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 139; Dec. Dig. § 67.*]

Appeal from Trial Term, Queens County.

Action by Judson D. Tiffany against Herbert S. Harvey, late Sheriff of Queens County. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and judgment directed for plaintiff for $500, with interest, etc.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Samuel J. Rawak, of New York City, for appellant.

William Rasquin, Jr., of New York City, for respondent.

BURR, J. This action is brought against the former sheriff of Queens county to enforce a statutory liability. After trial before the court, a jury having been waived, judgment was rendered dismissing the complaint upon the merits. Plaintiff thereupon appealed. On September 15, 1908, plaintiff began an action in the Supreme Court against Charles F. Washburn to recover damages in an action for conversion. On the same day an order was made directing defendant, at that time the sheriff of Queens county, to arrest the said Washburn and hold him to bail in the sum of $500. On the same day defendant executed the order of arrest, and served upon Washburn a summons and complaint in said action, and a copy of the order of arrest, and of the affidavit and undertaking given to secure the same. When Washburn was arrested, he deposited with defendant the sum of $500 cash in lieu of bail, and he was thereupon released. On September 24, 1908, Washburn filed with defendant an undertaking of bail, with two sureties, which undertaking was approved as to form and sufficiency by the county judge of Queens county, and thereupon, without notice to plaintiff, without procuring said bail to justify, and without any order by any court or judge authorizing him so to do, defendant returned to Washburn the sum previously deposited with him in cash. The trial court has found that a copy of said undertaking of bail was, on the 25th day of September, 1908, "inclosed in a securely postpaid wrapper" and mailed by defendant to the attorney for plaintiff at his office in the borough of Manhattan and city of New York.

In view of the positive testimony of plaintiff's attorney that he never received said copy, and the weak, evasive, and uncertain testimony given on the part of defendant as to such mailing, we think that defendant has not established this fact by a fair preponderance of evidence, and that this finding was erroneous. It is undisputed, however, that defendant did not at that time, nor at any other time, deliver to plaintiff's attorney any certified copy of the order of arrest with his return thereon, nor any notice of justification of sureties on the un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dertaking. On April 27, 1912, final judgment was rendered in plaintiff's favor in the action of Tiffany v. Washburn for $1,323.37, and on May 6, 1912, an execution thereunder was issued to the sheriff of Queens county and returned unsatisfied. On May 31, 1912, an execution against the person of Charles F. Washburn was issued to said sheriff, who, on the 23d day of July, 1912, returned the same, with an indorsement thereon that the defendant named therein could not be found. It appears that plaintiff did not know the actual residence of Washburn when said executions were issued, and there is no evidence that at that time he resided anywhere within the state of New York. Thereafter, and on August 8, 1912, this action was commenced to recover the sum of $500 from defendant.

[1] We think that the evidence made out a prima facie case of liability sufficient, in the absence of evidence to the contrary (and in this case there was none), to justify a judgment in plaintiff's favor. It was the sheriff's duty within five days after the receipt of cash bail to pay it into court (Code Civ. Proc. § 583), and for his failure so to do he became liable as bail, provided plaintiff was injured thereby.

[2] The excuse offered, namely, that neither the county clerk of Queens county nor the chamberlain of the city of New York wished to receive it, is insufficient. Performance of an official duty on the part of a public officer may be compelled by any one interested in such performance. People ex rel. Stephens v. Halsey, 37 N. Y. 344; People ex rel. Waller v. Supervisors, 56 N. Y. 249; People ex rel. Robison v. Supervisors, 85 N. Y. 323. When an undertaking of bail is given in the first instance, the sheriff is exonerated if he gives to plaintiff's attorney certified copies of the order of arrest, return, and undertaking, and if within ten days thereafter said attorney fails to notify him that he does not accept such bail, or if he does so notify him, if the bail justify. Code Civ. Proc. §§ 577, 581. No sufficient notice was given to call upon plaintiff to except to the surety if this section were applicable.

[3] But when cash is deposited with the sheriff in lieu of bail, and subsequently an undertaking is given, the affirmative duty is imposed upon the sheriff of serving notice of justification without waiting for exception (Hermann v. Aaronson, 3 Abb. Prac. [N. S.] 389; Id., 8 Abb. Prac. [N. S.] 155; Commercial Warehouse Co. v. Graber, 45 N. Y. 393), and until such notice is given and said sureties do justify, and the judge before whom the justification is had so directs, the sheriff is not authorized to return such deposit, and, if he does so, so that the money may not be applied to the payment of the judgment, if one is recovered in the action, he is guilty of an unlawful official act, to plaintiff's damage (Code Civ. Proc. § 585).

[4] The learned counsel for respondent contends that, if such be the case, the statute of limitations began to run upon the day that the money was returned, and, more than one year having elapsed thereafter, this action is barred. Id. § 385. While the first wrongful official act occurred on the 24th day of September, 1908, the cause of action was not complete until plaintiff had recovered his judgment, since up to that time he had no right to the money, and no injury had been sustained by him, and defendant's liability had not been incurred.

Id. 587. As this action was commenced within one year after that date, the plea of the statute of limitations fails.

[5] The learned trial court based its decision in favor of defendant solely upon the ground that there was a failure on plaintiff's part to allege and prove that the judgment recovered against Washburn was unpaid, citing from Judge Vann's opinion in Conkling v. Weatherwax, 181 N. Y. 258, 73 N. E. 1028, 2 Ann. Cas. 740. In that case Judge Werner alone assented to the opinion in full. Judges Gray and Bartlett held that in the case under consideration the burden of proof as to nonpayment was on plaintiff, but the latter declined to express an opinion on the general questions of law discussed therein as to the burden of proof, while Chief Judge Cullen, with whom Judges O'Brien and Haight concurred, although voting to reverse the judgment appealed from on other grounds, dissented from the doctrine of Judge Vann's opinion. Within such circumstances the rule therein referred to should not be extended to a state of facts differing from those upon which that controversy depended. Acharan v. Samuel Bros., 144 App. Div. 182, 128 N. Y. Supp. 943.

But in this case the action was not upon the judgment recovered by plaintiff against Washburn. Defendant's obligation as bail was that Washburn would render himself amenable to any mandate which might be issued to enforce a final judgment against him in the action. Code Civ. Proc. §§ 575, 595. There was allegation and conclusive proof that he had not done so. The breach being established, and injury resulting therefrom, plaintiff's cause of action was complete. Bensel v. Lynch, 44 N. Y. 162; Cozine v. Walter, 55 N. Y. 304.

[6] If subsequently anything occurred by which defendant's obligation was discharged, or the damages resulting from the breach thereof mitigated, this was an affirmative defense, to be pleaded and proved. Bradbury's Rules of Pleading, 1282, § 30. The court properly held that the executions against the property and person of Washburn were duly issued. Code Civ. Proc. § 597. But if defendant had not improperly returned the cash deposited in lieu of bail, such sum would have been applicable to payment of the judgment under the direction of the court (Code Civ. Proc. § 585), without the issuing of any execution (Hermann v. Aaronson, 8 Abb. Pr. [N. S.] 155, on page 160; Commercial Warehouse Co. v. Graber, supra, 45 N. Y. page 395).

The judgment appealed from must be reversed, upon questions of fact as well as of law, and judgment directed for the plaintiff in the sum of $500, with interest thereon from August 8, 1912, the date of the commencement of this action, with costs of the said action and of this appeal. The ninth finding of fact is reversed as contrary to the evidence, and in lieu thereof this court finds that no copy of the undertaking of bail was ever delivered to the plaintiff's attorney. All concur.

(158 App. Div. 166)

FAIRCHILD et al. v. CITY & COUNTY CONTRACT CO.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

RAILROADS (§ 64*)—PURCHASE OF LAND—CONTRACT—CONSTRUCTION.

Defendant, having a contract to construct a railroad and stations for a railroad company, contracted to purchase land from plaintiffs for a station at a particular location. The contract provided that the price was a reduction from the true value of the land, and was granted in consideration of the benefit the construction of the railroad and the station would cause to accrue to plaintiffs' other land in the immediate vicinity. The railroad, the principal officers of which also were officers of defendant, had previously located the road through the property in question, but later changed the route so that it did not touch the property at all, and defendant refused to purchase. *Held*, that defendant's obligation to take the land was not excused by the change of location and that it was liable for the damages sustained by its breach.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 144, 147–152; Dec. Dig. § 64.*]

Appeal from Trial Term, Westchester County.

Action by John F. Fairchild and others against the City & County Contract Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Ralph Polk Buell, of New York City (George S. Graham, of New York City, on the brief), for appellant.

Arthur M. Johnson, of New York City, for respondents.

THOMAS, J. On a former appeal it was decided that the complaint stated a good cause of action for damages. 153 App. Div. 277, 138 N. Y. Supp. 133. The present question is whether the failure to build and maintain a station is excused by change of location of the railroad. The defendant was empowered and obligated by contract with the railroad company to outfit and to deliver the railroad, built on right of way acquired in the company's name, and equipped ready for operation. In furtherance of such contract, the defendant made the contract for the purchase of the land in question, which was appropriated by defendant towards the fulfillment of the contract with the company.

If the defendant made such appropriation so as to commit the company to it, the latter could not change its location and compel the defendant to relinquish this and furnish other right of way without making compensation for any damages that defendant would suffer thereby. The contract with Reynolds was made March 2, 1906 (139), and the deed was executed in the following May (43) and contained the following stipulation:

"It is further agreed that the price at which said property is sold by the party of the first part to the party of the second part, is a reduction from the true value of the property which reduction the party of the first part has consented to, in consideration of the benefit which the construction of the railroad and of the railroad station proposed to be constructed by the said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

party of the second part will be to the remaining property of the party of the first part and in consideration for such reduction in the price of the property hereby conveyed, it is agreed by the party of the second part that it will, when it shall have constructed said railway as now laid out, construct, maintain and operate, or cause to be constructed, maintained and operated, a station on the line of said railway, which station shall be located upon lots numbers 81, 82, 83 and 84, as shown on said subdivision map, hereto annexed, and for such purpose shall, on the completion of said railway construction, exercise its option to purchase said lots 81, 82, 83 and 84 and said station shall be constructed and ready for use as such, on or before March 1, 1911."

It was not until February, 1909, that the route was changed so as to be entirely without the land purchased, and at that time the New York, New Haven & Hartford Railroad Company owned a controlling interest in the stock of the New York, Westchester & Boston Railway Company, and also in the stock of the defendant; and the defendant's president, treasurer, and secretary were the same persons who held similar positions in the railroad company, and the defendant's three directors were directors in the railway company, and "a certain large number of stockholders were joint stockholders in both companies." It is incredible that the railroad company disclaimed the right of way purchased by its authorized contractor, and changed its route without indemnifying and without the consent of the defendant, who had the sole right to build the railroad. The company had located its route through the Reynolds property before the time of the purchase, and the defendant conformed to its agreement for constructing the road in acquiring the property, and the company could not repudiate the act, and it is not presumed that it did so without defendant's consent. The evidence is not fully returned, but I assume from the presentation that nothing was omitted bearing on this question. But at the time of the abandonment of the old line there was not only no antagonism between the railroad company and defendant, but a practical unity of control, and, if the former changed the route against the will and interest of the defendant, the defendant should make it appear.

But even so, the defendant cannot escape responding. It had its contract with the railroad company and, fortified by it, agreed to cause the station to be maintained. It had or had not the authority to settle the location of the station. If it had such authority, it could obtain reparation for failure of the company to substantiate the agreement. If it had not such authority, it was assuming it and cannot plead its absence. There has been no destruction of the subject-matter of the contract by superior force, nor, so far as appears, against defendant's will. The defendant's very guaranty was that the station should be in a given place, and it fared better for it. It cannot now plead that it was not potential to put it there; it made its ability to do so the very basis for a reduced purchase price. It knew the law and the possibility of change of line and the power of the company to do it; it knew its relations to the company and could measure its power of influence or compulsion to keep the line where it was located and to have a station maintained, and so it agreed, in effect, that the railroad it had full and sole authority to build should be on a certain

route, and that, with the entire power to establish stations, it would fix one on a designated location. Now it pleads that it was impotent to prevent a change of route, but it stipulated its potency and should not now be heard to deny it. Relying then on the former decision of this court that the complaint does state a cause of action—a conclusion I am not at liberty to reconsider—there is no legal excuse for defendant's failure.

The judgment should be affirmed, with costs. All concur.

(81 Misc. Rep. 508)

GIBSON v. GIBSON.

(Supreme Court, Special Term, Erie County. July, 1913.)

1. DIVORCE (§ 328*)—JURISDICTION—ESTOPPEL.
Where a party obtained a decree of divorce without the state on notice by publication, he will not be permitted to deny the jurisdiction of the court or the validity of the decree, since he is estopped by having submitted himself to its jurisdiction and by his securing a decree in his own favor.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 831–834; Dec. Dig. § 328.*]

2. DIVORCE (§ 1*)—NATURE OF REMEDY—JURISDICTION OF COURTS.
The courts of this state have no authority to grant or modify decrees of divorce or separation, or for alimony, except as conferred by statute.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. DIVORCE (§ 245*)—JURISDICTION OF COURT—STATUTE.
Under the direct provisions of Code Civ. Proc. § 1771, the court has jurisdiction to modify its decree in relation to alimony.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 691–695; Dec. Dig. § 245.*]

4. DIVORCE (§ 245*)—ALIMONY—MODIFICATION OF DECREE.
Where a wife secures an absolute divorce, following a decree for separation awarding her alimony, the decree of separation should be modified so as to relieve the husband from the payment of alimony, since alimony given in a decree of separation is to enable the wife to live apart from the husband while the marriage still exists, and, after the relation is ended by death or absolute divorce, it is no longer necessary.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 691–695; Dec. Dig. § 245.*]

Action by Leota G. Gibson against Calder C. Gibson for separation. There was judgment for plaintiff, and defendant moves to modify decree so as to relieve him from the payment of alimony. Sustained.

August Becker, of Buffalo, and Worthy B. Paul, for the motion.
E. C. Schlenker, of Buffalo, opposed.

WHEELER, J. The papers on this motion show that on the 23d of June, 1910, the plaintiff obtained in this action a judgment separating the parties from bed and board, and by that decree the defendant was directed to pay the plaintiff $25 per month alimony. This alimony was paid as directed, up to the month of January, 1913. On the 25th of November, 1912, this plaintiff recovered a judgment of ab-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

solute divorce from the defendant in the court of common pleas of the state of Ohio for the county of Cuyahoga. An exemplified copy of this decree recites the plaintiff had been a resident of Ohio for one year next preceding the filing of the petition, and was a bona fide resident of the county of Cuyahoga. It was based on an allegation that "the defendant was guilty of willful absence from this plaintiff for three years prior to the filing of her petition herein." It further appears that the decree of the Ohio court was obtained, not by the personal service of process upon the defendant within the territorial jurisdiction of the state of Ohio, but upon substituted or constructive service by publication, presumably in accordance with the statutes of that state.

The defendant having failed to pay alimony after the granting of the Ohio divorce, a motion was made by the plaintiff to punish him for contempt. On the hearing of that motion, the defendant contended that the obtaining of an absolute divorce by the plaintiff in the Ohio court relieved him from the further obligation to pay alimony in obedience to the decree of separation in this action. We were of the opinion, however, that the proper practice was for the defendant to make a motion to modify the judgment of separation as to the payment of alimony, and that upon the hearing of that motion the effect of the Ohio decree could be passed on, and the motion to punish for contempt was therefore held until the defendant had an opportunity to make this motion. That he has now done and the force and effect of the Ohio divorce is now before the court for determination.

[1] The plaintiff's counsel contends that the Ohio decree has no extraterritorial effect, in that there was no personal service of process on the defendant, and that the courts of this state cannot and should not recognize its validity for the purpose of, in any way, modifying its own judgments.

If the defendant sought to impeach the validity of the Ohio decree on the ground of want of jurisdiction of the courts of that state to grant it, there would be presented very troublesome questions. He, however, does not question its validity, and it seems to be the rule of law recognized by the courts of this state that, where a party submits himself to the jurisdiction of a court and obtains its decree, he cannot be heard to question the jurisdiction of the court which entered the judgment. Starbuck v. Starbuck, 173 N. Y. 503 at page 506, 66 N. E. 193 (93 Am. St. Rep. 631). In that case, the Court of Appeals said:

"We are of the opinion that the Massachusetts decree was competent and that the defendants had the right to have it received in evidence. True, the plaintiff could not avail herself of a void decree, which she had procured to be entered, any more than she could of her own declarations; but it is different with the defendants. They have the right to avail themselves of the declarations, acts, and decrees obtained by their opponent, and the principle is well established that, where a party has procured a judgment or decree to be entered, submitting himself to the jurisdiction of the court, he cannot thereafter be heard to question the jurisdiction of the court which entered the judgment or decree."

"A party cannot avail himself of a defense or of a right to recover by means of an invalid decree or judgment obtained by him; but, on the other

band, he may not be heard to impeach a decree or judgment which he himself has procured to be entered in his own favor." 173 N. Y. 508, 66 N. E. 194, 93 Am. St. Rep. 631.

This doctrine of estoppel against a party questioning the validity of decrees and judgments obtained at his own instance and procurement has been followed in numerous cases in our courts. Guggenheim v. Wahl, 203 N. Y. 397, 90 N. E. 726, Ann. Cas. 1913B, 201; Van Blaricum v. Larson, 205 N. Y. 360, 98 N. E. 488, 41 L. R. A. (N. S.) 219; Strauss v. Strauss, 122 App. Div. 733, 107 N. Y. Supp. 842; People v. Shrady, 47 Misc. Rep. 335, 95 N. Y. Supp. 991; Voke v. Platt, 48 Misc. Rep. 274, 96 N. Y. Supp. 725; De Kohley v. Fernandez, 58 Misc. Rep. 29, 110 N. Y. Supp. 398; Simmonds v. Simmonds, 78 Misc. Rep. 572, 138 N. Y. Supp. 639. See, also, Davis v. Wakelee, 156 U. S. 689, 15 Sup. Ct. 555, 39 L. Ed. 578.

We must assume, therefore, for the purpose of this motion, that the Ohio decree is valid and binding, at least on the plaintiff, and the only question remaining is: What relief should or can be granted under such circumstances relieving the defendant from the payment of alimony provided by the decree in this action?

[2] At the very outset of the discussion it must be borne in mind that in actions for divorce or separation courts have no power or authority, except such as are conferred by statute. They possess no inherent authority to grant divorce or judicial separations or to award alimony, saving such authority as the Legislature of the state may see fit to confer. Nor may courts modify their decrees in respect to alimony when once fixed by their decrees, unless the Legislature has expressly given them such authority. Erkenbrach v. Erkenbrach, 96 N. Y. 461; Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600; Walker v. Walker, 155 N. Y. 77, 49 N. E. 663; Wilson v. Hinman, 182 N. Y. 411, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820; Goodsell v. Goodsell, 82 App. Div. 68, 81 N. Y. Supp. 806; Krauss v. Krauss, 127 App. Div. 741, 111 N. Y. Supp. 788; Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061.

[3] We must inquire whether there exists any provision of statute giving this court power to modify its decree. Section 1771 of the Code of Civil Procedure in our opinion confers such authority. It provides that:

"Where an action is brought by either husband or wife, as prescribed in either of the last two articles" (which cover actions for separation as well as for absolute divorce) the court must give "such directions as justice requires, between the parties * * * for the support of the plaintiff."

It further provides:

"The court may, by order, upon the application of either party to the action * * * at any time after final judgment, annul, vary or modify such directions," etc.

The right to modify decrees of separation is recognized in Burton v. Burton, 150 App. Div. 792, 135 N. Y. Supp. 248, Tonjes v. Tonjes, 14 App. Div. 542, 43 N. Y. Supp. 941, and Walker v. Walker, 21 App. Div. 219, 47 N. Y. Supp. 513, reversed, however, in 155 N. Y.

77, 49 N. E. 663, on the ground that the statute was not retroactive, and could not affect judgments entered prior to the passage of the amendment.

[4] The court, having authority to modify, the question remains whether, under the circumstances of the case, it should exercise that right.

This depends, in part at least, upon the nature and character of the provision for alimony made in the decree of separation. The judgment of separation did not dissolve the marriage relation. That relation still continued with all the legal obligations of the husband to provide for the support of the wife, the measure and extent of which was fixed and determined by the provision for the payment of alimony in the decree of separation. The marital relation was modified by the judgment of separation based on the husband's misconduct to the extent that the wife was permitted to live separate and apart from her husband, but the decree recognized and continued the obligation to support the wife, by the provision for the payment of alimony.

The direction for the payment of alimony in actions for a judicial separation proceeds upon a different theory than provisions for alimony in cases of absolute divorce. In the latter class of cases the marriage is dissolved, and the judgment for alimony in such cases is rather in the nature of a penalty imposed upon the guilty party for a violation of his marriage vows and obligations. Alimony in such cases is rather a substitute for the rights of the innocent wife which the divorce cuts off and forbids in the future. This distinction has been pointed out in numerous cases. Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820; Estate of Ensign, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717.

In cases of divorce, the obligation to pay alimony terminates on the death of the husband. Johns v. Johns, 44 App. Div. 533, 60 N. Y. Supp. 865; Barnes v. Klug, 129 App. Div. 192, 113 N. Y. Supp. 325.

The plaintiff in this action has seen fit to become a resident of the state of Ohio, and to invoke the jurisdiction of the courts of that state, and obtain an absolute divorce from the defendant. This divorce, we have seen, she is estopped from questioning, and it, in effect, has terminated the marriage relation between herself and the plaintiff, upon which the provision of the decree for the payment of alimony was predicated. In legal contemplation, the Ohio decree was just as effective to terminate the marriage relation as the death of the defendant would have been. Having elected to terminate that relation by proceedings in the Ohio courts, we do not think the plaintiff can insist that she still has the right to enjoy the benefits flowing from that relationship, and it follows that the judgment directing the payment of alimony should therefore be modified as asked.

In Burton v. Burton, 150 App. Div. 790, 135 N. Y. Supp. 248, the defendant had obtained a decree of judicial separation. Subsequently the defendant in that action brought an action for an absolute divorce against his wife on the ground of her adultery, and succeeded in his action. The court held that the court had the right and power by its judgment of divorce to provide that the plaintiff should be relieved from the obligation to pay further alimony by virtue of the decree of

separation, upon the ground and for the reason that the marriage relation was terminated, which was the basis of the provision for alimony in the judgment for separation.

The plaintiff's motion to modify the decree in this action as to the payment of alimony is therefore granted, and the motion to punish the defendant as for a contempt is denied, without costs to either party.

So ordered.

(158 App. Div. 183.)

CITY OF NEW YORK v. KELSEY.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. CEMETERIES (§ 3*)—CONSTITUTIONAL LAW (§ 208*)—EMINENT DOMAIN (§ 2*)—STATUTES—VALIDITY—LOCATION OF CEMETERY—DISTANCE FROM CITY WATER SUPPLY.

Laws 1868, c. 591, entitled "An act to prevent burials near the reservoirs and ponds" used for the water supply of the city of Brooklyn, and making it unlawful to establish any cemetery or place of burial within half a mile of any reservoir or pond used to supply Brooklyn with water, except that nothing contained therein should prevent burials in any established cemetery or grounds held by any duly organized religious corporation or society, was a proper exercise of police power and not unconstitutional as depriving the landowner of property rights without compensation or as discriminatory between persons and corporations.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 3; Dec. Dig. § 3;* Constitutional Law, Cent. Dig. §§ 649–677; Dec. Dig. § 208;* Eminent Domain, Cent. Dig. §§ 3–12; Dec. Dig. § 2.*]

2. CONSTITUTIONAL LAW (§ 47*)—STATUTES—CONSTRUCTION.

In determining whether a statute is constitutional it must be considered in the light of what may be done under it and not what has been done under it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43–45; Dec. Dig. § 47.*]

Appeal from Special Term, Nassau County.

Suit by the City of New York against Augustus D. Kelsey. Decree for complainant, and defendant appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Thomas Young, of Huntington (Francis G. Hooley, of Rockville Centre, on the brief), for appellant.

James D. Bell, of Brooklyn (John B. Shanahan, of Brooklyn, on the brief), for respondent.

CARR, J. [1] This is an appeal from a judgment of the Special Term in Nassau county, decreeing a permanent injunction against the defendant as to the use of certain lands owned by him in Nassau county, situated at Rockville Center, for purposes of a public cemetery. The land in question adjoins an existing cemetery, known as the Rockville Cemetery. These lands are described in the complaint herein. Permission was given to the defendant by the board of supervisors of Nassau county to devote said lands to the purposes of a pub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lic cemetery. Within half a mile of these lands is situated a large pond of water, known as "Smith's Pond," which forms a part of the water supply system of the present borough of Brooklyn and the former city of Brooklyn. This pond was a part of the water supply system of the city of Brooklyn prior to the enactment of chapter 591 of the Laws of 1868, which provides as follows:

"An act to prevent burials near the reservoirs and ponds used for the supply of the city of Brooklyn with water.

"Passed May 5, 1868.

"The people of the state of New York, represented in Senate and Assembly, do enact as follows:

"Section 1. It shall not be lawful to establish any cemetery or place of burial, or burial vaults, or other place for the reception or burial of dead bodies, or to bury, or deposit in vaults, any dead body, within a distance of half a mile of the Ridgewood reservoir, or any other reservoir, or any ponds used for the supply of the city of Brooklyn with water. But nothing herein contained shall be construed to prevent burials in any cemetery already established, or grounds now held by any religious corporation or society organized under the laws of this state.

"Sec. 2. This act shall take effect immediately."

The city of New York brought this action to enjoin the use of said lands for public cemetery purposes, as being in violation of the aforesaid statute. Judgment went for the plaintiff, but without any opinion from the trial court.

It is argued on this appeal that the act in question is unconstitutional in two aspects: First, that it deprives the owner of real property of a valuable property right in his land without compensation; and, second, that it makes an unlawful discrimination between various persons or corporations.

It seems that the obvious purpose of the act was to prevent the establishment of any more public cemeteries within a half mile from any reservoir or pond which formed a part of the water supply system of the city of Brooklyn. The appellant contends that the method in which this purpose is expressed is arbitrary, in that the distance of half a mile is taken, without regard to the lay of the land, or the actual question whether or not there was any danger of contamination of the sources of water supply. That the Legislature has power to prevent the erection of any additional public cemeteries within certain prescribed limits seems beyond question. If it has this power, then it may determine for itself, as a measure of absolute precaution, within what distances from sources of public water supply cemeteries may be erected. It might have said 300 feet, or 1,000 feet, but it has said at one-half mile, and it has taken this outside limit as a matter of absolute safety. Considering the sources of water supply of the borough of Brooklyn, ponds, streams, which are largely fed by percolating underground waters, it is impossible to say that the Legislature transcended its limits of power. To sustain an act as constitutional, it is not necessary that proof should be given to show that the act is reasonable, but the burden is upon those who attack the act to establish by proof, unless it is a matter of judicial cognizance, that the act is in its nature not only unreasonable but confiscatory of existing legal rights. Neither do we think that the act is to be condemned on the

ground of unlawful discrimination between persons or corporations within the same locality. The Legislature is presumed to have known just what cemeteries existed within a half mile of the Ridgewood reservoir, and the ponds of the Brooklyn water system, and likewise what burial grounds there were attached to churches and owned by religious corporations. It could have said, as it did say, that there were in its judgment sufficient of those existing burial grounds, and that there should be no further extensions or additions to them.

[2] It is argued, however, that the act is to be considered in the light of what may be done under it, not what has been done under it. Of course this is true. Then it is argued that under this act it would be unlawful for any man to inter on his farm lands a dead body, even if the place of interment was a private and not a public cemetery. In times long gone by it was the habit of many people to bury their dead on their own lands, and not in public cemeteries; but this custom has disappeared and the objection of the appellant is, in our judgment, unsubstantial. If necessary to uphold the act, it might be so construed as to relate only to places used for general cemetery purposes. In any event, we think we should affirm the judgment, with costs.

Judgment affirmed, with costs. All concur.

(158 App. Div. 217)

PEOPLE v. SILVER.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICE OF DENTISTRY—SINGLE ACT.
   Under Public Health Law (Laws 1909, c. 49 [Consol. Laws 1909, c. 45]) § 203, par. 5, subd. B, making it a misdemeanor to practice dentistry under a false or assumed name, proof of a single treatment, consisting of filling one tooth, is not sufficient to establish the practice.
   [Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6–11; Dec. Dig. § 6.*]

2. INDICTMENT AND INFORMATION (§ 109*)—STATUTORY OFFENSES—BURDEN OF PROOF.
   In a prosecution for a statutory offense, all facts necessary to bring the case within the statute must appear.
   [Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 286–288; Dec. Dig. § 109.*]

3. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING DENTISTRY UNDER ASSUMED NAME—EVIDENCE.
   In a prosecution for aiding and abetting another in the practice of dentistry under a false name, evidence *held* insufficient to show that the defendant committed any affirmative act which aided the commission of the offense.
   [Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6–11; Dec. Dig. § 6.*]

Harry B. Silver was convicted of aiding and abetting another to practice dentistry under an assumed name. Reversed, and defendant discharged.

See, also, 156 App. Div. 910, 141 N. Y. Supp. 1140.

Argued before JENKS, P. J., and THOMAS, CARR, STAPLETON, and PUTNAM, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles S. Taber, of Brooklyn, for appellant.

Harry G. Anderson, Asst. Dist. Atty., of New York City (James C. Cropsey, Dist. Atty., and Edward A. Freshman, Asst. Dist. Atty., both of Brooklyn, on the brief), for the People.

STAPLETON, J. The defendant was convicted in the Court of Special Sessions of a misdemeanor in violating section 203 of the Public Health Law (chapter 49 of the Laws of 1909, constituting chapter 45 of the Consolidated Laws). The specific provision of that section, alleged to have been violated, is paragraph 5 of subdivision B., which declares it to be a misdemeanor for a person to practice dentistry under a false or assumed name. The information does not charge that the defendant actually practiced dentistry under a false or assumed name, but it charges that on the 11th day of June, 1912, he aided and abetted one Maschke in so doing.

[1] The evidence showed that the other person gave a single treatment, filling one tooth; secured money therefor; gave a receipt on a bill of Longenecker Bros., signed "Longenecker Bros., by Dr. Maschke." The only evidence relating to the defendant is that Maschke asked the defendant "if he didn't think he would have to do so and so—I can't remember exactly what it was—in connection with a plate that he was fitting in my mouth," and the defendant said, "Yes, Doc, I think you'll have to." The defendant, at the time, was standing at the left of the complaining witness, alongside the operating chair. This was the only evidence of word or deed on defendant's part. There were two signs outside the dental parlors—"Longenecker Bros.," across the front of the building; and "Longenecker Bros.," at right angles to the building. The defendant's name did not appear at all. Without objection, the receipt was offered in evidence, and also a bill of sale from David L. Longenecker to the defendant, dated November 13, 1911, by the terms of which the dental business and equipment, together with the good will, were sold to the defendant. Longenecker covenanted in the instrument not to practice in the city of Greater New York. We do not perceive that there was any evidence that Maschke practiced dentistry under an assumed name or that he practiced it at all.

[2] The information, being for a statutory offense, must state all the facts which constitute the statutory offense, and upon the trial the proof, as well as the allegations, must bring the case within the statute. Wood v. People, 53 N. Y. 511. An essential ingredient of the offense charged was the practice of dentistry. In People v. Firth (Sup.) 142 N. Y. Supp. 634, the court said:

"It is a practice, not an act as distinguished therefrom, with which defendant is charged, and which the statute forbids. Practice results from a series of acts."

The Legislature has demonstrated its capacity to use appropriate and effective words to prevent personation of a skilled practitioner by a single act, in section 174 of the Public Health Law. It used this language:

"Any person who shall practice medicine under a false or assumed name, or who shall falsely personate another practitioner or former practitioner of a like or different name, shall be guilty of a felony."

See People v. Dudenhausen, 130 App. Div. 760, 115 N. Y. Supp. 374, affirmed 195 N. Y. 554, 88 N. E. 1127. The rule is:

"Purely statutory offenses cannot be established by implication, and acts otherwise innocent and lawful, do not become crimes, unless there is a clear and positive expression of the legislative intent to make them criminal." People v. Phyfe, 136 N. Y. 554, 559, 32 N. E. 978, 979 (19 L. R. A. 141).

[3] The conclusion that we reach, that the single act does not constitute the offense charged, makes it unnecessary to elaborate our view, equally fatal to the judgment of conviction, to the effect that, upon the assumption that the acts of Maschke constituted a crime, there is no evidence that the defendant was guilty of any affirmative act aiding and abetting him in the commission of those acts. United States v. Gooding, 25 U. S. (12 Wheat.) 460, 465, 6 L. Ed. 693; State v. Cox, 65 Mo. 29, 33; White v. People, 81 Ill. 333, 337; People v. Taylor, 192 N. Y. 398, 85 N. E. 759; Section 202, Public Health Law; Blatz v. Rohrbach, 116 N. Y. 450, 453, 22 N. E. 1049, 6 L. R. A. 669.

The judgment of conviction of the Court of Special Sessions should be reversed, and defendant discharged. All concur.

(158 App. Div. 222)

In re WATER SUPPLY OF CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

WATERS AND WATER COURSES (§ 156*)—CONVEYANCES—RIGHTS GRANTED.

A deed, which, pending proceedings for condemnation by a city for a water supply, after referring to the map filed in the condemnation proceedings, states the boundaries so as to include all the grantor's pond, except shallows on one margin, has an habendum, to have with the land "ponds, springs, stream, water rights, mill rights and privileges," gives the grantor right to fill said shallows, but provides that, whether or not he does so, he "relinquishes all water and mill rights," reserved to the grantor a right to continue his mill for three years, if the grantee does not sooner complete a pumping station, and to use such water as the grantee may not find necessary to take for its own use, though not including one of the banks of one of the tributary streams, gives the grantee the right to divert and consume the waters of the pond, to the extinguishment of the grantor's lower riparian rights, as owner of the lands on the outlet; and this though the more efficient means of withdrawing the water, finally adopted by the city, are not in mind at the time of the grant.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174–183; Dec. Dig. § 156.*]

Appeal from Special Term, Nassau County.

Application of the City of New York to acquire real estate at Wantagh, in the town of Hempstead, county of Nassau, for purposes of water supply. From an order confirming Commissioners' report, Edwin H. Brown appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

Theodore N. Ripsom, of New York City (Robert Bach, of New York City, on the brief), for appellant.

John B. Shanahan, of Brooklyn (James D. Bell, of Brooklyn, on the brief), for respondent.

PUTNAM, J. This is a proceeding to condemn land and to acquire an easement "to draw down the streams and ponds" and waters of any description, as shown upon a map duly filed. The territory to be affected was in Wantagh in the town of Hempstead, to the south of the "infiltration gallery," between the Merrick Road and Great South Bay—a district of approximately three square miles in area. This appeal is by Mr. Edwin H. Brown as owner of about 116 acres, in which is an artificial fresh water pond, originally of about 21 acres. Mr. Brown's title is through deed from one Jacob S. J. Jones, who in 1885 also owned an adjoining tract, above what is now the Brown estate. This upper tract lay between the Babylon Turnpike, now the Merrick Road, and the Long Island Railroad. It included an artificial millpond of about 85 acres, composed of smaller pools and formed by the waters of the Jerusalem Brook and the West Brook. This pond was retained by a dam at the Babylon Turnpike.

Since 1884, the former city of Brooklyn and its successor, the city of New York, had been taking water from along the south shore of Long Island by pumping stations and driven wells. In January, 1885, it had started proceedings to condemn lands for water supply purposes in this locality, and filed a map entitled the "General Map of Lands, Etc., intended to be taken and entered upon for the purpose of acquiring additional lands and the extinguishment of additional water rights with a view of increasing the water supply of the City of Brooklyn, pursuant to resolution of the Common Council of said City passed January 19, 1885."

Mr. Jones' pond was a favorable site for a city pumping station. Near the dam was a mill from which the overflow escaped into a swamp or salt marsh, also then owned by Mr. Jones, but in 1902 conveyed to this appellant. The city purchased this pond and mill site from Mr. Jones by conveyance on August 7, 1885. The proposed pumping station was expected to take about three years to erect, and the deed gave Mr. Jones certain rights to run his mill in this interval. After referring to the map filed in the condemnation proceedings, the deed stated the boundaries by compass courses and measurements, so as to include all the Jones pond except the shallows on the eastern margin. Some additional uplands on the west side, between the turnpike and Hogs Head Road, not specifically included in the description, were also granted. The conveyance had this habendum:

"Together with all and singular the tenements hereditaments ponds, springs, stream, water rights, mill rights and privileges, and rights and easements to take dirt gravel etc. from land on the south side of said turnpike for the repair of the milldams and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions remainder and remainders rents issues and profits thereof."

The instrument was a bargain and sale deed, with the usual full covenants.

Pending erection of the expected pumping plant, Mr. Jones was given the rights of boating, fishing, gunning, and taking ice from this pond for his domestic use, "said privileges to be continued, however, only as long as they are not found by the party of the second part, or its department of city works, to interfere with the proper maintenances or keeping of the pond and to be revoked by the said department of city works or its successors whenever their exercise shall be found in any way detrimental."

The shallow margin of the pond above mentioned, beyond the east purchase line, might be filled in by Mr. Jones "at his own expense whenever he may wish to do so; and that the said party of the second part may have on the other hand a similar right; but that whether such additional filling may or may not be made by either party the party of the first part relinquishes all water and mill rights."

Mr. Jones also reserved a qualified right to continue his mill and machinery for three years, and to use such water "as the party of the second part may not find necessary to take for its own use according to the judgment and in the discretion of its commissioner of the department of city works or his successors. Said privileges, however, shall not debar the party of the second part from the right to draw down the pond while constructing its waterworks north of the railroad if it shall be deemed necessary to drain said works during construction."

After expiration of three years, the city was to be entitled to charge a rental for the mill site, and for the use of the surplus water for mill purposes, with a preference in such renting to Mr. Jones, if it should decide to rent the same. If it decided not to rent, then Mr. Jones was to remove his mill and machinery at his own cost. In case, however, the pumping station on the pond should be built and operated before the three years, Mr. Jones was to receive $500 in addition to the consideration hereinbefore expressed.

Some time after this deed, the swamp land below the Merrick Road was excavated, so that in February, 1902, when Mr. Brown took his title, there was on his estate a pleasure pond of fresh water, about four feet deep, supplied by the overflow from the Jones pond. Mr. Brown did not feel any inconvenience in the lack of water for his pond, until the infiltration galleries were operated in 1905, when much of the flow from the Jones pond ceased, and the bottom became exposed, so that Mr. Brown was left to depend on a salt-water supply for his pond. He therefore sought compensation for this stoppage of the surface flow from the city's waterworks at the Jones pond.

This brings us to the scope and effect of this conveyance in 1885, in view of the attending circumstances, especially the condemnation proceedings started. What did the city acquire? Was it only the user of the water of the Jones pond, as appurtenant to the land, limited to a reasonable enjoyment thereof, such as a riparian owner ordinarily has; or did the city obtain the right to take, divert, and consume these waters, so as to exhaust all its overflow, if required for its municipal water supply?

The right here involved of the lower proprietor was not a claim to percolating subterranean waters, but to the living stream overflowing from the upper pond in a water course running into his adjacent marshland. Such a right, as against diversion and impairment by pumping or other appropriation of the surface water above, had always been judicially recognized. Van Wycklen v. City of Brooklyn, 118 N. Y. 424, 24 N. E. 179.

In 1909, the condemnation commissoners reported adversely to the city. They stated as reasons for their conclusion: (a) That as the Jones pond had been made from natural streams, the overflow of which ran on to Great South Bay, it could not be presumed that Mr. Jones meant to cede and extinguish his lower riparian rights; (b) that the infiltration gallery, installed 20 years after, was not then thought of; and (c) the rights of the city were incomplete since its boundary did not take all of the West Brook, but only to the middle line, by which it acquired but half that stream.

After hearing at the Special Term, this report was rejected and the matter sent back. The second report, here confirmed, awarded to Mr. Brown for the city's easement to draw down streams and other waters on his land, $9,500, but, as directed at Special Term, excluded any compensation for his pond as deprived of waters and springs originating in the Jones pond.

Upon this appeal Mr. Brown urges that the city took only the water rights naturally appurtenant to the grant to it,—a right to use the water, and not to take and divert its entire volume.

The title and easements granted were not to use the power or passing flow of this pond. The municipal purpose was to appropriate and conduct away for consumption, not to be returned, the corpus of the pond, or so much thereof as the city should judge necessary for its purposes.

The grant purported to vest in the city officials the discretion as to how much water it should take and appropriate. It was contemplated that the municipality might draw down the pond so that the mill would not turn, since that eventuality was to form the consideration for the additional $500, if this happened within the three-year period of Mr. Jones' continued occupancy. The public objects disclosed by the condemnation proceedings add weight and effect to the habendum, to have with the land "ponds, springs, stream, water rights, mill rights and privileges."

Such an absolute taking for sale and consumption negatived any lower riparian right, the essence of which is that all water so used be returned in quantity substantially undiminished, in the ordinary channel, as it leaves the first estate. 3 Kent's Com. 439. All these rights of such riparian proprietors were then vested in Mr. Jones, the city's grantor. He understood the grant he gave. As was said by Mellish, L. J.:

"It is quite plain (indeed, I do not know that it is disputed) that the diversion of the water of a stream for the purpose of sending it in large quantities to a reservoir to supply a town is not within the right of a riparian proprietor." Wilts & Berks Canal Nav. Co. v. Swindon Waterworks Co., L. R. 9 Ch. App. 451, 459.

Mr. Jones, at the same time owner of the millpond and of the entire course of its overflow to the bay, conveyed and granted this right to divert, appropriate, and consume, at the city's discretion, and to conduct its pumping to the point of absorbing all overflow and discharge. After such an unqualified grant, the appellant who stands in the shoes of the grantor, could not assert any riparian rights as to the waters so appropriated and consumed. N. E. Cotton Yarn Co. v. Laurel Lake Mills, 190 Mass. 48, 76 N. E. 231. Such a second pool to be fed and maintained from the overflow of the upper pond then sold, if contemplated, required an exception or reservation in the grant.

No doubt the increased efficiency of the water withdrawals through operation of the infiltration galleries was not then in mind; but these galleries were but a lateral extension of the usual pumping from wells (Strang v. City of New York [Sup.] 127 N. Y. Supp. 231), and clearly within the rights conveyed.

In 1885, the Jones pond had long dammed back the two streams which fed it. Although this deed bounded along the thread of the West Brook, above the line of pond flowage, it did not leave out any portion of that inflow, after it entered and became incorporated in the pond itself. It was not necessary that the city should also have title to both the tributary streams before they became merged in the waters of its purchase.

When, therefore, in 1902, Mr. Brown, the claimant, took his title to the lower lands, with the excavations thereon, he took it charged with full knowledge of the rights and easements under the deed of his grantor, by which the city could draw down the pond waters even to the extent of diverting and exhausting the southern overflow therefrom, however that might affect the lower estate.

I advise that the order confirming the report be affirmed, with costs. All concur.

(81 Misc. Rep. 606)

PEOPLE v. EVANS.

(Supreme Court, Special Term, Erie County. July, 1913.)

1. INDICTMENT AND INFORMATION (§ 10*)—SUFFICIENCY OF EVIDENCE TO SUPPORT INDICTMENT.

Under the express terms of Code Cr. Proc. § 256, the grand jury can receive only legal evidence, and under section 258 it ought to find an indictment only where, in their judgment, the evidence is such, if unexplained and uncontradicted, as would warrant a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 50–61; Dec. Dig. § 10.*]

2. CRIMINAL LAW (§§ 510, 511*)—TESTIMONY OF ACCOMPLICE—CORROBORATION.

Under Code Cr. Proc. § 399, a conviction cannot be had upon the uncorroborated testimony of an accomplice, and evidence to be corroborative must be such that it of itself leads to inference that a crime was committed and that the accused was implicated in it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126, 1128–1137; Dec. Dig. §§ 510, 511.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. CRIMINAL LAW (§ 511*)—TESTIMONY OF ACCOMPLICE—SUFFICIENCY OR CORROBORATIVE EVIDENCE.

Where the evidence, aside from that of an accomplice, merely showed that defendant, an attorney, who was accused of grand larceny, deposited $460 in the bank the day following the alleged larceny, there being nothing in that sum to direct suspicion, it was insufficient corroboration, considering the presumption of innocence, to support the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. § 511.*]

4. INDICTMENT AND INFORMATION (§ 144*)—MOTION TO DISMISS INDICTMENT—INSUFFICIENCY OF EVIDENCE.

Notwithstanding Code Cr. Proc. § 313, limiting the causes for setting aside an indictment to certain cases of failure to comply with the statutes, the person indicted has a constitutional right to move its dismissal, if the legal evidence received by the grand jury was insufficient to support the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. § 144.*]

William J. Evans was indicted for grand larceny. Motion to dismiss indictment sustained.

William J. Evans, of Buffalo (Henry W. Killeen, of Buffalo, of counsel), for the motion.

Wesley C. Dudley, Dist. Atty., and Guy B. Moore, Asst. Dist. Atty., both of Buffalo, opposed.

POOLEY, J. The defendant is indicted for grand larceny, and a motion is now made for an inspection of the minutes of the grand jury which found the indictment, and for a dismissal of the indictment, on the ground that the evidence before the grand jury was insufficient, in that it consisted of testimony of one Savage, who had previously been convicted of the crime charged, and that there was no corroboration of his testimony.

The crime charged was the stealing of $2,690 from the town of West Seneca, and was effected by preparing a false claim by the contractor, the certifying as to its correctness by the engineer, and the issuing of a warrant by the chairman of the town board, drawn upon the account of the town in the Union Stockyards Bank. This warrant was presented by the engineer and cashed at the Third National Bank, and in due course came to the Union Stockyards Bank and was charged to the account of the town. The money thus obtained is alleged to have been divided among the members of the board, the engineer, this defendant, and another.

The contractor was indicted, tried and convicted, as well also the engineer and the chairman of the board. These were the ones who executed the false warrant and procured the money from the bank. After conviction, the contractor appeared before the grand jury and gave evidence of the above facts, and also that the money when received by the engineer was taken by him to the office of the defendant, the attorney for the contractor, who divided it, giving the engineer $250.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Savage then testified before the grand jury as follows, reduced to narrative form:

"O'Connor came in about that time, and defendant handed O'Connor some money, package of money, and he gave me a package and told me to meet Lein at Kane & Beasley's saloon on Washington street. I went there with the package of money. I found Lein upstairs with Cosgrove, the town clerk. I handed Lein this package of money. He took it, and I believe he handed Cosgrove a package of it. Lein left the room with Cosgrove, and when he came back he handed the package to Cosgrove. I did not see what was in the package."

It appears by tellers of the banks that the warrant was cashed at the Third National Bank, April 10, 1908, and charged to the account of the town in the Union Stockyards Bank. It further appears by a teller of the Erie County Savings Bank that William J. Evans had an account there, and on April 11, 1908, deposited $460. It does not appear that the Erie County Savings Bank account is the account of this defendant, although the name is the same.

I have the grand jury minutes before me, and this evidence from the banks is the only evidence aside from that of Savage, before the grand jury, and is the only evidence that can be claimed to be corroborative of Savage's testimony, and it is urged by the defendant that it in no way connects him with the crime.

[1, 2] The statutes of the state are quite specific. The grand jury can receive none but legal evidence. Code of Criminal Procedure, § 256. The grand jury ought to find an indictment, when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury. Id. § 258. A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime. Id. § 399.

[3] The question then is: Does the testimony before the grand jury, other than that of Savage, corroborate the latter's testimony? It is apparent that the testimony of the three witnesses from the banks does not indicate the commission of any crime whatever. The warrant was regular on its face, and was properly cashed and charged to the account of the town. The only fact bearing any semblance of a connection of defendant with the crime is that on the day following the cashing of the warrant he deposited $460, in his account in the Erie County Savings Bank. This figure does not evenly divide the original $2,690, nor the $2,440, remaining after deducting the $250, alleged to have been paid to the engineer. Can it be said then that the mere fact that defendant made a deposit on this day was evidence that it was wholly or in part some of the stolen money? At most, it indicates that on the day in question he had $460, in money, which he deposited to his credit in the bank. There is nothing in the amount or in the size of it that need be said to be suspicious.

[4] In People v. Sexton, 187 N. Y. 495, 511, 80 N. E. 396, 402 (116 Am. St. Rep. 621) the Court of Appeals holds that:

"Whenever it clearly appears, therefore, the legal evidence received by a grand jury is insufficient to support an indictment, * * * the person in-

dicted has a constitutional right to make a motion to dismiss, notwithstanding the provisions of the Code to the contrary."

The provision of the Code referred to is section 313, which limits the cases in which the indictment must be set aside to those not found, indorsed, and presented as prescribed in sections 268 and 272; and when a person has been permitted to be present during the session of the grand jury except as provided in sections 262, 263, and 264, neither of which has any bearing here.

Every defendant charged with a crime is entitled to the presumption of innocence; and, starting with this presumption, legal evidence must be produced tending to connect the defendant with the crime. The essential probative force of the testimony against defendant narrows down to the fact that he deposited some money on the day after the false warrant was cashed. This is not inconsistent with a legitimate business transaction entirely foreign to the crime charged, and is in no way a rebuttal of the presumption of innocence.

In People v. Plath, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236, the court quotes with approval from Roscoe's Criminal Evidence, 122, as follows:

"That there should be some fact deposed to, *independently altogether of the evidence of the accomplice*, which taken by itself leads to the inference not only that a crime has been committed but that the prisoner is implicated in it."

Following this rule, and taking all the evidence before the grand jury except that of Savage, the accomplice, it in no way indicates or tends to indicate that any crime has been committed, nor does it implicate that the defendant was implicated or had any part in the transaction to which the charge relates.

The indictment is dismissed.

(158 App. Div. 153)

PEOPLE ex rel. BROOKLYN, Q. C. & S. R. CO. v. STEERS, President of Borough of Brooklyn.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. STREET RAILROADS (§ 28*)—RIGHT TO CONSTRUCT—STATUTORY PROVISIONS—"EXTENSION."

Under Railroad Law (Laws 1890, c. 565) § 90, as amended by Laws 1892, c. 676, providing that a street surface railroad corporation may file in each of the offices in which its certificates of incorporation are filed a statement of the names and descriptions of the streets, roads, and highways in which it is proposed to extend its road, and that upon filing such statement it shall have the same powers and privileges to extend, construct, operate, and maintain its road in such streets, roads, and highways as it acquired by its incorporation to construct and operate its road in the streets named in its certificate of incorporation, and section 5, as amended by Laws 1893, c. 433, now Consol. Laws 1910, c. 49, § 12, providing that if any domestic railroad corporation shall not, within five years after its certificate of incorporation is filed, begin the construction of its road and expend thereon 10 per cent. of the amount of its capital, its corporate existence and powers shall cease, where such a corporation filed a certificate of extension, naming eight separate and dis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tinct streets, neither of which communicated with either of the others, and thereafter within five years constructed a road on certain of those streets and expended the necessary percentage of the capital, but failed to construct any road on another of such streets, it lost its right to construct a road on such street as the different routes specified in the certificate constituted separate extensions, an "extension" involving the idea of something pre-existing with which it is connected and which is thereby enlarged, especially in view of the amendment of section 90, by Laws 1893, c. 434, authorizing the filing of such a certificate "from time to time" and referring to the construction of branches as well as extensions.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 39–42, 44, 45, 56, 61, 63–65; Dec. Dig. § 28.*

For other definitions, see Words and Phrases, vol. 3, pp. 2615–2618; vol. 8, pp. 7658, 7659.]

2. STREET RAILROADS (§ 61*)—RIGHT TO CONSTRUCT—STATUTORY PROVISIONS. The provision of Railroad Law (Laws 1890, c. 565) § 5, as amended by Laws 1893, c. 433, now Consol. Laws 1910, c. 49, § 12, that if any domestic corporation shall not, within five years after its certificate of incorporation is filed, begin its construction of its road and expend thereon 10 per cent. of the amount of its capital, its corporate existence and powers shall cease, applies to street surface railroad companies and is self-executing.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 50–54; Dec. Dig. § 61.*]

Appeal from Special Term, Kings County.

Mandamus by the People, on relation of Brooklyn, Queens County & Suburban Railroad Company, against Alfred E. Steers, President of the Borough of Brooklyn. From an order (80 Misc. Rep. 324, 140 N. Y. Supp. 945) granting a peremptory writ, the defendant appeals. Reversed, and motion for writ denied.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

William P. Burr, of New York City (William J. Clarke, of New York City, on the brief), for appellant.

Charles L. Woody, of Brooklyn, for respondent.

BURR, J. [1] Relator is a domestic street railroad corporation, and is the successor in interest of the Broadway Railroad Company, a similar corporation. Prior to December 31, 1892, the latter company had constructed its road to points on Atlantic avenue in the then city, now borough, of Brooklyn, substantially coterminous with the southerly portion of Troy avenue, Utica avenue, and Ralph avenue, respectively, lying between Atlantic avenue and the boundary line of said city. It seems to be conceded that the original franchise permitted such construction to the points named, or to a short distance southerly therefrom. On December 31, 1892, it caused to be filed and recorded in the appropriate offices a certificate of extension, pursuant to the provisions of the then existing Railroad Law (Laws of 1890, c. 565, § 90, as amended Laws of 1892, c. 676). The act as amended provided that:

"A street surface railroad corporation may file in each of the offices in which its certificates of incorporation are filed, a statement of the names and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

descriptions of the streets, roads and highways in which it is proposed to extend its road. Upon filing such statement such corporation shall, except as otherwise prescribed by law, have the same power and privileges, to extend, construct, operate and maintain its road in such streets, roads and highways as it acquired by its incorporation to construct, operate and maintain its road in the streets, roads and highways named in its certificate of incorporation."

In said certificate eight separate and distinct streets were named, none of which communicated with any of the others. The certificate contained eight paragraphs, in each of which the extension therein described was denominated a "route." The sixth, seventh, and eighth paragraphs thereof were as follows:

"6. A route commencing at the end of the track of said company on Ralph avenue between Atlantic avenue and Pacific street, thence through Ralph avenue to the city line.

"7. A route commencing at the end of the track of said company in Utica avenue at Atlantic avenue, thence along Utica avenue to the city line.

"8. A route commencing at the track of said railroad company at the intersection of Bergen street and Troy avenue, thence along Troy avenue to city line."

On July 17, 1893, the Broadway Railroad Company obtained from the local authorities of the city of Brooklyn its consent to the construction and operation of the street surface railroad over, among other streets named therein, "Troy avenue, from Fulton street to St. Marks avenue." Over a part of this route, namely, from Fulton street to Atlantic avenue, this road had been already constructed; but by the same consent permission was given to change the motive power "from horse to the overhead electric trolley system of propulsion." On July 24, 1893, a further consent was obtained by said railroad company from the local authorities to the construction and operation, either by horse power or electricity, of a railroad over 34 streets named therein, among which were "Ralph avenue, from Pacific street to the city line. Utica avenue, from Atlantic avenue to the city line," and "Troy avenue, from St. Marks avenue to the city line." Within five years thereafter railroads were constructed along the routes designated in the certificate of extension as routes numbered 6 and 7, and referred to in the consent of the local authorities as the Ralph avenue and Utica avenue routes. Up to this time there has been no construction upon any part of the Troy avenue route designated as number 8 in said certificate.

Relator, being now desirous of building a railroad through said avenue, applied to the president of the borough of Brooklyn for the necessary permit to open the street for that purpose. Upon his refusal this proceeding was instituted to obtain a peremptory writ of mandamus, and from an order granting its application defendant appeals.

[2] By section 5 of the Railroad Law of 1890, as amended (Laws of 1893, c. 433, now section 12 of Consolidated Laws, c. 49 [Laws of 1910, c. 481]), it is provided that:

"If any domestic railroad corporation shall not, within five years after its certificate of incorporation is filed, begin the construction of its road and expend thereon ten per centum of the amount of its capital, * * * its corporate existence and powers shall cease."

This statute is applicable to street surface railroad companies, and is self-executing. In re Brooklyn, Queens County & Suburban R. R. Co., 185 N. Y. 183, 77 N. E. 994. Upon the Ralph avenue route and the Utica avenue route, within the prescribed period relator has expended a sum equal to 10 per cent. of the capital necessary to construct a railroad upon all of the eight routes named in the certificate, and the total mileage of track thus laid exceeds 10 per cent. of the entire trackage upon all of said additional routes. The learned court at Special Term fairly stated the controversy in these words:

"The relator claims that all eight routes named in the certificate of extension filed December 31, 1892, constitute one extension. The city authorities, on the other hand, contend that the one certificate of extension enumerating eight routes contains in law and fact eight separate extensions."

We think that the latter construction is correct. An "extension" involves the idea of something pre-existing, with which it is connected, and which is thereby enlarged. In Bohmer v. Haffen, 35 App. Div. 381, 388, 54 N. Y. Supp. 1030, 1035, affirmed 161 N. Y. 390, 55 N. E. 1049, Presiding Justice Van Brunt said:

"In considering the provisions of chapter 676 of the Laws of 1892, in relation to extensions by street surface railroad corporations, it would seem that the word 'extend' was not intended to be used in its restricted sense of prolongation in a given direction, but rather that it was intended to enable the railroad company to acquire a right of construction, maintenance, and operation of additional *routes* which might be operated in connection with its existing lines."

But each extension, which is unrelated to any other extension except through the thing which they enlarge, would naturally be spoken of as a separate extension, just as the certificate in question described them as separate and additional routes. The branch must of necessity be joined to the vine and be a part thereof, but as between themselves each branch has a separate and distinct entity. In Matter of Brooklyn, Queens County & Suburban R. Co., supra, the court said (185 N. Y. page 183, 77 N. E. page 998):

"The certificate of extension which a corporation files is in effect, clearly and simply, an amendment of its original articles of incorporation. Those original articles prescribe the line and extent of its proposed route. The certificate of extension prescribes the line and route of an additional road and to that extend amends the original articles of incorporation. For the purposes of this provision, we think it may naturally and easily be treated as an amendment to the articles of incorporation made to include the proposed extension, and the date of filing of which will fix the periods within which a corporation must act as to said extension."

This language must, of course, be construed in the light of the facts then under consideration. In that case but a single extension, that along Saratoga avenue, was involved, and the court had before it the question whether the provisions of this statute were applicable to street surface railroads, were self-executing, or otherwise, and the meaning of the words "ten per cent." of the amount of its capital. The learned court at Special Term, however, making use of this language as a basis for its argument, says:

"It can hardly be contended that if all the streets named in the various routes in the certificate of extension of December 31, 1892, had originally

been named in the articles of incorporation of the company, and over 10 per cent. of the total cost of the first projected railroad had been made in actual construction, there could have been a forfeiture."

If the argument proves anything, it proves too much. If the original articles of incorporation are to be deemed amended in this broad sense, and were these new roads automatically to become part of the original system, then, if the company had expended upon its original route 10 per cent. of the amount necessary to construct both its original and extended road, no actual construction would ever become necessary on the parts added by extension to prevent forfeiture for violation of the statutory requirement above referred to. Again, although more than 10 per cent. had been expended upon the construction of the original route, if when the certificate of extension was filed less than 10 per cent. of the cost of the original route plus the extension had been expended, instantly forfeiture would follow. The question actually decided in Matter of Brooklyn, Queens County & Suburban Railroad Co., supra, that the 10 per cent. provision referred to the cost of the extension only, clearly indicates that the language of the opinion cannot be enlarged to the extent claimed. We think that the manifest purpose of the statutory requirement that within five years actual construction should begin, and 10 per cent. of the capital be then expended, was to prevent a railroad company from obtaining a franchise from the state for the operation of a railroad through a large number of designated streets, and then indefinitely postponing actual construction of track through any portion thereof. The subsequent history of the legislation confirms this view. The statute relating to extension as originally passed (Laws of 1892, c. 676) in express terms authorized only the filing of one certificate of extension. In the succeeding year (Laws of 1893, c. 434) a continuing power was given to file such certificate "from time to time," and in express terms such certificate was made to refer to the construction of "branches" as well as extensions. The section was further amended (Laws of 1895, c. 933) in particulars not here important, and is now found in section 170 of the present Railroad Law (Consolidated Laws, c. 49, supra) in these words:

"Any street surface railroad corporation, at any time proposing to extend its road or to construct branches thereof, may, from time to time, make and file in each of the offices in which its certificate of incorporation is filed, a statement of the names and description of the streets, roads, avenues, highways and private property in or upon which it is proposed to construct, maintain or operate such extensions or branches."

There would seem to have been no necessity for the amendment of 1893, perpetuated in the present Railroad Law, if at one time a railroad company could file a certificate of extension, relating not only to its present needs, but to every street or avenue that by any excess of imagination it might conclude would be useful in the future. We think, therefore, that when there is included in a certificate of extension several separate and distinct routes, unrelated to each other, each route must, for the purpose of the statute under consideration, be deemed a separate extension. If, availing itself of the provisions of the amended statute, relator had "from time to time," and on eight

successive days, filed eight separate certificates, designating in each a single route, we think that it would not be contended that these eight certificates were to be read together as constituting a single extension. The fact that eight unrelated routes, separately described, were included in a single instrument, cannot make any difference as to the construction or meaning thereof.

The order should be reversed, with $10 costs and disbursements, and the motion for a peremptory writ of mandamus should be denied, with $50 costs. All concur.

(158 App. Div. 210)

WEBSTER v. RICHMOND LIGHT & R. CO.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. WITNESSES (§ 402*)—CONTRADICTING ONE'S OWN WITNESS.
While one by placing a witness on the stand vouches for his credibility to a certain extent, yet, if there is anything in his testimony which operates against her, she may claim he was mistaken as to that, prove the facts as they really were, and ask that such inferences be drawn as are really warranted by the other evidence in the case.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1268; Dec. Dig. § 402.*]

2. ELECTRICITY (§ 19*)—INJURY FROM ESCAPE—CARE REQUIRED—CUSTOMARY DEVISES.
Evidence, in an action against an electric light company for a death of a person in a house through a high voltage current escaping from a primary to a secondary wire, the transformer having gotten out of order, that it was customary for such companies to use a devise, not used by defendant, which would prevent such flowage, is admissible.
[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

3. ELECTRICITY (§ 19*)—INJURY FROM ESCAPE—NEGLIGENCE—EVIDENCE.
Evidence, in an action against an electric light company for injury to one, turning the switch in a dwelling, from a high voltage current which had escaped from the primary to the secondary wire *held* to make a case for the jury on the question of negligence.
[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

4. ELECTRICITY (§ 14*)—INJURY FROM ESCAPE—CARE REQUIRED.
Where a corporation, for its profit, assumes to control the distribution of electricity, it must exercise at least reasonable care to prevent its escape in a death-dealing manner.
[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.*]

5. ELECTRICITY (§ 19*)—INJURY FROM ESCAPE—NEGLIGENCE—EVIDENCE.
The escape to a dwelling supplied by an electric light company, of a high voltage current, causing death, is, in the absence of explanation, evidence of negligence, regardless of direct proof of defective appliances; being a thing which in the ordinary course of business does not happen if reasonable care is used.
[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

6. DEATH (§ 76*)—CONTRIBUTORY NEGLIGENCE—EVIDENCE.
While plaintiff, in an action for death from negligence, has the burden of showing deceased used due care, this, while it must be established af-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

firmatively, need not, where there is no eyewitness, be proved by testimony addressed directly to its support, but may be shown by evidence of circumstances which exclude fault.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 94; Dec. Dig. § 76.*]

7. ELECTRICITY (§ 19*)—INJURY FROM ESCAPE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence, in an action for death to one, when turning the switch in a dwelling, from a high voltage current of electricity, which had escaped to the wire of the electric company leading into the house, *held* to make the question of contributory negligence one for the jury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

Appeal from Trial Term, Richmond County.

Action by Julia Webster, administratrix, against the Richmond Light & Railroad Company. From the judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and THOMAS, CARR, STAPLETON, and PUTNAM, JJ.

Rutherford B. Meyer, of New York City, for appellant.

E. Clyde Sherwood, of New York City, for respondent.

STAPLETON, J. The plaintiff appeals from a judgment entered against her, dismissing her complaint at the close of her case. The action was brought to recover damages for neglect of the defendant whereby the death of her intestate was caused.

The decedent was employed as an assistant to the engineer in the City Farm Colony, an institution established and maintained by the city of New York. His general work was to make minor repairs to the plumbing, heating, and electrical apparatus about the buildings of the colony. On the farm are seventeen buildings, one of which is known as the Burke building and used as a dormitory, with accommodation for about 200 aged and indigent women.

The defendant, a public service corporation, supplied electric current for illuminating purposes to the buildings, including the Burke building. It owned, controlled, and maintained a generating plant, poles, wires, transformers, and pole conduits. The transformer is a device designed to reduce the voltage, and in this case the reduction was from 2,200 to 110. It was attached to a pole near the building, and from it two sets of wires, incased in leads or mains, carried the low voltage current down the pole and into the building. The wires and connections between the transformer and the switchboard were in excellent condition. In the transformer there were three coils of wire around the high potential coil, operated at 2,200 volts, and two others, each delivering 110 volts, to what is known as the secondary circuit. A witness, skilled in electrical engineering, found, shortly after the casualty, one secondary coil intact and the other secondary coil broken down, as to insulation, to the primary winding. He also found that there was an electrical connection between the primary coil, operating

on 2,200 volts, and the secondary coil, from which was delivered 110 volts for the operation of the lamps; that the inside of the transformer showed burns on the connection plate, caused by an electric current; that there was a breakdown between the primary winding and the secondary winding; that there was a breakdown between the right-hand primary coil and the right-hand secondary coil; that the two windings are entirely distinct from each other and are separated electrically unless there is such a breakdown; that the tests showed there was a specific breakdown between the primary winding and one-half of the secondary winding, there being two secondary coils in the transformer. The result was to establish on the secondary system of wiring, a wire of which entered the building and connected with the switchboard, a pressure or electric potential equivalent to that on the primary system, namely, 2,200 volts. Twenty-two hundred volts is a fatal force; 110 volts are comparatively harmless.

On the 24th day of July, 1911, at 3 o'clock in the afternoon, the plaintiff's intestate was working around the kitchen of the Burke building, repairing a boiler valve. A fellow workman noticed a blaze coming from a chandelier in the vestibule adjoining the kitchen. The blaze was fan-shaped and about 8 feet long. The attention of the decedent was attracted to the blaze. He procured a ladder and a patent fire extinguisher and ascended the ladder, bringing the extinguisher with him, and played the extinguisher upon the blaze. The blaze went out and the decedent descended the ladder. There was a resumption of the blaze, the second blaze being about 2½ feet long. A witness was permitted, without objection, to testify that the deceased said he would run down and turn off the switch, and he thereupon suited his action to his word. That was the last his fellow workman saw of him in life. The canopy from which the blaze descended was not equipped with bulbs for lighting purposes at the time. The decedent obtained the key to the boiler room from a nurse who was in charge of the building. He came in to her in a hurry and asked for the key. About 15 minutes afterwards the dead body of the decedent was found by the nurse, lying on the floor of the boiler room, under the switchboard. He had been killed by a deadly current of electricity. His right hand had evidences of deep charred burns, penetrating to the bone. The cause of death was cardiac paralysis, due to contact with a wire charged with commercially prepared electricity. The switchboard was adjacent to the entrance door of the boiler room and was raised about 3 feet from the floor. The boiler room was about 25 feet square and contained 2 windows, each about 25 inches square. The windows were about 15 feet away from the switchboard, on the opposite side of the room. There was no eyewitness to the casualty.

The secondaries from the transformer were not grounded. A skilled witness did not notice any lightning arresters on the overhead circuit from the Farm Colony connected with the station. Another skilled witness described and defined a lightning arrester as follows:

"A lightning arrester is a device which is connected to line wires which are commonly exposed to the effects of electrical storms. This device carries a wire which is connected to receive, and by certain arrangements of terminals or electromagnetic means, moving parts or otherwise, the conditions

are so arranged that the high frequency lightning discharged, instead of traveling along those wires and proceeding into buildings and expensive apparatus, will be deflected into the ground, and do no damage."

There was evidence that prior to the casualty an electrical storm was in progress, but that the lightning feature of it had subsided about a half hour previously, although the rain continued.

[1] A skilled witness, called on behalf of the plaintiff and adopted by the defendant, testified that at the time he made his examination of the transformer he did not determine from his examination whether the breakdown in the transformer was due to lightning; that there was no primary evidence that lightning struck the transformer; and that there was no lightning indicated in the transformer. He gave his opinion that the lightning struck the primary lines leading to the transformer and then went to the transformer; that the pulling on the switch would have the effect of stopping the blaze from the canopy; and that the switchboard was of ordinary construction. Concerning the testimony of this witness it may be said that, while the plaintiff vouched for his credibility to a certain extent by placing him on the stand, if there was anything in his testimony which operated against her, she had the right to claim he was mistaken as to that, to prove the facts as they really were, and to ask that such inferences be drawn as were really warranted by the other evidence in the case. Quick v. American Can Co., 205 N. Y. 330, 334, 98 N. E. 480.

[2] The plaintiff offered to show by a qualified witness that it was customary for illuminating companies to use a device, not used by the defendant, which would prevent high voltage from flowing from primary to secondary wires and thence into buildings. This was objected to, excluded, and an exception taken. This ruling was erroneous and would of itself require the reversal of the judgment of nonsuit. Gray v. Siegel-Cooper Co., 187 N. Y. 376, 381, 80 N. E. 201; Dick v. Steel & Masonry Contracting Co., 153 App. Div. 651, 654, 138 N. Y. Supp. 700; Flanagan v. Carlin Construction Co., 134 App. Div. 236, 239, 118 N. Y. Supp. 953.

[3-5] We are of the opinion that the case as it stood should have been submitted to the jury upon the question of the defendant's negligence and the freedom of the plaintiff's intestate from contributory negligence. Where a corporation, for its profit, assumes to control the distribution of a substance as dangerous to human life as electricity when the current is maintained at a high voltage, it is its duty to exercise at least reasonable care to prevent its escape in a death-dealing manner. Braun v. Buffalo General Electric Co., 200 N. Y. 484, 492, 94 N. E. 206, 140 Am. St. Rep. 645, 21 Ann. Cas. 370; Caglione v. Mt. Morris Electric Light Co., 56 App. Div. 191, 193, 67 N. Y. Supp. 660; Paine v. Electric Illuminating, etc., Co., 64 App. Div. 477, 479, 72 N. Y. Supp. 279; Wagner v. Brooklyn Heights R. Co., 69 App. Div. 349, 350, 74 N. Y. Supp. 809, affirmed 174 N. Y. 520, 66 N. E. 1117; Morhard v. Richmond Light & R. Co., 111 App. Div. 353, 356, 98 N. Y. Supp. 124. When we contemplate the proven defects in the transformer, the absence of a lightning arrester, and the proof of the other circumstances hitherto recited, we are unable to perceive

a distinction between this case and that of Morhard v. Richmond Light & R. Co., supra, in which the defendant was held to be negligent.

The force causing the death of the defendant, lethal in its nature unless properly contained, being in the control of the defendant, and the casualty being such as in the ordinary course of the business does not happen if reasonable care is used, proof of these circumstances, regardless of direct proof or defective appliances, affords, in the absence of explanation, sufficient evidence that the accident occurred from want of care on defendant's part. Breen v. N. Y. C. & H. R. R. Co., 109 N. Y. 297, 300, 16 N. E. 60, 4 Am. St. Rep. 450; Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; Clancy v. N. Y. & Queens Co. Ry. Co., 82 App. Div. 563, 569, 81 N. Y. Supp. 875; Smith v. Boston Gaslight Co., 129 Mass. 318. In the case last cited it was held that the escape of gas from the pipes of a gas company was prima facie evidence of negligence.

[6, 7] Upon the issue of contributory negligence the evidence presents as full a disclosure of the facts and circumstances as the nature of the case allows. The burden is, of course, upon the plaintiff to show that her intestate exercised due care, and, although it must be established affirmatively, it need not, in a case where there is no eyewitness to the occurrence, be proved by testimony addressed directly to its support, but may be shown by evidence of circumstances which exclude fault. The switchboard and its appliances were ordinarily harmless. There was nothing to manifest danger at the time of the injury, and the decedent had no reason to suppose that the switchboard or its parts had suddenly become deadly. The decedent was where he had a right to be. He was engaged in a laudable, proper, and appropriate service when he pulled the switch. There is nothing that excludes the inference that he acted in the usual manner in operating the switch handle. The question of contributory negligence was for the jury. Baxter v. Auburn & Syracuse El. R. Co., 190 N. Y. 439, 441, 83 N. E. 469; Schmeer v. Gaslight Co., 147 N. Y. 529, 541, 42 N. E. 202, 30 L. R. A. 653; Braun v. Buffalo General Electric Co., supra; Paine v. Electric Ill. Co., supra; Morhard v. Richmond Light & R. Co., supra; Smith v. Boston Gaslight Co., supra; Illingsworth v. Boston Electric Light Co., 161 Mass. 583, 588, 37 N. E. 778, 25 L. R. A. 552.

In Baxter v. Auburn & Syracuse El. R. Co., supra, the court said:

"It is necessary in these cases, when a defendant is sought to be charged with the consequences of the neglect of a duty to exercise care, that the person injured, as the result of that neglect, shall not appear to have contributed to the injury by his own negligence. It must, affirmatively, appear that his conduct did not so concur with the defendant's negligence, and enter into the incident, as to have become a proximate cause of the injury. He must have exercised that degree of care which was commensurate with the situation. That may be shown, directly, through the testimony of eyewitnesses; or it may appear from circumstances, which permit the jurors, fairly, to infer the fact. When, by reason of the death of the injured person, his mouth is closed, the burden, nevertheless, remains upon the complainant, upon whom the cause of action has devolved, to show, affirmatively, by direct evidence, or from surrounding circumstances, that the deceased was without fault. When the evidence as to how he conducted himself is confined to inferences from circumstances, the courts, where the defendant's con-

duct has been flagrantly violative, in one way or another, of the duty owing, have been inclined to relax the application of the rule as to the quantum of proof, and greater latitude is allowed in permitting the inference of an exercise of ordinary care. If, in such case, the surrounding facts and circumstances, reasonably, indicate that the accident might have occurred without negligence in the deceased that inference becomes possible, in addition to that which involves careless conduct, or a willful disregard of personal safety, and thus, as a question of fact, it would be for the jury to decide between the two possible inferences."

I advise that the judgment be reversed, and a new trial granted; costs to abide the event. All concur.

(158 App. Div. 186)

PEOPLE v. BUCCUFURRI.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. HOMICIDE (§ 118*)—SELF-DEFENSE—DUTY TO RETREAT.
   A person attacked is not bound to retreat if such would imperil his safety the more, or if a reasonable man under the circumstances would be justified in believing that to retreat would add to the danger.
   [Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 168–171; Dec. Dig. § 118.*]

2. CRIMINAL LAW (§ 776*)—GOOD REPUTATION OF ACCUSED—EFFECT—DUTY TO CHARGE.
   In a prosecution for murder, evidence of the good reputation of the accused may in itself create a reasonable doubt where none would otherwise exist, and the court must so charge when requested, and it was not enough for the court to charge that the jury might take such evidence into consideration when passing upon the facts.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838–1845; Dec. Dig. § 776.*]

3. CRIMINAL LAW (§ 776*)—CHARACTER OF ACCUSED—EVIDENCE.
   In proving the good reputation of an accused on a criminal charge, the inquiry is properly directed to the particular trait which is involved in the charge itself; and hence in a prosecution for murder the evidence as to the good reputation of the prisoner for peace and quietness is sufficient to support an instruction that the good reputation of accused is sufficient of itself to create a reasonable doubt.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838–1845; Dec. Dig. § 776.*]

4. HOMICIDE (§ 163*)—CHARACTER OF ACCUSED—EVIDENCE.
   In proving the reputation of an accused in a prosecution for murder, evidence of his reputation in various shops in which he had been employed was competent evidence of his general reputation.
   [Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310–317; Dec. Dig. § 163.*]

5. WITNESSES (§ 37*)—COMPETENCY—CHARACTER OF ACCUSED.
   In proving the general reputation of an accused, evidence by witnesses based upon their own personal observation, and not as to general reputation, was not competent.
   [Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80–87; Dec. Dig. § 37.*]

6. CRIMINAL LAW (§ 776*)—TRIAL—REQUESTED CHARGE.
   Defendant's request that evidence of good character may in itself create a doubt when none would otherwise exist should not have been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

refused because of the use of the word "doubt" instead of "reasonable doubt," as its meaning was plain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838–1845; Dec. Dig. § 776.*]

Appeal from Trial Term, Kings County.

Vincenzo Buccufurri was convicted of manslaughter in the first degree, and he appeals. Reversed, and a new trial granted.

See, also, 154 App. Div. 827, 139 N. Y. Supp. 305.

Argued before JENKS, P. J., and BURR, CARR, RICH, and PUTNAM, JJ.

John Palmieri, of New York City (Samuel Wechsler, of New York City, on the brief), for appellant.

Edward A. Freshman, Asst. Dist. Atty., of Brooklyn (James C. Cropsey, Dist. Atty., of Brooklyn, and Harry G. Anderson, Asst. Dist. Atty., of New York City, on the brief), for the People.

CARR, J., The defendant appeals from a judgment of the Supreme Court in Kings County, by which he was sentenced to imprisonment on an indeterminate sentence of the maximum of ten years and two months and the minimum of nine years. This judgment was entered upon the verdict of a jury that convicted the defendant of the crime of manslaughter in the first degree. He was indicted for the murder in the first degree of one Robert Witl, on the 2d day of December in the year 1910, in the borough of Brooklyn, in the county of Kings. At the trial, the theory of the defense was that of justifiable homicide.

It is urged upon this appeal by the appellant that the commission of any crime on the occasion in question was not established at the trial beyond a reasonable doubt, and further objection is made as to the rulings of the trial court in the admission and exclusion of evidence, and particular stress is laid upon an alleged error of the trial court in refusing a request made by the defendant for an instruction to the jury. The defendant was a workman in a shoe factory, and the decedent was his foreman. Bad blood had developed between these parties on the afternoon of the day before the killing. On the morning of the homicide, the defendant came to the factory in question with a five-chamber revolver in his overcoat pocket. He hung his overcoat upon a rack on the wall of the workroom, and went to his bench, where he sat down. In a short while the decedent, Witl, came to him with the wages already earned by the defendant, and said that he (the defendant) was discharged and should leave the factory. It seems that the quarrel which arose between these parties had some reference to the fact that Witl had discovered that the defendant was in some way connected with a labor union and was receiving membership dues from certain operatives in the factory. On the day before the homicide, Witl told the defendant that he would procure his discharge. The defendant then appealed to a Mr. Treat, who was the superintendent of the factory, and a colloquy took place between Treat, the defendant, and the foreman Witl, in which Mr. Treat advised Witl not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to have the defendant discharged but to allow him to stay at work for some time. This took place towards the close of the working day. When Witl approached the defendant the next morning, angry words took place between them, in which Witl accused the defendant of being a "ruffian," in that the defendant had appealed, over his head, to the superintendent of the factory. The defendant appears to have answered that not he, but Witl, was a "ruffian," in that Witl had gone to the employer and procured the defendant's discharge from work, thereby taking away his "bread and butter." Witl thereupon struck the defendant on the mouth with his hand, thereby causing a slight bruise or cut from which some blood oozed on the lips of the defendant. A number of workmen who were near by got up from their benches and separated the defendant and Witl, and some of them advised Witl to leave the room while the defendant was there. Witl, however, ordered the defendant from the room, and he had in his hand a wooden last which served as a model for the making of women's shoes. In a few moments the defendant fired five shots at Witl, one of which struck Witl in the abdomen, another grazed his hips near the buttocks, another struck him on the side of the arch of the left foot, another imbedded itself in a door which led from the workroom to a staircase, the fifth being unaccounted for. The wound in the abdomen was mortal, and Witl died three days thereafter.

The question litigated at the trial was whether the defendant fired these shots at Witl when the latter was going away from him towards the door, or whether the latter was shot while he was advancing upon the defendant with this wooden shoe last in his hand. The prosecution produced three witnesses as to shooting, one Ondik, one Marino, whose name, however, appears in the printed record as Herino, and one Ruffle, whose testimony was that of most importance for the prosecution and seems to have been strongly considered by the jury, for the record shows that after the jury had retired they returned with a request that the testimony of Ruffle be read to them again, which was then done under the direction of the trial court. The witness Ondik was a foreigner with poor command of the English language, and his testimony makes rather hard reading and sheds but little light upon the actual occurrence. Marino was an important witness as to the events which preceded the homicide and as to some of the actual occurrences of the killing. Ruffle did not speak Italian, and he did not know much of any of the occurrences preceding the final dispute in which the killing was done. According to his testimony, the decedent was trying to avoid the defendant at the time the defendant opened fire upon him.

After the homicide, the defendant left the factory and was pursued by Treat and Ruffle. He went into the rear room of a barber shop and left there on a shelf the revolver which he had used and which contained five empty cartridges. This weapon was found there subsequently by the police and produced upon the trial; the defendant admitting his ownership of it. Among the police officers making the arrest was one Garner. This officer testified that the prisoner told him that he had shot the decedent because "he was taking the bread and butter out of his mouth," and that he had bought the gun "the night

before." On cross-examination Garner admitted that he had given no testimony before the coroner as to the defendant's alleged statement as to the time of the purchase of the revolver, but explains that the omission was due to the fact that he was not asked about it, but it appears that he did state before the coroner that the defendant had said to him that the reason why he had shot Witl was that Witl had taken the bread and butter from him and that he got excited and shot him. As a part of the case of the prosecution, the coroner's physician, Hartung, described the location and nature of the wounds as disclosed by a post mortem examination. This witness said he could not tell how the deceased was standing when he received the wound in the foot, but that as to the wound in the abdomen "he was facing whoever shot him." The location of the wounds was described as follows:

"A pistol shot wound on the outer side of the *left* foot. * * * There was another pistol shot wound on the *right* side, on the outside of the upper portion—that is, by the buttocks—just a graze. Then there was a pistol shot wound three inches to the right and three inches below, one wound right in the right side of the abdomen."

The defendant took the stand on his own behalf and produced several witnesses who claimed to have seen the shooting, Amadeo, Valenti, and D'Angelo. These witnesses corroborated the main story of the defendant. His story of the shooting was that, when he received notice of his discharge, Witl called him a "ruffian" and a "spy," and that he retorted in kind; that Witl thereupon struck him in the mouth, and several nearby workmen came up and separated them; that he (the defendant) announced to the bystanders that he was going down to inform the employers how workmen were treated in the shop, and that he started to the door; that Witl, with a shoe last in his hand, was between the door and himself and advanced upon him angrily; that he thereupon fired one shot into the door to frighten Witl, who still advanced upon him; and that then he fired four shots, one after the other, not to kill Witl, but to wound him in order to defend himself. He denied that he told the policeman Garner that he had bought the revolver the night before, and produced a public school teacher who testified that on the night before the homicide he (the defendant) was in attendance at night school from 8 p. m. to 10 p. m. He testified that he had this revolver five years or more, but did not carry it about his person until a few months before the homicide, when he began to carry it as he had valuable jewelry and a considerable sum of money on his person and was obliged to go to and from the factory at hours when it was dark, and that he feared robbers.

[1] If the jury had accepted the story of the defendant and his witnesses, they might have found a verdict of acquittal on the ground of justifiable homicide. The defendant did not "retreat," but he was not bound to retreat if such would imperil his safety the more, or if a reasonable man under the circumstances would be justified in believing that to retreat was to add to the imminent danger. People v. Jeina, 125 App. Div. 697, 110 N. Y. Supp. 83.

[2] The defendant introduced evidence as to his previous good reputation for peacefulness and quietness. The trial court in its

charge to the jury did not refer at all to this evidence or as to the permissible or possible effect of such evidence on the question of reasonable doubt as to the commission of a crime. At the close of the main charge, the court was requested to charge as follows:

"Now I ask your honor—and this is my last request—to charge the jury that the defendant has presented evidence of good character by these various foremen and other persons, and upon that question I ask your honor to charge the jury that evidence of good character is proper evidence on the question of whether the defendant is a person of peaceful habits, and it may create in this case, of itself, evidence of good character, may in this case of itself create a doubt where none would exist otherwise."

To which the court replied:

"Give him due consideration for his character, if you believe his character is good in passing on the evidence."

The defendant then excepted. It is contended that this ruling of the court constituted fatal error. It is answered that there was in fact no evidence of good character presented by the defendant, and that therefore the request was refused properly. The defense in offering evidence as to the defendant's good reputation confined their inquiry to his reputation for "peace and quietness." Some of this evidence was given as to his reputation generally in his community, and some as to his reputation in the various shops in which he had worked.

[3] In proving the good reputation of one on trial on a criminal charge, the inquiry may be directed to the particular trait which is involved in the charge itself; that is, if the charge is one of unlawful violence, evidence may be given as to reputation of the prisoner for peace and quietness. People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650, 12 Ann. Cas. 745. Hence there was evidence in the case of the good reputation of the defendant material to the issue involved in the charge.

[4] While some of the evidence related to the reputation of the defendant in the various shops in which he had been employed, rather than to that in the community generally, still it was competent, as the shop life was a large part of the defendant's life and brought him under close observation by a large number of persons.

[5] There was other evidence given on behalf of the defendant by various witnesses, based upon their personal observation of him and not as to general reputation; but this evidence, though admitted by the trial court, was not competent (People v. Van Gaasbeck, ut supra), and though in the case may not be considered as evidence of good reputation. There was, however, as before stated, some evidence in the case of the defendant's previous good reputation. This being so, let us consider the ruling of the trial court in this light.

[6] That evidence of good reputation may in itself create a reasonable doubt even where none would otherwise exist, and that it is the duty of a trial court to so instruct a jury when requested, is the settled law of this state. People v. Bonier, 179 N. Y. 315, 72 N. E. 226, 103 Am. St. Rep. 880. It is not enough for the court to instruct the jury that they may take such evidence into consideration when passing upon the facts, but they must be instructed as to the effect which

they may give to such evidence if they believe it. People v. Bonier, ut supra. It is argued that as the request used only the word "doubt," and not the words "reasonable doubt," it was refused properly. But in this particular the request was practically the same as that used in People v. Elliott, 163 N. Y. 11, 57 N. E. 103, where it was held that a refusal to so charge was fatal error which required a reversal of a judgment of conviction. This last-cited authority is referred to with approval in People v. Bonier, ut supra. True, this request was framed in a crude, inarticulate manner, yet its obvious intention was plain, and the court should have instructed the jury adequately as to the legal bearing of the question which it raised.

I think there was error sufficiently serious to require a reversal of the judgment of conviction and a new trial, and I so recommend. All concur.

(81 Misc. Rep. 431.)

JURGENSON v. DANA et al.

(Supreme Court, Special Term, Suffolk County. July, 1913.)

1. DEEDS (§ 196*)—CONVEYANCE BY CHILD TO PARENT.
Where a deed by child to parent is constructively fraudulent, the burden is on the person claiming under it to show affirmatively that no deception was practiced and no undue influence used, but that all was fair, open, voluntary, and well understood.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587–593, 649; Dec. Dig. § 196.*]

2. DEEDS (§ 72*)—DEED BY CHILD TO PARENT—FRAUD.
To avoid a deed by a child to his parent, the acts of the parties claimed to be the moving cause of the conveyance must amount to a legal fraud of such character as equity and good conscience would not tolerate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 190–199; Dec. Dig. § 72.*]

3. DEEDS (§ 72*)—CONVEYANCE BY CHILD TO PARENT—VALIDITY.
A conveyance by a child to his parent may be a proper family arrangement and for the best interest of the child; but if no such considerations are found, and the conveyance has been wrongfully obtained from the child, it will be set aside in equity or the parent converted into a trustee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 190–199; Dec. Dig. § 72.*]

4. DEEDS (§ 211*)—CONVEYANCE TO PARENT—VALIDITY.
Where a deed by a child to his adopting parent recited that the grantor knew that his deceased adopting mother had intended to will all her property to such father, and, no such will having been found, the grantor executed the deed of his interest in certain real estate of which his mother died seised and there was no evidence of fraud, such recitals indicated that the deed was executed under proper influences.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. § 211.*]

5. WILLS (§ 781*)—DEVISE—ELECTION.
Where testator, having an interest in certain real estate less than fee, a part of the property being owned by a devisee under this will, attempted to devise the entire fee in the property, the devisee owning such interest

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was bound to elect whether he would claim the same or accept the devise in the will, but could not have both.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2013–2017; Dec. Dig. § 781.*]

Partition by Kathryn Floyd Dana Jurgenson, an infant, by Edward J. Lynch, her guardian ad litem, against Richard Floyd Dana and others. Complaint dismissed on the merits as to plaintiff, and defendant Richard Floyd Dana required to elect within sixty days whether he will accept the benefits of the will of William B. Dana, deceased, or will take his interest in the property described in the complaint.

George R. Bristor, of New York City, for plaintiff.

Joseph W. Bristor, of New York City, for defendant, Richard Floyd Dana.

Winthrop E. Dwight, of New York City (Percy L. Housel, of Riverhead, of counsel), for defendants Shepherd, Seibert & Dana.

Henry M. Brigham, of New York City, guardian ad litem for infant defendant, William Shepherd Dana.

JAYCOX, J. The plaintiff seeks in this action to have the premises described in the complaint divided among the owners thereof, or, if such division cannot be made, that the same be sold and the proceeds thereof divided, and alleged that the plaintiff is seised of an undivided one-third part thereof, that the defendant Richard Floyd Dana is seised of an undivided one-third part thereof, and that the defendant Ethel Dana Shepherd is seised of an undivided one-third part thereof, subject to certain rights of dower and inchoate rights of dower.

Kathryn Floyd Dana was seised of these premises in her lifetime, and died so seised of them on the 6th day of April, 1886. She left her surviving her husband, William B. Dana, and adopted children hereinafter mentioned. She left a last will and testament dated August 4, 1875, duly admitted to probate by the surrogate of Suffolk county July 26, 1886, in and by which she disposed of the premises in manner following:

"First. I appoint my husband William B. Dana my sole executor authorizing and empowering him to sell and convey by deed or otherwise all or any portion of the property real and person of which I may die possessed and reinvest the proceeds of such sale as he may deem best.

"Second. All of the said property I give to my said husband to hold and enjoy during his life and to use the entire income therefrom for his own purposes.

"Third. After the death of my said husband I give and bequeath to our adopted children John Kirkland Dana, Ethel Floyd Dana and Richard Floyd Dana all my estate then remaining and all the increase thereof, share and share alike to have and to hold forever for their own proper use and enjoyment."

At the time of the death of Mrs. Dana, John Kirkland Dana, the father of the plaintiff, together with Richard Floyd Dana and Ethel Floyd Dana, lived in the home of William B. and Kathryn Floyd Dana and were treated as their children and members of the family.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John Kirkland Dana died in Tacoma, Wash., in 1903. The plaintiff is his only child.

It is conceded that the defendant Ethel Dana Shepherd owns at least one-third of the property, and the only controversy is as to the other two-thirds, Ethel Dana Shepherd claiming to own the whole of the property, and the plaintiff, Kathryn Floyd Dana Jurgenson, and the defendant Richard Floyd Dana each claiming to be the owner of one-third of said property, and it is as to these claims that this action is contested. Much that has been discussed in the briefs herein I consider it unnecessary to discuss, as I shall place my decision upon other grounds.

On the 22d of April, 1886, John Kirkland Dana, one of the remaindermen in the forgeoing will, executed and delivered to William B. Dana a deed dated on that date, conveying to said William B. Dana all the right, title, and interest which the said John Kirkland Dana then had or might thereafter acquire, under the said will of Kathryn Floyd Dana, or under any other will of hers which might thereafter be found, in and to the premises affected by this action. The consideration and premises were therein recited as follows:

"Whereas Katharine Floyd Dana, before her death and during the past winter did state and declare more than once in my presence that she had already willed whatever property she possessed to her husband William B. Dana and did also in my presence state and declare that she did then and there give and transfer to him the said William B. Dana, all her property real and personal of every kind and nature whatsoever. And whereas no will of the said Katharine Floyd Dana has been as yet found except a certain will purporting to be signed by her, dated August 4, 1875, by which she gives her said husband power to sell and convey all her property, real and personal and gives him all the said property, to hold and enjoy during his life and to use the entire income thereof for his own purposes and after the death of her said husband gives and bequeathes to me, together with Ethel Floyd Dana and Richard Floyd Dana, all her estate then remaining and all the increase thereof, share and share alike. And whereas, I know as aforesaid that the said will does not express the desire of the said Katharine Floyd Dana. Now therefore, I, the said party of the first part, desiring that her wishes shall in all respects be carried out, for and in consideration of the premises and of the sum of One dollar to me in hand paid, the receipt whereof is hereby acknowledged," etc.

At the same time Ethel Floyd Dana, now the defendant Ethel Dana Shepherd, executed a similar deed to William B. Dana, conveying in a similar manner all her interest in the premises and reciting the same premises and consideration for the deed as the last preceding deed.

If the deed made by John Kirkland Dana above recited, to William B. Dana, is valid, then the plaintiff herein has no interest in, or title to, the premises. This deed expresses an ample and sufficient consideration, and the recitals of the inducement for the transaction therein contained are binding upon the plaintiff and the defendant Caldwell, who are privies to the grantor, John Kirkland Dana. Van Winkle v. Van Winkle, 95 App. Div. 605, 89 N. Y. Supp. 26, affirmed 184 N. Y. 193, 77 N. E. 33.

[1] This deed is attacked only upon the ground of constructive fraud. If it be conceded that the deed is constructively fraudulent, the burden of proof is shifted, and the transaction is presumed void. It is then incumbent upon the defendant claiming under such deed to

show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary, and well understood. Cowee v. Cornell, 75 N. Y. 91–101, 31 Am. Rep. 428.

[2] There has been no fact proven in any way tending to contradict the entire bona fides of the transaction, and, if credit is to be given to the recital of the deed itself, no fraud of any character was practiced upon the grantor. To avoid a deed of this character the acts of the parties claimed to be the moving cause of the improper act must amount to a legal fraud of such a character as equity and good conscience will not tolerate. Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1067; Hutchinson v. Hutchinson, 84 Hun, 482, 32 N. Y. Supp. 390; Bullenkamp v. Bullenkamp, 43 App. Div. 510, 60 N. Y. Supp. 84.

[3] In Perry on Trusts, subd. 201, p. 255, it is said:

"In the same manner courts of equity carefully scrutinize contracts between parents and children by which the property of children is conveyed to parents. The position and influence of a parent over a child are so controlling that the transaction should be carefully examined, and sales by a child to a parent must appear to be fair and reasonable. Such contracts are not, however, prima facie void, but there must be some affirmative proof of undue influence or other improper conduct to render the transaction void; for while the parent holds a powerful influence over the child, the law recognizes it as a rightful and proper influence, and does not presume, in the first instance, that a parent would make use of his authority and parental power to coerce, deceive, or defraud the child. Therefore it is always necessary to prove some improper and undue influence in order to set aside contracts between parents and children. As purchases by a parent in the name of a child do not create a resulting trust but are presumed, in the first instance, to be the advances made by the parent to the child, so conveyances to the parent by the child may be a proper family arrangement, and for the best interest of the child. If no such considerations can be found in the case, and the conveyance, after all allowances are made, is found to have been wrongfully obtained from the child, a court of equity will set it aside or convert the parent into a trustee. But the proceedings must be had at once. The child cannot wait until the parent's death, or until the rights of other parties have intervened. The same rules apply when contracts are made between children and those who have put themselves in loco parentis; and so when family relatives make use of their position and influence to obtain undue and improper advantages, as where two brothers obtained a deed from a sister, it was set aside."

In Ten Eyck v. Whitbeck, 156 N. Y. 341, at page 353, 50 N. E. 963, at page 967, it is said:

"Where the relation between the parties is that of parent and child, principal and agent, or where one party is situated so as to exercise a controlling influence over the will and conduct of another, transactions between them are scrutinized with extreme vigilance, and clear evidence is required that the transaction was understood and that there was no fraud, mistake, or undue influence."

[4] Applying that rule to this case, the only evidence we have is obtained from the recital of the deed itself, and that certainly shows that no fraud or deception was practiced upon the grantor. It shows that he was acquainted with the fact that a will had been made in which he was named as remainderman of one-third of the estate disposed of by said will. It also shows that the grantor was aware that testatrix had changed her designs as to the disposition of her property and desired that her husband should have the whole of her es-

tate, and this young man very properly desired to see the will and desires of his foster mother carried out, and for that purpose, with full knowledge of the facts, he made a conveyance to his father. Under these circumstances I can see no reason for holding this deed fraudulent or void.

The other adopted child of Kathryn Floyd Dana and William B. Dana, who is the defendant Richard Floyd Dana in this action, made no conveyance to his father William B. Dana.

During his lifetime, and very soon after the decease of his wife, William B. Dana made a conveyance of all the property involved in this action to the defendant Joseph P. Kirlin, and Kirlin thereupon reconveyed the same to said William B. Dana. William B. Dana occupied the premises in question from the death of Kathryn Floyd Dana to the date of his own death in 1910. During his lifetime the said William B. Dana became seised in fee simple of certain lands in the state of California, which at the time of his death were of the value of $16,000. He left a last will and testament dated April 12, 1909, and a codicil thereto dated September 13, 1910, both of which were duly admitted to probate by the surrogate of Suffolk county. Said will of William B. Dana contained the following provision:

"Seventh. I give and devise to Richard Floyd Dana and Hazel B. Dana, his wife, of the city and county of Riverside, in the state of California, my lots numbered 5, 6, 11 and 14 in block numbered 13 of the lands of the Riverside Land and Irrigating Company, as surveyed by C. C. Miller, according to the plat of such survey in the recorder's office in the county of Bernardina or elsewhere in the state of California, and also all other lands which I may own at my death in said Riverside county, and also my household furniture and other personal effects on any of my said lands in said Riverside county, California, to have and to hold the same during their lives with remainder to the survivor of them."

By the tenth paragraph of his will he gave and bequeathed to the defendant Richard Floyd Dana $2,500 and to his wife, the defendant Hazel B. Dana, $2,500. By the codicil of said will William B. Dana disposed of the lands described in the complaint as follows:

"I give, devise and bequeath all that certain tract of land with the appurtenances known as 'Moss Lots' consisting of about twenty acres, situated at Mastic, on Long Island, in the state of New York and all my household furniture, horses, carriages, harnesses, boats, books, pictures and silverware thereon, and all my household furniture, books, pictures and silverware, carriages and harnesses, which are in my house or barn at my estate known as Greycliff, in Englewood, New Jersey or which are in storage, to Ethel Dana Shepherd, to have and to hold the same during her life and after her death I give, devise and bequeath the same unto my adopted son William Shepherd Dana, or if he be not living, to his issue, or if said William Shepherd Dana shall die without issue prior to the death of Ethel Dana Shepherd, I give, devise and bequeath the same to Ethel Dana Shepherd absolutely."

The question involved in this action is whether the defendants Richard Floyd Dana and Hazel B. Dana, his wife, are required to elect between the share which Richard Floyd Dana owns in the premises described in the complaint and the inchoate right of dower therein of the defendant Hazel B. Dana, and the provisions made for them in the will of said William B. Dana.

[5] As to the doctrine of election there is but very little controversy between the parties in this action. It is only as to whether it is applicable to the situation disclosed in this action. The rule in equity is set forth in Beetson v. Stoops, 186 N. Y. 456, at page 459, 79 N. E. 731 (9 Ann. Cas. 953) as follows:

"Where a testator assumes by his will to devise property owned by him, and also other property not owned by him, that the person to whom is devised the property owned by such testator cannot accept such devise, with knowledge of all the facts, without being precluded from asserting a claim to other property devised by the same instrument."

All the facts necessary for the application of this rule are clearly established in this case. The only question that seems to be open to controversy is as to whether the fact that the testator William B. Dana concededly had some interest in the premises involved in this action will prevent the application of the rule. The situation which calls for the application of this rule is set forth in Havens v. Sackett, 15 N. Y. 365, as follows:

"It is indeed laid down that, in order to furnish a case for compelling an election, it must appear clearly and certainly that the interest attempted to be disposed of was such as the testator did not own."

And again at page 373 of 15 N. Y.:

"It must be clear beyond all reasonable doubt that he has intentionally assumed to dispose of the property of the beneficiary, who is required, on that account, to give up his own gift."

Applying that rule, which certainly is as strong as the defendant Richard Floyd Dana can claim to be, it seems to me that a case for the application of the doctrine of election is clearly made out. The testator in clear and unmistakable terms disposed of the entire property. The language of his gift cannot be satisfied with anything less than the entire fee of the property described. That being so, the defendant Dana cannot lessen the gift to Ethel Dana Shepherd by claiming his share of this property and at the same time accepting the benefits conferred upon him by the will.

The complaint should be dismissed upon the merits as to the plaintiff.

The defendant Richard Floyd Dana should elect within 60 days whether he will accept the benefits conferred upon him by the will of William B. Dana, or will take his interest in the property described in the complaint herein.

Let the decree herein be settled upon two days' notice.

BRODY & CO. v. HOCHSTADTER.

(Supreme Court, Special Term, New York County. February 15, 1913.)

VENDOR AND PURCHASER (§ 130*)—MARKETABLE TITLE.

Where plaintiff's title to certain real property in controversy was based on a referee's deed in foreclosure against tenants in common, one of whom was an absentee, and the record did not contain a report as to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the proof of the facts stated in the complaint, and of the examination of plaintiff or his agent on oath as to any payments made as required by Code Civ. Proc. § 1216, and General Practice Rules 30 and 60, the title was not marketable so as to sustain a suit for specific performance, and this, notwithstanding that between the date of the contract of sale and the date fixed for closing it plaintiffs procured an order under which they attached to the judgment roll in the foreclosure proceedings, as of the date of the judgment, a copy of the testimony concerning the facts required.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245–247; Dec. Dig. § 130.*]

Suit by Brody & Co. against one Hochstadter for specific performance. Complaint dismissed.

See, also, 150 App. Div. 530, 135 N. Y. Supp. 549.

M. & I. Isaacs, of New York City, for plaintiffs.

H. M. Bellinger, Jr., of New York City, for defendant.

HENDRICK, J. The issue presented on this trial is whether defendants are entitled to a decree for specific performance of a contract alleged in the counterclaim by which they agreed to sell and plaintiff agreed to purchase the premises described. The original contract and a modification thereof are dated December 18 and 22, 1911. At that time defendants' title was defective. It rested upon the deed of a referee to sell in an action of foreclosure of a mortgage. One tenant in common, owning a one-fourth interest in the mortgaged premises, was an absentee. In such cases the statute and the general rules require the following proceedings:

"Where the summons was served upon the defendant without the state, or otherwise than personally, * * * the plaintiff may apply to the court, or a judge or justice thereof, for the judgment demanded in the complaint. * * * The court, or a judge or justice thereof, must require proof of the cause of action, set forth in the complaint to be made, either before such court or such judge or justice, or before a referee appointed for that purpose. * * * If the defendant is a nonresident or a foreign corporation, the court, or a judge or justice to whom such application is made, must require the plaintiff, or his agent or attorney, to be examined on oath, respecting any payments to the plaintiff, or to any one for his use, on account of his demand, and must render the judgment to which the plaintiff is entitled. * * *" C. C. Pro. § 1216.

"* * * If any of the defendants are absentees the order of reference shall also direct the person to whom it is referred to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent, on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale. * * * The plaintiff, in such case, when he moves for judgment, must show, by affidavit or otherwise, whether any of the defendants who have not appeared are absentees; and, if so, he must produce the report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made." General Rule 60.

"In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them, and the report of the referee shall be filed with the testimony." General Rule 30.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

These rules have the force of statutes, and, together with the Code provisions, they establish a procedure which for this state may be deemed due process of law. The provisions are phrased in the imperative mood and they must be observed. I conclude, therefore, that in December, 1911, when the contract was made, defendants could not have enforced specific performance, for it is admitted that neither the court nor a justice had required proof of the cause of action or that any one should be examined respecting payments. Consequently the judgment roll did not contain the papers required by law. Defendants, however, seek to avoid the effect of noncompliance. They have offered proof that intermediate the contract and the date of closing they procured an order under which they attached to the judgment roll as of the date of judgment of foreclosure, which was several years before, an amended order which contained the statutory requirements, and had also filed a copy of the testimony as to the facts required, which is said to have been taken during the foreclosure proceedings, but not filed. They now contend that the referee's deed was validated by those ex post facto proceedings. If that were the question to be determined, I might find among the many decisions cited by the respective counsel, and the able disquisitions by which they have been distinguished and counterdistinguished, my way to a satisfactory conclusion. It might appear that the statutory requirements are not jurisdictional, and that a curative order made several years after the action of foreclosure had terminated does not transcend the power of the court to make essential orders nunc pro tunc. But it does not seem to me that any such issue is presented by this counterclaim. The real issue is whether the title derived through the referee's deed is so free from doubt that acceptance of a conveyance should be enforced. And it seems to me, too, that local conditions should receive some consideration, for specific performance is not a matter of absolute right, but depends somewhat upon varying conditions. In the city of New York real estate is almost as current as some forms of personal property. It is frequently the subject of vast improvements, for which loans are required amounting to hundreds of thousands of dollars. Investors are not so much interested in the fact that title is good as they are in the assurance that corporations with money to lend will find nothing to consider except the amount of the loan. Lenders are not inclined to weigh legal questions, decide between variant views of legal advisors, or add to their cares the burdens of legal uncertainties. The evidence in this case shows that neither lawyers nor lenders are agreed that the title is free from reasonable doubt. The contract contains provisions showing that the purchaser intended to erect a 12-story building with funds to be advanced by an insurance company, "such building to be erected according to plans and specifications to be approved of by the Metropolitan Life Insurance Company."

"The purchaser agrees * * * to execute and deliver to the Metropolitan Life Insurance Company all necessary papers to enable it to make a building loan and permanent loan of $235,000 to the purchaser." "It is agreed and understood that if the Metropolitan Life Insurance Company shall, on or before the eleventh day of January, 1912, refuse to enter into an agreement for the making of a building and permanent loan of $235,000 to

the purchaser upon the terms hereinbefore mentioned, that then in that case this agreement shall be null and void."

After consulting with its attorneys the insurance company decided that the title was not satisfactory and withdrew its offer to make the loan. I am constrained to hold that the title is not one which would be acceptable to men of ordinary business prudence and that a decree for specific performance should be denied. The following statement of the law seems to be founded on good sense:

"The title tendered need not in fact be bad in order to relieve him from his purchase, but it must either be defective in fact or so clouded by apparent defects, either in the record or by proof outside of the record, that prudent men, knowing the facts, would hesitate to take it." Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966.

Plaintiff may present a form of decision incorporating the substance of defendant's proposed findings of fact except Nos. 8, 9, 13, 14, and 18. Plaintiff's proposed finding No. 18 may need revision.

(158 App. Div. 232)

AMES v. DANZILO.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. MORTGAGES (§ 479*)—FORECLOSURE—INFANT DEFENDANTS—REFERENCE—ORDER.

Where, in foreclosure, certain infant defendants appeared and filed the usual answer by their guardian ad litem, and the case was referred to a referee, who took proof of the facts and circumstances set forth in the complaint and filed the evidence with his report, the foreclosure proceedings were not void because the order of reference did not contain a direction to the referee to take and report such facts, as required by General Practice Rule 60; the intent of the statute having been carried out, the order was amendable to comply with the rule nunc pro tunc.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1395–1398; Dec. Dig. § 479.*]

2. MORTGAGES (§ 479*)—FORECLOSURE—REFERENCE—ORDER TO TAKE PROOF—OMISSION.

Where an order of reference in mortgage foreclosure did not direct a referee to take proof of the facts and circumstances alleged in the complaint, as required by General Practice Rule 60, such omission was one of form only, which did not change the result of the foreclosure action or deprive the court of jurisdiction of the subsequent proceedings; and hence the foreclosure decree was conclusive on all the parties.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1395–1398; Dec. Dig. § 479.*]

Submission of controversy on an agreed statement of facts between Albert C. Ames and James C. Danzilo. Judgment for plaintiff.

Argued before JENKS, P. J., and BURR, CARR, RICH, and PUTNAM, JJ.

Alfred L. Rose, of New York City (Benjamin G. Paskus, of New York City, on the brief), for plaintiff.

James C. Danzilo, of Brooklyn, for defendant.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RICH, J. The parties entered into a contract, the plaintiff to sell, and the defendant to purchase, certain real property situate in the county of Kings, to which the plaintiff claims title under a judgment of foreclosure and sale. The defendant has refused to perform his contract upon the ground that the plaintiff's title is defective and not marketable.

It appears that plaintiff's title is from a referee in a foreclosure action. There were two infant defendants in the foreclosure proceeding, who appeared by their guardian ad litem and interposed the usual infants' answers submitting their rights to the protection of the court. It also appears that the order of reference to compute the amount due did not contain a direction to the referee to take proof of the facts and circumstances set forth in the complaint, as required by rule 60 of the General Rules of Practice. Although this direction was not contained in the order, the referee did take this proof, and filed the evidence with his report, the same in all respects as if the order had conformed to the requirements of the rule referred to. The report was confirmed, and the usual judgment of foreclosure and sale entered, under which the mortgaged property was sold to the plaintiff. Thereafter, due notice of motion having been given, an order was made and entered appointing a referee to compute, nunc pro tunc, and inserting therein the direction required by Rule 60. The regularity of the judgment of foreclosure and sale thereunder is not questioned.

[1] It is contended by the defendant that rule 60 of the General Rules of Practice has the force of a statute, and must be complied with to give any validity or effect to an order of reference to compute the amount due in a mortgage foreclosure where there are infant defendants, that the omission of the direction to take proof as required by the rule invalidates all subsequent proceedings, and that they were not validated by a subsequent order. Two cases are cited as authorities: Brody & Co. v. Hochstadter, 143 N. Y. Supp. 72; and Smith v. Warringer, 41 Misc. Rep. 94, 83 N. Y. Supp. 655. Because of the dissimilarity of facts, neither of these cases is applicable to the case at bar.

In Smith v. Warringer, supra, no testimony was taken, and consequently none was filed with the report, so, as the court said, the plaintiff had a judgment against an infant without any proof of the facts and circumstances alleged in the complaint.

In Brody v. Hochstadter, supra, the foreclosure record was defective. Final judgment had been rendered without filing any testimony. The order of reference having failed to direct the taking of testimony as required by the rule, and no testimony in fact having been taken by the referee so far as the record disclosed, and this being the condition when the contract to convey was entered into two years later, the court properly held that the noncompliance with the provisions of rule 60 rendered the title defective, and that, such defect existing at the time the contract was under consideration, the rights of the parties thereunder were fixed and could not be cured or corrected by the order thereafter made.

[2] In the case at bar, however, while the order of reference did not comply with the rule, the proof was in fact taken, returned, and

filed with the referee's report before the judgment was rendered, and the order of reference was amended nunc pro tunc before the contract under consideration was entered into by the parties. Everything that would have been done had the order of reference contained the direction was in fact done, and the infant defendants were as fully protected as they could have been had the order of reference contained these recitals. The omission was one of form and not of substance, and did not change the result of the foreclosure action or deprive the court of jurisdiction over the subsequent proceedings. The judgment was binding and conclusive upon all parties.

The rule applicable to the case presented by this record is that, if the intent and spirit of a statute are carried out, the words or method used, so long as not in direct contravention of statute or rule of law or public policy, make but slight difference, and mistakes therein may be corrected nunc pro tunc. As was said in Mishkind-Feinberg Realty Co. v. Sidorsky, 111 App. Div. 578, 98 N. Y. Supp. 496, affirmed 189 N. Y. 402, 82 N. E. 448:

"An order may not be made nunc pro tunc which will supply a jurisdictional defect by requiring something to be done which has not been done; but where the thing itself has been done, when the object looked at by the Code in requiring it to be done has actually been accomplished, the power to make the order express the fact does exist."

Judgment is directed for plaintiff, with costs, in accordance with the terms of the submission. All concur.

(81 Misc. Rep. 493)

THAYER v. ERIE COUNTY SAVINGS BANK.

(Supreme Court, Equity Term, Erie County. July, 1913.)

1. INSANE PERSONS (§ 42*)—COMMITTEE—ACCOUNTING.
One appointed committee of an incompetent is required to account for money of the incompetent which as such committee she withdraws from the bank, though withdrawing it before qualifying by giving the required bond.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 64–67; Dec. Dig. § 42.*]

2. INSANE PERSONS (§ 45*)—COMMITTEE—BONDS—LIABILITY OF SURETIES.
The bond of the committee of an incompetent, given in compliance with the order appointing her, and conditioned that she shall in all things faithfully discharge her trust and account for all moneys "received" by her, renders the sureties liable for money previously received by her, for which she was legally liable and accountable.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 72; Dec. Dig. § 45.*]

3. BANKS AND BANKING (§ 133*)—UNAUTHORIZED PAYMENT—LIABILITY.
The right of possession of a committee of an incompetent of money of the incompetent, which the committee as such withdrew from a bank before qualifying by giving the required bond, being perfected by her subsequently giving such bond, rendering the sureties thereon liable for such money, the bank is not liable because of its premature payment, though before the bond is given the committee has been defrauded of the money by a third person.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 339–352; Dec. Dig. § 133.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Wallace Thayer, committee of William Glynn, an incompetent, against the Erie County Savings Bank. Complaint dismissed.

Frederick Haller, of Buffalo, for plaintiff.
William L. Marcy and S. Fay Carr, both of Buffalo, for defendant.

WHEELER, J. This action is submitted for decision by the court upon the pleadings and upon stipulated facts. The action is brought to recover the amount of a deposit standing in the name of William Glynn in the defendant's bank, claimed to have been illegally withdrawn and paid over by said bank to Sarah M. Faller by said bank.

The said William Glynn became insane and was judicially declared incompetent to manage his affairs by proceedings taken in the Erie County Court. By an order of said court the said Sarah M. Faller was appointed committee of the person and estate of the said incompetent person by an order bearing date the 26th day of July, 1904, which order was in the words and figures following:

"Ordered that Sarah M. Faller be, and is hereby appointed, a committee of the person and of the property of the said William Glynn upon executing and filing a bond for eight thousand and five hundred dollars, to be approved by this court, pursuant to the provisions of the statutes in such case made and provided."

Thereafter, and before the commencement of this action, and on the 6th day of June, 1911, the plaintiff was duly appointed the successor of the said Sarah M. Faller, as committee of the person and estate of said incompetent.

The remaining essential facts in the case are covered by the stipulation of the parties to the action, and are as follows, to wit:

The plaintiff admits that on the 26th day of July, 1904, and after the making of said order by the County Court of Erie county, the said Sarah M. Faller caused to be presented to the defendant a written order in words and figures following:

"Erie County Savings Bank.

"$3,126.67.

"Buffalo, N. Y., July 26, 1904.

"Pay cash or bearer three thousand and one hundred and twenty-six dollars, and charge to account of Book No. 132646.

"Sarah M. Faller, as Committee of the Person and Property of William Glynn, an Incompetent Person."

—and the bank book of the incompetent, issued by defendant, and that the defendant thereupon, and relying upon the said writing and order, paid to the said Sarah M. Faller the sum of $3,126.67.

The plaintiff also admits that of the said money so paid by the defendant to the said Sarah M. Faller, the sum of $1,126.76 was actually applied upon and for the benefit of the said William Glynn, the incompetent.

The plaintiff herein also admits that after the payment of said money by the defendant to the said Sarah M. Faller, and on the 22d day of January, 1907, the said Sarah M. Faller duly filed in the office of the clerk of the county of Erie a bond pursuant to the said order appointing said Sarah M. Faller a committee, and pursuant to the

statute, upon which said bond one Edith M. Anthony and Jessie A. Smythe were sureties; that said bond and the sufficiency of said sureties was duly approved by the said County Court of the County of Erie on the said 22d day of January, 1907, and was duly filed as aforesaid, and that the condition of said bond was as follows:

"If the said Sarah M. Faller shall and do in all things faithfully discharge the trust reposed in her as the committee of the person and estate of William Glynn, an incompetent person, of which she has been duly appointed, and shall obey all lawful directions of the said court or a judge thereof, or of any other court or judge, touching the said trust, and shall in all respects render a just and true account of all moneys and other properties received by her, and of the application thereof, and of her said committeeship, whenever she is required so to do by a court of competent jurisdiction, then the preceding obligation to be void, otherwise to remain in full force and virtue."

The plaintiff also admits that on or about the 1st day of May, 1911, said Sarah M. Faller, as committee of said person and property of said William Glynn, presented a petition for the judicial settlement of her accounts as such committee, to the County Court of Erie County, and prayed for her discharge as such committee, and that thereafter and on or about the 14th day of June, 1911, an order was granted by the said County Court of the County of Erie, accepting the resignation of the said Sarah M. Faller as such committee, and referring her accounts to John H. Madden, Esq., as referee to take and state the accounts of said Sarah M. Faller as such committee; and the plaintiff further concedes that in said proceeding said referee found and reported as follows:

"From the evidence submitted before me, it appears that Sarah M. Faller, the former committee, was appointed such committee by an order of this court made and entered in the Erie county clerk's office on or about the 26th day of July, 1904, and that said order provided that said Sarah M. Faller be appointed committee upon her executing and filing a bond to be approved by this court. It further appears that no such bond was ever given by said Sarah M. Faller until the 17th day of January, 1907, when the present bondswomen executed such bond. It appears that until the 17th day of January, 1907, the said Sarah M. Faller did not qualify or become committee. It appears that on the 26th day of July, 1904, immediately upon obtaining and filing the order appointing her, her former attorney, Philip V. Fennelly, induced the said Sarah M. Faller to sign her name as committee to a check on the Erie County Savings Bank for the sum of $3,126.67, and to draw from the bank on that check out of the funds deposited in the bank in the name of William Glynn, the incompetent, the said sum of $3,126.67, and that of said sum the said Philip V. Fennelly forced the said Sarah M. Faller to deliver to him the sum of $2,000, to be held by him in trust as pretended security for a bond which he was to procure for the said Sarah M. Faller; that thereupon the said Philip V. Fennelly misappropriated the sum of $2,000, and has never accounted for any part of it; that at the same time the said Philip V. Fennelly delivered to Sarah M. Faller the residue of the proceeds of the said check, $1,126.67; she has since used the $1,126.67 for the benefit of the incompetent.

"On the 17th day of January, 1907, the bond of the appearing bondswomen was duly executed, approved by the judge of this court, and filed in the Erie county clerk's office and Sarah M. Faller thereupon became the committee of the incompetent. At that time, January 27, 1907, as appears by her account, she turned over to herself as such committee, from herself as an individual, and had in her possession as the funds of the incompetent, $1,434.03."

Said sum of $1,434.03, however, includes other moneys that came into the hands of the said Sarah M. Faller over and above and besides the $1,126.67 of the money drawn by the said Sarah M. Faller from the defendant, and of which the said incompetent received the benefit.

This plaintiff further concedes that thereafter and on or about the 3d day of July, 1911, an order was made by the said County Court of Erie County confirming the said report of said referee. This plaintiff also concedes that the defendant herein never received any notice of said proceeding for judicial settlement of the accounts of Sarah M. Faller as committee of the person and property of the said William Glynn.

This plaintiff also concedes that said Edith M. Anthony is solvent and able to pay the full amount of the claim herein made against the defendant, and that no action has ever been brought or judgment obtained by the plaintiff against said Edith M. Anthony and Jessie A. Smythe, or either of them, or against the said Sarah M. Faller for the recovery of the sum herein sought to be recovered from the defendant by the plaintiff, or any part thereof.

The parties herein concede and stipulate that the interest on $2,000 from the 1st day of July, 1904, to the 26th day of April, 1913, has been properly computed and amounts to the sum of $807.

The question presented is the right of the plaintiff to recover upon the facts stated; the defendant admitting that, at the time the moneys on deposit to the credit of the incompetent were paid to Sarah M. Faller, she had not qualified as committee and had no legal right to receive the same, but contending that when the committee did give the required bond of January 22, 1907, the sureties on the undertaking became liable for the moneys paid, and the bond related back as of the date of the order of appointment, and relieved the bank from further liability for premature payment of the money.

The plaintiff contends that the sureties did not become liable for the moneys so improperly withdrawn, and, if they are liable, that fact does not relieve the defendant from liability for such payment.

The inquiry of the court is therefore directed sharply to the questions: First, whether the undertaking given did or did not make Mrs. Faller's sureties liable for these funds; and, second, if the sureties are liable, whether it relieved the bank from further responsibility. We will take up the consideration of these questions in the order presented.

We are of the opinion that the sureties on the undertaking of January 22, 1907, did become liable for the moneys received from the bank.

[1, 2] There can be no question in our mind that the committee became chargeable, and was required in law to account for, all these moneys received by her, even though withdrawn prior to her qualifying by giving the required bond. She drew it from the bank as committee of the incompetent. It did not belong to her individually. It was impressed with a trust to hold for the benefit of the estate for which she assumed to act, and in an accounting Mrs. Faller could not be heard to say that she did not become responsible for the money

simply because she obtained it before she had the legal right to reduce the fund to her possession and control. Not only is this true, but it is also true that the sureties on her official bond also became liable for the property so received by their principal.

The undertaking did not relate simply to the future. It was given in compliance with the order of appointment, and was conditioned that the committee should "in all things faithfully discharge the trust reposed in her as the committee of the person and estate of William Glynn, an incompetent person, of which she has been duly appointed, and shall obey all lawful directions of the said court or a judge thereof touching the said trust, and shall in all respects render a just and true account of all moneys and other properties received by her, and of the application thereof," etc.

The very wording of the condition of the bond shows it was the clear purpose and intent of the instrument to make the sureties liable for all moneys received by their principal, whether received after or before the giving of the undertaking. The past tense is used. It covers moneys and property "received" without regard as to when or how received. It is not confined to such property as "shall be received," but covers property actually "received." Not only this, but it was the clear purpose and intent of the order that the undertaking should cover all such moneys. If, at the time the undertaking was given, it, by its terms, had excluded all such moneys and property, and been conditioned simply for only such as should come to the committee's hands in the future, is there any question that such an undertaking would not have received the approval of the judge whose duty it was to approve the bond as to form and sufficiency of the sureties? We think not. The whole tenor of the bond is to make the sureties liable for all moneys received by the committee, and for which she became liable, whether coming to her hands before or subsequent to the giving of the undertaking. This view of the case is in harmony with the decided cases.

In Gottsberger v. Taylor, 19 N. Y. 150, it was held that the sureties of a special administrator are liable for money belonging to the estate received by him before his appointment and as the agent of a previous administrator to whom he succeeded. In that case the bond contained no provision that the administrator should obey the orders of the surrogate, and in this respect differed from and is not as strong as in the case at bar.

In Scofield v. Churchill, 72 N. Y. 565, an application was made for the removal of an executor, and resulted in an order of the surrogate that the executor file security or be removed from the executorship. The bond sued on was executed pursuant to such an order and was prosecuted, and the defense was made that the sureties on that bond did not thereby become liable for the defaults of the executor committed prior to the giving of the undertaking pursuant to the surrogate's order. The court, however, held the sureties liable in view of the facts and provisions of the statute which contemplated the giving of the bond to cover the situation presented, especially as it was conditioned "not only for the faithful execution of the trust, *but for*

obedience to all orders made by the surrogate in relation to the estate."

Whatever may be said in reference to the distinguishing facts in Scofield v. Churchill, the case is certainly an authority to the extent that where the order pursuant to which the undertaking is given contemplates that it shall cover all property and money for which the principal is liable, whether received before or after the giving of such bond, the bond will be given such a construction, if the wording of the undertaking is fairly susceptible of such a construction. That, we think, is what the order appointing the committee in the case at bar contemplated.

The decisions of the courts of other states are quite in harmony with those of New York.

The case of Choate v. Arrington, 116 Mass. 552, holds that, where an executor gives a bond with a surety for the faithful discharge of his duties pursuant to an order for his appointment, "the surety is liable for whatever is properly chargeable to his principal in the official capacity on account of which the bond was given," whether the assets are received before or after the execution of the bond.

In the case of Pinkstaff v. People, etc., 59 Ill. 148, a bond was given conditioned to "do and perform all other acts which may at any time be required of him by law," and it was held that, where the administrator had misapplied the funds of the estate before the bond was given, the sureties became liable for such misappropriation "because the gravamen of the action would be, not the prior misapplication, but the failure to pay over."

In determining the question of the liability of the sureties in the case at bar, due weight must be given to provisions of the condition of the bond that the committee "shall obey all directions of said court or a judge thereof."

The plaintiff in this case cites to the court the case of Thomson v. American Surety Co., 170 N. Y. 109–113, 62 N. E. 1073, and contends that case is an authority for his position that the sureties here are not liable for the moneys received from the bank. We think, however, that the facts in the Thomson Case distinguish it from this. The facts in the Thomson Case are not fully stated in the reported opinion of the court. The record, however, shows that one Benjamin Lord died in 1851, leaving a will, and letters testamentary were issued to one Barstow, who resigned, and one Marshall was appointed in his place, and that by order of the Supreme Court made in February, 1883, Augustus Cruickshank was appointed as Marshall's successor in the trust, and gave a bond with an individual surety. In 1888 an action was brought by beneficiaries under said will against Cruickshank, in which action a judgment was rendered adjudging that said Cruickshank held as the balance of said trust fund the sum of $87,653.33, which he was directed to pay over and distribute among the beneficiaries under the will. In October, 1893, an order was made requiring Cruickshank to file a new bond, whereupon the bond in suit was given conditioned:

"That if the said Augustus Cruickshank shall faithfully execute the trust reposed in him as such trustee, and shall faithfully pay over, distribute and

divide and account for all the property and money which *shall* come to his hands as such trustee in accordance with the provisions of said will; then the above obligation to be void, otherwise to remain in full force and effect."

Cruickshank subsequently died, without having rendered any account of the $87,653.33 with which he had been charged in the decree of March 6, 1890, and it was sought to charge the surety company, the surety on the second bond, with the balance of the amount established by the decree rendered before the giving of this second undertaking. The Court of Appeals very properly held that:

"According to the tenor of the defendant's bond, it was not responsible for any failure of Cruickshank to discharge the duties of his trust prior to its execution, or to account for moneys which came into his hands before that time." 170 N. Y. page 113, 62 N. E. page 1074.

It will be noted that the condition of the undertaking was that he should account for "all the property and money which shall come to his hands as such trustee." It was clearly an undertaking for the future, and did not cover, and was not intended to cover, past transactions or defaults.

But that is not this case. Here the undertaking did not relate simply to the future. It was given in compliance with the order appointing Sarah M. Faller committee, and was conditioned, not only that she should "in all things faithfully discharge the trust reposed in her as the committee of the person and estate of William Glynn, an incompetent person, of which she has been duly appointed, and shall obey all lawful directions of the said court or a judge thereof touching the said trust, and shall in all respects render a just and true account of all moneys and other properties received by her, and of the application thereof," etc.

Not only the wording of this undertaking, but the circumstances under which it was given, clearly show that it was intended to make the sureties on it liable for all moneys and property received by or coming to the committee, whether such property or money reached her hand prior to the giving of the bond or subsequent thereto. They undertook to become liable as sureties for all moneys and property however or whenever received, for which their principal became legally liable and accountable.

We therefore are of the opinion that the case of Thomson v. American Surety Co. cannot be deemed as controlling in the disposition of the question involved in this action.

[3] This, then, brings us to the consideration of the remaining question involved in this case, whether, nothwithstanding the giving and approval of the undertaking and the conclusion that the sureties on it became liable for the moneys received from the Erie County Savings Bank, that bank is relieved from the consequences of the unauthorized payment to the committee of the deposit to the credit of the incompetent before such committee had duly qualified in accordance with the provisions of the order for her appointment. It may be argued that the mere premature withdrawal and payment of these moneys worked no injury to the incompetent's estate. In other words, that after the required undertaking had once been given the estate was

placed in exactly the same position as it would have been had the money been paid after the giving of the bond. That the money paid to the committee was nevertheless impressed with a trust for the incompetent's benefit, whether she was legally entitled at that time to receive it or not, and she was still bound to account for its proper disposition, and when she gave the required security the estate was placed in exactly the same position as it would have been had the bond been given and approved and filed prior to the receipt of the money.

What was the legal effect of the giving and approval of the official bond of the committee? It not only rendered the sureties on the bond liable for the acts of their principal, but also completed and perfected the right of the committee to the possession of all the property of the incompetent. In this case we learn that, before the right of possession had been perfected by the giving of a bond, the committee in fact received the money from the bank, and her attorney, by a fraud practiced upon her, obtained a portion of this fund. Let us suppose that, instead of the committee having paid over the money to her attorney before the giving of the bond, she had retained possession until after the bond had been executed and filed, and then had been induced by the fraudulent acts of her attorney to pay it over to him. Could it fairly be claimed that, although the bank had prematurely paid the money on deposit, the bank should be compelled to pay a second time, because her attorney had taken advantage of her confidence and ignorance, and gotten away with the funds? We think not, because the giving of the undertaking perfected her right of possession, and cured any defect in that respect. In substance, the mere time of payment is not to be deemed controlling. The committee had the right of retention. If this view be correct, does it not also follow that the bank could not be compelled to pay a second time where the money was fraudulently obtained by a third person from the committee prior to the giving of the bond? We are unable to discover any logical distinction between the two situations. The committee took the fund charged with a trust in favor of the incompetent's estate; and, as we have seen, is chargeable with a failure to account for the money. Her sureties also became liable for these very moneys. The defendant had nothing to do with her attorney or his acts. Let us suppose, further, that subsequent to the committee having qualified by the giving of the undertaking and before the appointment of her successor, she had herself brought suit for the money on deposit and prematurely paid her by the bank. Would it not have been a good and sufficient answer to such an action for the bank to have said: "It is true we paid the money to you before you were entitled to receive it, but since then you have qualified, and supplied all the requirements of the law. You took the fund impressed with a trust, and ought not to be heard to say that you have lost or misappropriated the fund." If such an answer would avail in an action brought by the committee to whom the money was paid, is her successor in office in any better position to maintain this action? We think the question suggests the answer, and that in the negative.

Let us suppose again that the bank, upon the discovery that it had prematurely paid over the deposit, had brought an action to recover the deposit on the theory that it had been paid under a mistake of fact. Would it not have been a complete defense to such an action for the defendant to have pleaded and proved that subsequent to such payment she had qualified by the giving of the required bond, and was entitled to retain the moneys paid? If that be true, upon what principle can the bank be held liable to the committee for the double payment of a debt?

As the result of the discussion, we cannot reach any different conclusion than that the subsequent giving of the official bond by the committee operated to supply and cure any want of authority to recover payment of the money withdrawn from the bank, and placed the parties in the same position, so far as their legal rights are concerned, as though the payment had been made after the committee had qualified by giving the required bond.

It remains for us to discuss two cases cited and relied on by the plaintiff, which it is claimed sustain the plaintiff's right to recover.

In Scribner v. Young, 111 App. Div. 814, 97 N. Y. Supp. 866, a committee of an incompetent gave verbal permission to third persons to cut timber on lands of the lunatic. In a suit against those so cutting such timber, it was held they were liable for the value of the timber taken, to the successor of the committee, as the committee had no power to authorize the cutting without the express authority of the court. It appeared that no money or consideration for the timber cut and taken ever reached the hands of the committee. The statement of the case shows the facts, and the questions there involved differ entirely from those presented by the case at bar, for here the committee in fact received the money in question.

In Johnson v. Ayres, 18 App. Div. 495, 46 N. Y. Supp. 132, arising in this department, it was held that the sureties on a committee's bond could not be held liable for moneys received in consideration of the committee executing a deed of real estate of the incompetent, where he had received no direction from the court to do so, and the deed was void; that the title of the lunatic was not divested by such a conveyance, and the sureties were only liable for moneys legally coming to his hands as trustee. The money paid by the purchasers did not legally belong to the cestui que trust, and therefore the sureties never assumed any liability for such moneys.

It is manifest the case here presented is not this case, for here the moneys received were the property of the cestui que trust, and were impressed with a trust for their benefit. We therefore think the two cases cited do not control the decision in this case. The considerations above expressed lead us to the conclusion that the plaintiff is not entitled to recover. The complaint is therefore dismissed.

Let findings be prepared in accordance with the views expressed.

So ordered.

RUBACK v. McCLEARY, WALLIN & CROUSE.

(Supreme Court, Trial Term, Montgomery County. February, 1913.)

MASTER AND SERVANT (§ 177*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

A servant cannot recover of his master for injury from explosion of a tank through negligence of a fellow servant in a detail of the work, in letting the pressure get above the point at which he was instructed to keep it, and in not sooner attempting to shut it off after seeing this.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 352, 353; Dec. Dig. § 177.*]

Action by William Ruback against McCleary, Wallin & Crouse. Verdict for plaintiff set aside.

Henry V. Borst, of Amsterdam, for plaintiff.

Kernan & Kernan, of Utica, and Charles S. Nisbet, of Amsterdam, for defendants.

WHITMYER, J. It is my duty, it seems to me, under the law, as I understand it, to grant defendant's motion to set aside the verdict of the jury in favor of the plaintiff in the above-entitled action, not generally, but solely on the ground that the negligence which caused the injury to plaintiff was that of George Sanders, a fellow servant of plaintiff, in a detail of the work, and for the same reason, and solely for that reason, to grant defendant's motion for a nonsuit, made at the close of the evidence. It cannot be said that the verdict is against the weight of evidence, if defendant is liable for the negligence of Sanders. It is urged strenuously that the verdict is excessive, in view of the previous injury to plaintiff's leg. That question, however, was for the jury, and the verdict should not be disturbed on that ground.

The action is at common law. The accident occurred February 8, 1905. There was no claim on the trial of any defect in the machinery, except the regulator, which was attached to the pump, and which was designed to regulate the pressure in the tank by means of weights attached to it. The regulator failed to regulate on several occasions. This was evidenced by the gauge and the noise from the more rapid operation of the frames. While plaintiff testifies that this was a frequent occurrence, an examination of his testimony will show that the difficulty in the operation of the frames occurred in the fall before the accident, and that the last time that he observed anything unusual in the marking of the gauge was in the spring before the accident. Sanders says that one of the pipes in the regulator at times would become filled with waste, and that on such occasions the frames would not work steadily because of the increased pressure. He says that this happened five or six times during the two years of his service with defendant, and that, when it did happen, the superintendent or master mechanic would cause the regulator to be cleaned out, after which it would regulate properly. It had been working all right on the night before the accident, it had been cleaned a couple of weeks before this, and there is no evidence of any difficulty with it between these times.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In fact, there is no evidence of any difficulty with it at the time of the accident.

Under these circumstances, I fail to see any negligence on the part of the defendant. Sanders had worked in defendant's factory for two years before the accident, and had been in charge of the pump for four months at least, and was in charge of it at the time of the accident. There is no claim that he was incompetent. He had been instructed not to let the pressure exceed 105 pounds. The pump was operated by electricity, and was controlled by a switch on the wall about 12 or 14 feet from the pump. It was his custom, on starting the pump, to observe the pressure as shown by the gauge. On the morning of the accident, he started it, and then moved over to the gauge, where he stood for upwards of 5 minutes, and watched it rise, until it had registered 120 pounds. He had not adjusted the weights, by which the regulator was regulated, at this time. He says that there was steam in the room, and that he could not see well; but the fact is that he did see, and, when he saw that the pressure was at 120 pounds, he went to the wall to turn the switch by which the pump was controlled, but before he could do so, the fuse blew out, and almost simultaneously the tank exploded, and plaintiff was injured.

The explosion was caused by the pressure in the tank. Sanders had been instructed not to permit it to go beyond 105 pounds. It reached 120 pounds on this occasion, and he saw it. The weights had not yet been adjusted. The pressure could have been relieved by stopping the pump. That was the customary method. To stop the pump, it was necessary to walk only 12 or 14 feet to the switch and to turn it. This was clearly a detail of the work. Sanders did not do this, and his failure to do it was negligence. But he was a fellow servant of plaintiff, and his negligence related to a detail of the work, so that defendant is not responsible for it.

An order may be prepared accordingly.

SMITH v. ELDREDGE et al.

(Supreme Court, Trial Term, Schenectady County. January, 1913.)

1. FRAUDULENT CONVEYANCES (§ 208*)—PERSONS ENTITLED TO ASSERT INVALIDITY—SUBSEQUENT CREDITORS.

Action to set aside a deed as fraudulent cannot be maintained by creditors whose claims were not in existence at the time of the conveyance.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 631, 633; Dec. Dig. § 208.*]

2. BANKRUPTCY (§ 303*)—FRAUDULENT CONVEYANCES—INTENT OF GRANTOR—SUFFICIENCY OF EVIDENCE.

Evidence, in an action by a trustee in bankruptcy to set aside conveyances of property by the bankrupt to his wife as fraudulent, *held* insufficient to sustain a finding that they were made with intent to hinder, delay, and defraud creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458–462; Dec. Dig. § 303.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by George H. Smith, trustee in bankruptcy of Frank S. Eldredge, against Frank S. Eldredge and others to set aside conveyances as fraudulent. Action dismissed.

Miller & Golden, of Schenectady, for plaintiff.
Miles R. Frisbie, of Schenectady, for defendants Frank S. Eldredge and Ella Eldredge

WHITMYER, J. The action has been brought to set aside a deed of certain real property, situate on the westerly side of Wright avenue in the city of Schenectady, N. Y., executed and delivered by Frank S. Eldredge and Ella Eldredge, his wife, to Frank H. Dettbarn, dated April 8, 1908, recorded April 9, 1908, at 11:40 a. m., in Liber No. 183 of Deeds at page 154, and another of the same property, executed and delivered by the said Frank H. Dettbarn and Mary Dettbarn, his wife, to the said Ella Eldredge, dated April 9, 1908, recorded May 12, 1909, at 10:26 a. m. in Liber No. 191 of Deeds at page 43. The consideration for each conveyance was stated to be one dollar. An alleged indebtedness from Eldredge to his wife, the amount of which does not clearly appear, was claimed to be the actual consideration. The property was fairly worth the sum of $4,000, and was subject to a mortgage of $2,500 given to one Dora S. Campbell, dated April 1, 1908, and recorded April 8, 1908. Eldredge received $1,500 of the amount for which this mortgage was given, on April 8, 1908, and the balance of $1,000 a few months thereafter. Other real estate owned by him at the time, or his equity therein, was fairly worth the sum of $1,125. His indebtedness aggregated the sum of $1,500. His creditors were Frank H. Dettbarn, Van Loon & Hedden, Clark Witbeck, Dr. Lester Bates, a certain mason, and the Knapp & Hotchkiss Lumber Company. All of them were paid on the day of, or shortly after, the transfers, except the lumber company, which received $1,000 on April 8, 1908, and $195 on April 24, 1908. The lumber company claimed upwards of $2,300, but Eldredge disputed the amount. The conveyances were made during the controversy and the company acquired knowledge of them at the time, or immediately thereafter, from Eldredge himself. Action was brought some time later to recover $1,000, or thereabouts. This was settled March 29, 1909. In settlement, Eldredge gave, and the company, having knowledge of the transfers, accepted, his bond for $1,000, and, as collateral thereto, a mortgage in the same sum, payable two years from date, with interest at 6 per centum per annum, payable semiannually, on certain real property on Avenue B, in said city. This mortgage was the second lien on said property. The first, a mortgage in the sum of $2,800, given February 18, 1909, was thereafter foreclosed and the property bid in by the first mortgagee for the amount of his mortgage, so that the lumber company did not receive anything on its bond and mortgage and has never received anything on its claim. Eldredge and his wife occupied the property at the time of the conveyances and are still occupying the same, and during all this time he has paid the interest and the taxes out of his own money and has not paid rent. He was adjudicated a bankrupt July 26, 1911, and plaintiff was appointed trustee

August 16, 1911. The lumber company filed a claim for $2,300 on the day of the first hearing herein, although it had had no transactions with Eldredge after the settlement. None of the indebtedness set forth in the schedules in bankruptcy was in existence at the time of the transfers.

[1] That this action cannot be maintained for creditors whose claims were not in existence at the time of the transfers is clear. Allee v. Slane, 26 App. Div. 455, 50 N. Y. Supp. 55. Whether or not it can be maintained in behalf of the Knapp & Hotchkiss Lumber Company, in view of the fact that its claim was not filed until after the commencement of the action, it is not necessary to decide. The Real Property Law (Laws 1909, c. 52 [Consol. Laws 1909, c. 50]) § 263, provides that a conveyance in writing of an estate in real property, made with the intent to hinder, delay, or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts, or demands, is void as against every person so hindered, delayed, or defrauded. Section 265 of the law provides that the question of fraudulent intent in such a case shall be deemed a question of fact and not of law, and that a conveyance shall not be adjudged fraudulent as against creditors, purchasers, or incumbrancers, solely on the ground that it is not founded on a valuable consideration. Under the statute, the absence of a valuable consideration is not sufficient to warrant adjudging a conveyance fraudulent as against creditors, but other and further evidence that it was made with fraudulent intent is required.

In Kain v. Larkin, 131 N. Y. 307, 30 N. E. 106, the court says:

"An owner of real estate can make a voluntary settlement thereof upon his wife and children without any consideration, provided he has ample property left to satisfy all the just claims of his creditors. If the grantor remains solvent after the conveyance and has sufficient property left to satisfy all his just debts, then the conveyance, whatever his intention was, cannot be a fraud upon his existing creditors; and, when a judgment creditor assails a conveyance made by the judgment debtor, he cannot cast upon the grantee the onus of showing good faith and of establishing that the grantor was solvent after the conveyance by simply showing that the deed was not founded upon a valuable consideration. But the person assailing the deed assumes the burden of showing that it was executed in bad faith, and that it left the grantor insolvent and without ample property to pay his existing debts and liabilities."

[3] Allee v. Slane, supra, is to the effect that a conveyance from husband to wife is presumptively fraudulent. An alleged indebtedness from Eldredge to his wife was claimed to be the consideration here, but the fact of indebtedness was not clearly and sufficiently shown, so that the conveyance will be treated as a voluntary one. The value of the equity conveyed was about $1,500. It is conceded that Eldredge was indebted in that amount at the time. He received $1,500 of the $2,500 for which the Campbell mortgage on this property was given, on the day the conveyances were drawn. This money was used for the payment of debts, and all claims were paid except that of the lumber company, which received $1,000 at that time and $195 about two weeks later. The company claimed upwards of $2,300, but Eldredge disputed the amount. The conveyances were made before the controversy was settled.

At this time, Eldredge was the owner of other real property of the value of $1,125 and had not yet received the $1,000 balance of principal of Campbell mortgage. The balance due to the lumber company, shown by the fact that action was thereafter brought to recover such amount, was $1,000. So that the conveyances did not render Eldredge insolvent. In addition to this, the company acquired knowledge of the conveyances from Eldredge himself at the time or immediately after they were made. Having such knowledge, it brought action to recover the balance due on its claim some time thereafter. Instead of prosecuting such action to judgment and attacking the conveyances, it settled the action March 29, 1909, about one year thereafter, by accepting the bond of Eldredge for $1,000, with a mortgage in the same amount, on other real property, belonging to him. This mortgage was a second lien on that property, and, since the first lien has been foreclosed and the property has been sold and bid in by the owner of that lien for the amount thereof, the security of the company is worthless. But the company accepted it with knowledge and cannot complain. That Eldredge has paid interest and taxes out of his own money since that time cannot, under the circumstances, affect the result. The evidence will not, it seems to me, sustain a finding that the conveyances were made with fraudulent intent. The complaint must therefore be dismissed, with costs.

Findings may be prepared accordingly.

(81 Misc. Rep. 611.)

GIBBS v. LUTHER et al.

(Supreme Court, Special Term, Cattaraugus County. July, 1913.)

1. MUNICIPAL CORPORATIONS (§ 1000*)—TAXPAYER'S ACTION—PARTIES.

In an action to enjoin a city from entering into a contract for paving a street pursuant to a resolution of the common council, the members of the common council, as such, were not necessary parties, as their action was completed and an injunction against them would avail nothing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2167–2172, 2198; Dec. Dig. § 1000.*]

2. MUNICIPAL CORPORATIONS (§ 290*)—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—STATUTORY PROVISIONS.

Olean City Charter (Laws 1893, c. 478), § 98, relative to paving streets at the expense of abutting property owners, requires a petition of a majority of the property owners naming two temporary commissioners to have charge of the work, publication of notice thereof, a hearing of objections, approval of the petition, a direction that the improvement be made, a determination of its probable cost, an assessment of the expense, publication of notice by the assessors to correct and confirm the assessment, and collection of the assessment as other taxes are collected. Laws 1913, c. 247, adds to the General City Law (Consol. Laws 1909, c. 21), a number of new sections, section 24 of which provides that that act is not to be construed as in derogation of the powers of the state, but as intended to aid the state in the execution of its duties by providing adequate power of local government for the cities of the state. Section 22 provides that the powers thereby granted shall be in addition to all the powers, privileges, and functions existing in any city pursuant to any other law. Section 20 provides that, subject to the Constitution and general laws of the state, ev-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ery city may construct and maintain public works and public improvements including local improvements, and assess upon the property benefited thereby the cost in whole or in part. Section 23, subd. 1, provides that the powers thereby granted are to be exercised by the officers or body vested with such powers by any other law or ordinance, and in the manner and subject to the conditions prescribed by law or ordinance, but that no provisions of any special or local law shall operate to defeat or limit the grant of powers contained therein; that any provision of any special or local law which operates to prevent the exercise or limit the extent of any power thereby granted shall be superseded; that, when any such law is superseded thereby, such power, freed from the limitations imposed by such law, shall be exercised by the same officer or body that would be vested with such power if such provisions had not been superseded; but that the exercise thereof shall be subject to the limitations provided for in subdivision 2. Subdivision 2 provides that, in the absence of any provision of law or ordinance determining by whom and in what manner or subject to what conditions any power thereby granted shall be exercised, the common council of the city, subject to the provisions of that section, shall have power to determine by whom, in what manner, and subject to what conditions the powers shall be exercised. *Held*, that such act does not supersede the requirements of the Olean Charter mentioned; they not being a limitation upon the power granted by that act, but being conditions upon which the power shall be exercised.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 763, 764; Dec. Dig. § 290.*]

3. CONSTITUTIONAL LAW (§ 63*)—LEGISLATIVE POWERS—DELEGATION.

The legislative power is vested by the Constitution in the Senate and Assembly, and purely legislative powers of the state cannot be delegated to a municipality.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108–114; Dec. Dig. § 63.*]

Taxpayer's action by Arthur Gibbs against George H. Luther and others, as Commissioners of Public Works of the City of Olean, and others. On motion to continue the temporary injunction. Motion granted.

Allen J. Hastings, of Olean, for the motion.
Henry Donnelly, of Olean, opposed.

POOLEY, J. This is an action by a taxpayer, pursuant to section 5, General Municipal Law, to restrain defendants from entering into any contract for paving North Clinton street, or for laying water lines therein, on the ground that the proceedings are illegal official acts, affecting the funds of the city. A temporary injunction has been issued which it is now sought to continue.

The defendants have all appeared, and their answer is submitted, alleging that the proceedings to pave, etc., are authorized by the City Charter, together with the provisions of chapter 247, Laws of 1913, known as the Home Rule Bill, and they urge that the city of Olean is not a proper party to this action, and that the members of the common council are necessary parties.

The acts of the city, through its officers and representatives, are attacked, and it and they are entitled to be heard. Wenk v. New York,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

171 N. Y. 607, 64 N. E. 509; Steele v. Glen Park, 193 N. Y. 341, 86 N. E. 26.

[1] There would be no useful purpose subserved in joining the members of the common council as such, as parties, because their action, whether right or wrong, is completed, and an injunction against them would avail nothing.

[2] The charter of the city of Olean is found in chapter 478, Laws of 1893, and acts amendatory thereof, which provide for paving streets and assessing the expense upon abutting property. As in most city charters, it provides in detail the machinery to accomplish this, in section 98, viz.: A majority petition for payment and nominating two temporary commissioners, presented to the common council, publication of notice thereof and of a hearing of objections, approval of the petition, and directing the improvement to be made, determining probable cost, the expense to be assessed, publication of notice by the assessors to correct and confirm the assessment, and collecting as other city taxes are collected. The charter also provides that, "in anticipation of the collection of the taxes, the common council shall issue certificates of indebtedness or revenue bonds of said city in anticipation of such respective amounts," payable in not exceeding ten years, with interest.

None of these steps have been taken, but the common council, on May 19, 1913, took the following action:

"By Alderman Ball: Resolved that the following streets be paved and otherwise improved under the direction of the commissioners of public works, A. D. Pratt and John Meloy as temporary commissioners for the improvement of Laurel avenue from Clinton street to the line of the P. R. R. Clinton street from East State street to the north line of Jay street, temporary commissioners of Clinton street to be E. V. Wood and H. W. Eaton. The width of Clinton street is to be 26 feet and Laurel avenue to be 24 feet. The above streets to be improved under and by virtue of chapter 247 of the Laws of 1913, commonly known as the Home Rule Bill. Adopted."

Following this, the commissioners of public works published notice that sealed proposals would be received until June 21, 1913, "for the construction of a vitrified block pavement in North Clinton street, * * *" and the water commissioners published notice that sealed bids or proposals would be received until June 25, 1913, for putting in lead service connections in North Clinton street and other streets.

No petition has been presented, nor any temporary commissioners named by the property owners; they have had no voice in determining the kind of pavement, nor does the resolution indicate the kind of pavement; no notice to them nor opportunity to present objections. The commissioners undertake to determine and specify the kind of pavement as a vitrified block pavement; whether of stone or brick or wood block does not appear.

The defendants contend that, by reason of the powers granted by the home rule bill, the preliminaries required by the charter are dispensed with and superseded, and that the common council alone have power to pave any street, and consequently every street in the city on their own motion.

This is not the meaning of the home rule bill. If it were, it would accomplish the opposite of its supposed intention, and would, in this

instance, invest 16 citizens of the city of Olean with arbitrary power to levy assessments upon owners of property in a given street without their consent or approval. They would not only dictate that the street shall be paved, but also the kind of pavement.

[3] The legislative power is vested by the Constitution in the Senate and Assembly, and cannot be delegated, and its exercise is governed by the provisions of article 12, § 1, of the Constitution, "to restrict their (cities) power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessment and in contracting debt by such municipal corporations."

The power to tax is one of the highest prerogatives of the state, and is and should be exercised with the greatest care to avoid abuses. So in these latter days of advanced ideas of popular government, when it is deemed wise by general legislation to give into the hands of the citizens of a municipality a larger part in the administration of their own affairs, it must be remembered that purely legislative powers of the state cannot be delegated to the municipality, because even the Legislature has no such power. Stanton v. Supervisors, 191 N. Y. 428, 84 N. E. 380; Village of Saratoga Springs v. Saratoga Gas, etc., Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713.

The home rule bill, so called, is very broad in its terms and is to be construed (section 24), "not as an act in derogation of the powers of the state, but as one intended to aid the state in the execution of its duties, by providing adequate power of local government for the cities of the state." Section 22 provides that:

"The powers granted by this article shall be in addition to and not in substitution for, all the powers, privileges and functions existing in any city pursuant to any other provision of law."

Section 20 provides that:

"Subject to the Constitution and general laws of this state," certain powers are granted, among them being: "(11) To construct and maintain public buildings, public works and public improvements including local improvements, and assess and levy upon the property benefited thereby the cost thereof in whole or in part."

Section 23, subd. 1, provides that:

"The powers granted by this act are to be exercised by the officer, officers or official body vested with such powers by any other provision of law or ordinance (subject to amendment or repeal of any such ordinance), and in the manner and subject to the conditions prescribed by law or ordinance (subject to amendment or repeal of any such ordinance), but no provision of any special or local law shall operate to defeat or limit in extent the grant of powers contained in this act; and any provision of any special or local law which in any city operates, in terms or in effect, to prevent the exercise or limit the extent of any power granted by this act, shall be superseded. Where any such provision of special or local law is superseded under the provisions of this subdivision, such power, freed from the limitations imposed by such provision, shall be exercised by the same officer, officers or official body that would be vested with the same under the provisions of this subdivision, if such provision had not been superseded, but the exercise thereof shall be subject to the limitations provided for in subdivision two of this section."

Subd. 2. "In the absence of any provision of law or ordinance determining by whom and in what manner, or subject to what conditions any power granted by this act shall be exercised, the common council or board of alder-

men, or corresponding legislative body of the city, shall, subject to the provisions of this section, have power by ordinance to determine by whom and in what manner and subject to what conditions, said power shall be exercised."

The home rule bill grants powers in addition to and not in substitution of the charter provisions, and is intended to supply omissions. Charters that contain all necessary powers require no augmentation, while those that are lacking are furnished, in order to bring all cities up to a standard of efficiency in transacting their business. It does not pretend to direct the details and methods of carrying out the powers granted. For those, we look to the provisions of the existing charter, and they must be followed in order to secure a legal proceeding.

It is contended, however, that the formality of a petition by citizens, as a prerequisite, is a limitation upon the power granted, and hence is superseded, and the provision of the act (section 23) quoted above is cited to substantiate this contention, the particular clause reading: "But no provision of any special or local law shall operate to defeat or limit in extent," etc.

In my opinion, the charter provision is not a limitation within the meaning of the home rule bill. It does not "defeat or limit in extent the grant of powers contained in this act," it does not "prevent the exercise or limit the extent," but prescribes the conditions upon which the power shall be exercised. Can it be said that the Legislature intended to supersede those provisions of the charter which were placed there to safeguard the rights and property of the citizen, by granting, in the guise of a home rule bill, arbitrary powers which leave the citizen no rights except to pay? The act requires no such strained construction, and, if it is to remain upon the statute books, it must be read as in aid of, and not as in annihilation of, provisions recognizing the rights of the citizen. If the formality of a petition of property owners is dispensed with, why not the other provisions of the charter? Why appoint the temporary commissioners? Why take the time to advertise for bids? In short, carried to its logical conclusion, all the details would be wiped out and the members of the common council would be in absolute control.

The common council has the power, under the conditions named, to pave every street in the city. If these conditions are superseded or canceled, then the common council would only be accountable to the voters in case they came up for re-election. This is not what the people have been taught to expect from the advocates of home rule for cities.

This bill, read in connection with the charter of the city of Olean, does not change the procedure under the latter, in the performance of municipal administrative acts, and there is no authority for the acts of the common council in directing the improvement, nor for the acts of the commissioners in advertising for bids with the intent of entering into contracts on behalf of the city, until the provisions of the charter are complied with.

The acts sought to be enjoined affect the funds and property rights of the municipality, and are therefore the proper subjects for judicial control. The bonds to be issued in anticipation of the collection of the

assessment will be obligations of the city of Olean, and, if the local assessment be declared void for irregularity, the city's funds would have to be used to meet the obligation.

The injunction granted herein is continued until the determination of this action.

(81 Misc. Rep. 474)

WITHERBEE, SHERMAN & CO. v. WYKES.

(Essex County Court. June 30, 1913.)

LANDLORD AND TENANT (§ 303*)—RECOVERY OF POSSESSION—SUMMARY PROCEEDINGS—PETITION.

Under Code Civ. Proc. § 2236, relative to summary proceedings to recover the possession of real property, which provides that where the person to be removed is a tenant at will the petition must state the facts showing that the tenancy has been terminated by giving notice as required by law, and Real Property Law (Consol. Laws 1909, c. 50) § 228, providing that a tenancy at will may be terminated by a written notice of not less than 30 days requiring the tenant to remove from the premises, which notice may be served by delivery to the tenant, by delivery to a person of suitable age and discretion residing upon the premises, or by affixing it upon a conspicuous part of the premises where it may be conveniently read, if neither tenant nor person of suitable age can be found, a petition alleging that the petitioner caused a notice in writing to be served on the tenant requiring him to remove from the premises was fatally defective, since it did not show in which of the three methods prescribed by the statute the notice was served or that it was served in any of those methods; the allegation that it was served being a mere conclusion of the pleader.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1303–1309; Dec. Dig. § 303.*]

Appeal from Justice Court.

Summary proceeding brought before a justice of the peace to recover the possession of real property by Witherbee, Sherman & Company against Harry B. Wykes. From a final order awarding possession of the property to the petitioner, defendant appeals. Reversed, and restitution awarded.

Robert W. Fisher, of Mechanicville, for appellant.

Stokes & Owen, of Port Henry, for respondent.

PYRKE, J. The landlord brought this proceeding to remove a tenant at will alleged to be holding over after the expiration of his term. A final order awarding delivery of possession to the landlord was made. The defendant appeals, and challenges the jurisdiction of the court below. The point urged is that the petition was defective in its statement of the termination of the tenancy.

Section 2236 of the Code of Civil Procedure provides that:

"Where the person to be removed is a tenant at will . * * * the petition must state the facts, showing that the tenancy has been terminated, by giving notice, as required by law."

The "notice required by law" is specified in section 228 of the Real Property Law (Consol. Laws 1909, c. 50), which provides in substance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date & Rep'r Indexes

that a tenancy at will may be terminated by a written notice of not less than 30 days given in behalf of the landlord to the tenant, requiring the tenant to remove from the premises. The section further provides three different ways by which service may be made: First, by delivery to the tenant; second, by delivery to a person of suitable age and discretion residing upon the premises; third, by affixing the notice upon a conspicuous part of the premises where it may be conveniently read, if neither tenant nor person of suitable age can be found.

The allegation of the petition in this proceeding as to the service of notice is:

"That your petitioner caused on the 20th day of January, 1913, a notice in writing to be served on said tenant, requiring him to remove from said premises within thirty days from the date of the service thereof."

This allegation falls considerably short of a statement of facts showing the termination of the tenancy. It is impossible to determine from it in which of the three alternative methods the notice was served. Indeed, it is possible that the service was not made in accordance with any of those methods. For aught that appears it might have been served by mail. All that can be spelled out of this allegation is that a notice was communicated to the tenant in a manner that the landlord deemed service. In short, the allegation that the notice was "served on said tenant" is not a statement of fact but a conclusion of the pleader.

As an original proposition I should be inclined not to regard this defect as jurisdictional, but on this point I am apparently foreclosed by authority. While no decision has been called to my attention, in a holding over case, the authorities are numerous in the nonpayment of rent cases. The analogy between the two classes of cases is so complete that the authorities in one cannot be overlooked upon the other.

In People ex rel. Morgan v. Keteltas, 12 Hun, 67, it was held that an allegation by the landlord that he had "demanded the said rent from the said tenants by a three days' notice, in writing, a copy of which is hereto annexed," etc., was not only clearly insufficient but constituted a fatal defect in the proceedings. This case has been repeatedly cited with approval. See Tolman v. Heading, 11 App. Div. page 266, 42 N. Y. Supp. 217; Beach v. McGovern, 41 App. Div. page 383, 58 N. Y. Supp. 493; Matter of Stuyvesant Real Estate Co., 40 Misc. Rep. 207, 81 N. Y. Supp. 642.

The justice, therefore, not having acquired jurisdiction, the final order made by him was unauthorized and should be reversed, with costs, and restitution awarded to the tenant. See Bristed v. Harrell, 21 Misc. Rep. 93, 46 N. Y. Supp. 966.

(82 Misc. Rep. 33)

BENDURE v. BIDWELL et al.

(Supreme Court, Special Term, Erie County. August 14, 1913.)

1. LIBEL AND SLANDER (§ 6*)—WORDS ACTIONABLE—SPECIAL DAMAGE.
To constitute libel, false statements in a circular letter concerning a person need not be libelous per se, if they were actuated by malice and ill will, with intent to injure such person in his business or profession.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3–16; Dec. Dig. § 6.*]

2. APPEAL AND ERROR (§ 953*)—REVIEW—ORDER GRANTING ATTACHMENT.
Under Code Civ. Proc. § 636, authorizing a judge in civil actions to grant a warrant of attachment, when it is made to appear by affidavit that the defendant has departed from the state to avoid service of summons, or keeps himself concealed therein with like intent, the discretion of a judge in granting a warrant will not be reviewed, unless the insufficiency is so obvious as to justify the conclusion that his action was inadvertent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3816; Dec. Dig. § 953.*]

3. EVIDENCE (§ 83*)—PRESUMPTION.
The presumption is that a deputy sheriff, in attempting to serve summons, did his duty, and that the places he visited, upon such information as he could gather, were the most probable places for defendant to be found.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

4. ATTACHMENT (§ 249*)—PRELIMINARY AFFIDAVIT—REQUISITES.
Under Code Civ. Proc. § 636, authorizing the granting of a warrant of attachment in civil actions, when it is made to appear by affidavit that the defendant has departed from the state to avoid service of process, or is concealing himself therein with like intent, all that is required of the preliminary affidavit is that it furnish information on which a reasonably prudent man would act, and on a motion to vacate the attachment, solely because of the insufficiency of the affidavit, the plaintiff is entitled to all legitimate inferences and deductions from the facts stated in the affidavit.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 861–876; Dec. Dig. § 249.*]

Action by James A. Bendure against Alfred C. Bidwell and another. On motion by defendant Bidwell to vacate a warrant of attachment because of insufficiency of the preliminary affidavit. Denied.

Corcoran & Corcoran and Henry W. Killeen, all of Buffalo, for the motion.

Kimball & Stowe, of Buffalo, opposed.

WOODWARD, J. This is a motion on the part of the defendant Bidwell to vacate a warrant of attachment, upon the grounds that the affidavits upon which the attachment was granted wholly fail to state facts sufficient to justify the court in holding that the defendant had left the state to evade the service of a summons, or was concealed within the state to evade such service, and that the complaint does not state a cause of action.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] The action is for libel, alleged to be contained in a circular letter sent out by the defendants Bidwell and the International Automobile League, and an examination of the complaint shows conclusively that the same is not open to the objection urged. Whether the language of the circular letter is libelous per se or not is not material at this time, for the complaint alleges that it was "circulated widely throughout the United States and Canada," and "that in so doing, and making the false and defamatory statements aforesaid of and concerning the plaintiff therein contained, defendants were actuated by actual malice and ill will toward the plaintiff, and intended to harm him in his business and his professional standing," and there can be little question that this is a statement of fact which calls for submission of the issue to the jury if the case is litigated. Indeed, this seems to be practically conceded by the defendant upon this motion, and we shall consider merely the question of the sufficiency of the affidavits.

[2] Under the provisions of section 636 of the Code of Civil Procedure it is necessary, in procuring a warrant of attachment in a case such as that now before us, to "show by affidavit, to the satisfaction of the judge granting the same," that "one of the causes of action specified in the last section exists against the defendant," and that, being a natural person and a resident of the state, "he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent." This requirement has been met. It has been shown to the satisfaction of the judge granting the writ, and by affidavit, that the defendant is a natural person and a resident of the state, and that he has departed from the state to avoid the service of summons, or keeps himself concealed therein with the like intent, and upon this motion we are required to determine whether the affidavits are sufficient to justify this conclusion. The moving affidavits are not controverted in any manner; there are no answering affidavits submitted. We are merely asked on this motion to review the discretion of the judge granting the warrant, and to hold that facts stated in the affidavits were not such as to warrant the original determination, and unless this is so obvious as to justify the conclusion that the action on the part of the judge in granting the warrant was inadvertent, it would not comport with the orderly administration of the law to grant the relief demanded.

We have already indicated that there is no question of the sufficiency of the pleadings. We are equally clear that there is nothing to warrant the setting aside of the warrant of attachment. The affidavit of George C. Riley sets forth that he is an attorney for the Northland Rubber Company, and that as such attorney he brought an action against the International Automobile League, Alfred C. Bidwell, James J. O'Shea, and others, as defendants, to recover an affirmative judgment for damages and to obtain an injunction, and that on the 9th day of July, 1913, a temporary injunction was granted, containing an order requiring the defendants to show cause on the 15th day of July, 1913, why said injunction should not be made permanent during the pendency of the action; that on said day a summons was duly issued in said action, and, with the other papers, was placed in the hands of Ed-

ward J. Altschaft for service upon the defendants; that on the 10th day of July, 1913, said summons and other papers were duly served upon the defendant International Automobile League by leaving the same with James J. O'Shea, who was at the time the general manager of such league, and of which the defendant Alfred C. Bidwell, was the president; that continued efforts have been made to serve the said Alfred C. Bidwell with the papers in that case; that upon the return day of the said order to show cause deponent personally appeared at Special Term at the opening of court, and the said James J. O'Shea appeared by counsel; that there was no appearance for the defendant International Automobile League, or the defendant Alfred C. Bidwell.

Edward J. Altschaft makes an affidavit setting forth in detail the efforts made by him to serve the papers in the injunction action on Mr. Bidwell. He tells us that he went to Rochester, at the request of the Northland Rubber Company, his employer, and finally found Mr. Bidwell registered at the Hotel Seneca; that he visited the room assigned to Mr. Bidwell and found his baggage there; that he waited about for several hours; that he went out to get something to eat, and that on returning a half hour later he found that the baggage of Mr. Bidwell had been removed, and that Mr. Bidwell had left the hotel without paying his bill; that Mr. Bidwell sent a letter to the Hotel Seneca, asking to have his bill sent to his business address in Buffalo, and that all subsequent efforts to find Mr. Bidwell were unavailing, until he was finally located at the Clifton Hotel at Niagara Falls, Ontario, on the 14th day of July, and it does not appear that he has since been within the jurisdiction of this court. In this day of telephones and telegraphs, with Mr. Bidwell a guest of one of the leading hotels of Rochester, and the general manager of his business in the city of Buffalo served with papers in an action for damages and an injunction involving his company, it is not creditable to our intelligence to suggest that Mr. Bidwell was not aware of the fact that he was wanted in the action, and his conduct in leaving his hotel without paying his bill, his disappearance from view from the 11th to the 14th day of July, and his appearance in a hotel outside the jurisdiction of this court, though within easy speaking distance of his office, all tend irresistibly to point to the conclusion that he was in the act of avoiding the service of process. Add to these the affidavit of Andrew Kick, deputy sheriff, showing his diligence in trying to serve the papers in the present action, and we have a very complete case within the letter and the spirit of the statute, and one which fully justifies the court in making use of the warrant of attachment.

[3] The presumption is, of course, that the deputy sheriff did his duty; that the places which he visited, upon such information as he was able to gather, were the most probable places for Mr. Bidwell to be found; and the suggestion that the affidavit fails to disclose that there were reasons for looking for him in these places is not entitled to any very serious consideration, where there is no effort to show that Mr. Bidwell was available, or that he was in good faith away from home and his business temporarily, and with no intention of evading process.

[4] All that the law requires is that the information furnished by the moving papers shall be such that a person of reasonable prudence would be willing to accept and act upon it. Brandly v. American Butter Co., 130 App. Div. 410, 114 N. Y. Supp. 896. And the same authority says that, where a defendant moves to vacate an attachment solely upon the affidavit upon which it was granted, the plaintiff is entitled to all the legitimate inferences and deductions that can be made from the facts stated.

The motion should be denied, with $10 costs.

(82 Misc. Rep. 92)

NEW YORK COACH & AUTO LAMP CO. v. BROWN.

(Supreme Court, Special Term, New York County. August, 1913.)

1. PLEADING (§ 123*)—ANSWER—DENIAL.
   A denial in an answer of all the "material allegations" of the complaint is insufficient to raise any issue, as the denial must be direct, unequivocal, and not evasive.
   [Ed. Note.—For other cases, see Pleading, Cent. Dig. § 255; Dec. Dig. § 123.*]

2. PLEADING (§ 146*)—COUNTERCLAIM.
   In an action for goods sold and delivered, an allegation in defendant's answer that plaintiff had in its possession one radiator and one wind shield, reasonably worth $65, was insufficient as alleging a counterclaim.
   [Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 294–296; Dec. Dig. § 146.*]

Action by the New York Coach & Auto Lamp Company against Charles E. Brown. Judgment for plaintiff on the pleadings.

Adolph M. Schwarz, of New York City (Louis F. Perl, of New York City, of counsel), for the motion.

G. J. Martin, of Long Island City, opposed.

GIEGERICH, J. The action is for goods sold and delivered. The first paragraph of the complaint alleges the incorporation of the plaintiff; the second, the sale and delivery of goods, wares, and merchandise, and the defendant's promise to pay therefor the sum of $69.20; and the third, that the sum last mentioned has not been paid, although duly demanded. The defendant interposed the following answer:

"Denies upon information and belief the material contained in paragraphs 1, 2, and 3 of the complaint. As for a first separate defense and counterclaim, the defendant alleges that the plaintiff has in its possession one radiator and one wind shield, which is worth the reasonable value of $65. Wherefore defendant prays judgment for the amount of $65, with costs."

[1] The plaintiff has moved for judgment on the pleadings, and the defendant's counsel claims that through an oversight the word "allegations" was omitted after the word "material" in the denial contained in the answer. Even if such word were incorporated in the answer, a denial of "material" allegations is wholly insufficient and raises no issue. Mattison v. Smith, 24 N. Y. Super. Ct. (1 Rob.) 706, 19 Abb.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Prac. 288; Hammond v. Earle, 5 Abb. N. C. 105. A denial must be direct and unequivocal. 1 Nichols, N. Y. Pr. 947. In Mattison v. Smith, supra, the answer denied "each and every material allegation in said complaint contained," which was held to be evasive. The court in passing upon the form of such answer said (24 N. Y. Super. Ct. 710, 19 Abb. Prac. 292):

"It is impossible to ascertain from the answer what is the ground of the defense. No new matter is set up, and it cannot be known from the answer on which of the allegations of fact found in the complaint, and their supposed falsity, the defense is to rest. Such a form of answering should not be encouraged. It is to say the least evasive, and if sanctioned would tend to authorize the general issue in all cases, although a defendant would not hazard a specific or even a general denial in terms on oath of every allegation which is clearly material."

In Abbott's Forms of Pleading, completed after Dr. Abbott's death by Dean Carlos C. Alden, it is said on page 1500 of volume 2:

"It is the better opinion that a denial expressed simply in the words of the statute as of 'each and every *material* allegation' in the complaint should be treated as evasive. The object of the word 'material' in the statute is to compel defendant to go to judgment if he admits that plaintiff is entitled to recover anything whatever, and to prevent prejudice to the defendant on an assessment of damages from his omitting to deny an allegation which is not essential to plaintiff's cause of action, but not to give him the advantage of delaying until the trial the giving of any indication as to what he denies. The statute should therefore be construed distributively, and not allow a denial qualified by the word 'material'"—citing Mattison v. Smith, 19 Abb. Prac. 288; Hammond v. Earle, 5 Abb. N. C. 105.

[2] So far as the alleged counterclaim is concerned, the mere possession by the plaintiff of the chattels in question does not afford any basis whatever for a counterclaim against plaintiff's alleged cause of action.

The motion is therefore granted, with costs and $10 costs of this motion, with leave to plead over upon payment, within a time to be specified in the order to be entered hereon, of costs before notice of trial and $10 motion costs. Kramer v. Barth, 79 Misc. Rep. 80, 82, 139 N. Y. Supp. 341.

ARCHER et al. v. ARCHER et ux.

(Supreme Court, Special Term for Trials, Rockland County. July, 1913.)

1. TRUSTS (§ 231*)—TRUSTEE—PURCHASE OF TRUST PROPERTY.

Testator devised his property to his executors in trust to manage during the life of his widow and to pay one-third the income to the widow and two-thirds to his three sons, and at the death of the widow the property to go to the three sons equally. The three sons were appointed executors, but one, A., was subsequently removed. A. subsequently executed three mortgages covering his interest, and his entire interest was afterwards sold at execution sale. The executors purchased these mortgages and the interest at the execution sale. The mortgages were afterwards foreclosed, the executors becoming the purchasers, outbidding the heirs of A., thereby acquiring the entire interest of A. in the estate for $11,000, while it was worth over $20,000. *Held* that, though the three sons were tenants in common and might mortgage their undivided interest,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

during the life of the widow, the property was trust property, the executors were trustees, and A., as to his interest, was cestui que trust, and the executors could not deal with his interest for themselves individually, but, as trustees, they would be held to have acted for the benefit of A. and his heirs.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330–335; Dec. Dig. § 231.*]

2. TRUSTS (§ 231*)—TRUSTEE—RIGHT TO PURCHASE TRUST PROPERTY.

No one can purchase property individually, where he has a duty as to the property inconsistent with such purchase.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330–335; Dec. Dig. § 231.*]

3. JUDGMENT (§ 715*)—RES JUDICATA—MATTERS CONCLUDED.

Where outstanding mortgages executed by cestui que trust on his interest were purchased by the trustee, but the assignment was made to the trustee's wife, a foreclosure of the mortgages by the wife is not a bar to a subsequent suit by the devisees of the cestui que trust against the trustee to impress a trust on the property for profits derived by the trustee in dealing with the trust property, since in the foreclosure suit the only issue was as to the validity of the mortgages, while in the latter the issue was whether a trustee, in purchasing the mortgages, would be held to have acted for the benefit of the cestui que trust.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244–1246; Dec. Dig. § 715.*]

Action by Margaret Archer, individually and as administratrix of Allison Archer, deceased, and others, against George Archer, individually and as executor of Michael A. Archer, deceased, and wife. Judgment for plaintiffs.

Leon R. Jillson, of New York City (M. B. Patterson, of Nyack, of counsel), for plaintiffs.

Frederick W. Penny, of Haverstraw (Frank Comesky, of Nyack, of counsel), for defendants.

TOMPKINS, J. Michael A. Archer died in 1881, leaving a widow, Clarissa A. Archer, who still lives, and three sons, namely, Allison M. Archer, Charles D. Archer, and the defendant George Archer. The said Michael A. Archer left a last will and testament, by which he devised and bequeathed all of his property, both real and personal, to his executors—

"in trust, to receive the rents, issues and profits thereof, for and during the lifetime of my wife, Clarissa A. Archer, and apply the same to the use of the following persons, as follows: Pay the one-third thereof to my said wife during her lifetime, and the other two-thirds thereof to my three sons, Allison M. Archer, Charles D. Archer and George Archer, in equal proportions during the same time. * * * At the death of my said wife, I order and direct my said executors to sell and dispose of my property as soon as they deem it wise and expedient so to do, and divide the proceeds thereof equally between my said three sons, unless they elect then to hold the same, but if they elect and desire to hold the same together, then the same shall be conveyed to them by my said executors instead of being sold. * * * I empower my executors to sell and convey my property, real and personal."

This will was probated in the Surrogate's Court of Rockland county, and letters testamentary issued thereon to Charles D. Archer, Al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lison M. Archer, and George Archer, the three sons of the deceased. Later Allison M. Archer was removed as executor and trustee, and thereafter Charles D. Archer died, leaving the defendant George Archer as sole surviving executor and trustee under said will.

On the 20th of October, 1885, Allison M. Archer and his wife, Margaret Archer, one of the plaintiffs in this action, gave a mortgage to one George S. Sherwood, for the sum of $4,000, covering his undivided interest in his father's estate, and on the 7th of May, 1887, the said Sherwood assigned said mortgage to the said Charles D. Archer (now deceased), and the defendant George Archer, for which they gave their personal note for the sum of $4,000, which assignment they took in their individual names, and thereafter, and until December, 1900, held the said bond and mortgage as their individual property.

In December, 1900, the said Charles D. Archer and George Archer assigned the said bond and mortgage to Fannie F. Archer, the wife of the defendant George Archer, as security for loans claimed to have been made by the said Fannie F. Archer to her husband, the defendant George Archer, the aggregate of which loans is disputed by the plaintiffs in this action. On January 27, 1887, the said Allison M. Archer gave another mortgage to said Sherwood, to secure payment of the sum of $3,000, and covering all of his right, title, and interest in the estate of the said Michael A. Archer, deceased, and on July 20, 1887, said Allison M. Archer gave a third mortgage to said Sherwood for the sum of $6,000, covering his interest in his father's estate as aforesaid.

Those two mortgages, dated respectively January and July, 1887, were assigned by the said Sherwood to the People's Bank of Haverstraw on February 1, 1909, and were further assigned by said bank to Clarissa A. Archer, the widow of the said Michael A. Archer, deceased. The consideration for the assignment of those two mortgages to Clarissa A. Archer was the sum of $7,000, and was paid and secured by the defendant George Archer and his brother Charles D. Archer, deceased, and as collateral security for the promissory notes which they gave in part payment for those mortgages they gave a mortgage covering the whole estate of Michael A. Archer, deceased.

On February 3, 1909, the said Clarissa A. Archer assigned both of said mortgages to the defendant Fannie F. Archer, and received therefor no consideration whatever. On December 15, 1900, the sheriff of Rockland county, under an execution sale, conveyed to Clarissa A. Archer all the right, title, and interest of the said Allison M. Archer in the real estate of which the said Michael A. Archer died possessed, subject to the liens of the said three mortgages, the consideration for which conveyance was paid to the sheriff by the said George Archer and Charles D. Archer, and within a few days thereafter the said Clarissa A. Archer conveyed the said interest acquired from the sheriff as aforesaid to the said Charles D. and George Archer, no valuable consideration passing therefor.

Allison M. Archer died in 1892, leaving a last will and testament by which he devised all of his property to his widow and children, the plaintiffs herein. The amount paid by George Archer and Charles

D. Archer individually to the sheriff for the interest of Allison M. Archer, sold under the execution, was the sum of $682.44, and the aggregate of the sums paid by them for the three mortgages, covering the said interest of Allison M. Archer in the estate of his father, was the sum of $11,000, while the proof in this case justifies a finding that the actual value of the equitable interest of the said Allison M. Archer and the plaintiffs herein is upwards of $20,000.

In 1910 the defendant Fannie F. Archer foreclosed the said three mortgages covering the interest of the said Allison M. Archer, and thereafter the said interest was sold at public auction under a judgment of foreclosure and sale in that action, at which sale the defendant George Archer purchased said interest for the sum of $15,575, the property having been struck down to him for that amount after competitive bidding by him and the plaintiff William Watson Archer, and George Archer paid in cash to the referee 10 per cent. of his bid, amounting to $1,557.50, besides the referee's fees and expenses, amounting to $1,891.27. The balance of the purchase price was made good to the referee by a receipt signed and given by the said Fannie F. Archer, the plaintiff in the foreclosure suit, no other money passing between the parties, and the defendant Fannie F. Archer now has a deficiency judgment in the said foreclosure action, against the plaintiffs as representatives of the said Allison M. Archer, deceased.

This action is brought to impress a trust upon the interest which the said Allison M. Archer, deceased, had in the said real premises under his father's will, in favor of these plaintiffs, as the devisees under the will of the said Allison M. Archer, deceased, and for a judgment decreeing that the defendant George Archer holds the premises conveyed to him by the referee under the judgment of foreclosure and sale, in the action brought by Fannie F. Archer to foreclose the said three mortgages made by Allison M. Archer, and under the deed from Clarissa A. Archer of the interest which she acquired from the sheriff under the execution sale, in trust for the plaintiffs in this action, to the extent and value of said premises, in excess of the amounts that have been properly paid out and advanced by said defendant George Archer on account of said premises.

The claim is made by the defendants that Fannie F. Archer paid valuable and adequate consideration for the mortgages that she subsequently foreclosed, and that she was a bona fide holder of said mortgages. The facts and circumstances, however, convince me that she took those mortgages and held them, first for her husband, the defendant George Archer, and Charles D. Archer, now deceased, and subsequently for her husband alone, and that he and they individually were the real owners of those mortgages. The testimony of Mrs. Archer as to the advances made to her husband, which it is claimed furnished the consideration for the assignment of those mortgages to her, is very unsatisfactory. No doubt she did make large advances to her husband, but it seems to me they were not made, or intended to be made, as a consideration for the assignment of those mortgages, and that such assignments were made entirely independent of such advances, and were for the convenience and benefit of her husband

and his brother, for the purpose of enabling them individually to obtain possession of their brother Allison M. Archer's interest in said premises. This view of the transactions is supported by the undisputed facts, and is strengthened by the fact that at the foreclosure sale, when the premises were purchased by George Archer, his wife gave the referee a receipt for the entire bid, less the cost and expenses of the sale and 10 per cent. of the bid, thereby relieving her husband from the payment to the referee of the balance of his bid of $15,575, without receiving any monetary consideration therefor. In other words, Charles D. Archer, while he lived, and the defendant George Archer, were the real owners of these three mortgages, that were subsequently foreclosed by George's wife, and the owner as well of whatever title was obtained from the sheriff under the execution sale.

[1] The foregoing is a summary of the facts and the claim of the parties, and the question of law now presented is whether Charles D. Archer and George Archer, the executors and trustees, had a legal right to acquire the said mortgages, and take a deed from the sheriff of their brother's interest in the premises, for their individual purposes, and whether the defendant George Archer, the sole surviving executor and trustee, had a right at the foreclosure sale to acquire said premises for his individual profit. I think they had not that right. They were the executors and trustees to whom Michael A. Archer devised the premises in question, and had an active duty as such trustees during the lifetime of Clarissa A. Archer, who is still alive, and that duty was to preserve and care for the said premises, and collect the income therefrom, and divide it into three parts, and to pay one part to the widow, and the other two parts to the three sons, in equal proportions, and to the extent of Allison M. Archer's interest in the income of the property during the life of his mother he was a cestui que trust of the testamentary trustees, Charles D. and George Archer, and they had no right to deal with the trust property for their own benefit; and in all their dealings with it—i. e., in the acquisition of the interest under the sheriff's sale, and in their purchase of the three mortgages, and the subsequent foreclosure of said mortgages by Fannie F. Archer, who simply represented her husband George Archer, and in the purchase of the entire interest of Allison M. Archer, and his devisees at the foreclosure sale—these executors and trustees must be regarded as having acted for the benefit of their cestui que trust, Allison M. Archer, and, after his death, his devisees, these plaintiffs.

It is undoubtedly true, as contended for by defendant's counsel, that the three sons of Michael A. Archer were tenants in common of the premises, and could mortgage, sell, or devise their undivided interests; but nevertheless their vested equitable remainders were subject to the trust created by the will, which was to continue during the lifetime of the widow, Clarissa A. Archer, and was not only for her benefit, but as well for the benefit of Allison M. Archer, George Archer, and Charles D. Archer, who were to share equally two-thirds of the issues and profits thereof during the lifetime of their mother, and so long as that trust continues these executors and trustees must deal with the property as trustees only, and always for the advantage and

interest of the beneficiaries of the trust, and never for their individual profit.

[2] That the defendant George Archer is now holding the property adverse to his trust is apparent from the fact that at the foreclosure sale he outbid one of the plaintiffs, William Watson Archer, who was endeavoring to buy the property for the protection of himself and the other devisees under his father's will. The rule is that:

"No party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account." Fulton v. Whitney, 66 N. Y. 548.

In the same case, the court said:

"The argument that the defendants benefited the sale by becoming bidders is one which might be used in every case where a trustee bids at a sale of property to which his trust relates. It has been so often used and so often refuted that it is not necessary to consider it here."

I think there can be no question but that the will created an executory trust, to continue during the life of Clarissa A. Archer, and until the trustees sell the property, or convey it to the cestuis que trustent, under the terms of the will, and that Charles D. Archer and George Archer were bound to deal with the property in their capacity as trustees only, and that in all their transactions in respect to Allison M. Archer's interest they are to be deemed to have acted as trustees, and for his benefit, and that of his devisees. Van Epps v. Van Epps, 9 Paige, 237; Fulton v. Whitney, 66 N. Y. 548; Davoue v. Fanning, 2 Johns. Ch. 252.

[3] The decree of foreclosure and sale in the action brought by Fannie F. Archer is not res adjudicata as to the plaintiffs in this action, nor a bar to the maintenance of this action. The only issue there decided was as to the validity of the three mortgages, and whether they were valid liens upon the interest of Allison M. Archer, deceased. There is no question, and never was, as to the validity of those mortgages; but the question now is whether, in acquiring and foreclosing them, Charles D. Archer and George Archer could act for themselves as individuals, or whether in equity they are to be regarded as having acted for Allison M. Archer and his heirs. This latter question was not presented in the foreclosure suit, and is now properly before the court in this action, and for the first time.

My conclusions are that the plaintiffs are entitled to a judgment impressing a trust upon the interest mortgaged by Allison M. Archer, in favor of the plaintiffs, subject, however, to the reimbursement of the defendant George Archer for the moneys actually paid out by him in the purchase of the three mortgages, and the sheriff's deed, and interest thereon, he to account to the plaintiffs for one-third of the income of said premises from the time that the trustees ceased paying income to Allison M. Archer. If the interest on these mortgages has been paid out of the income of the property, then, of course, the defendant George Archer will not be entitled to interest.

It seems to me that there will have to be an accounting of the rents, issues, and profits received by the executors and trustees, and the

interest paid by them on these liens. As to the form of the judgment, I will hear counsel upon the settlement of the findings, which shall be upon notice.

(82 Misc. Rep. 79.)

TILTON v. FARMERS' INS. CO. OF TOWN OF PALATINE.

(Supreme Court, Trial Term, Montgomery County. February, 1913.)

1. INSURANCE (§ 336*)—FORFEITURE—ADDITIONAL INSURANCE.

Where at the time a policy of insurance, which provided that it should be void if the assured already had other insurance on the property of which the company was not notified, or should thereafter obtain other insurance and should not with all reasonable diligence give notice thereof to the insurer and have it indorsed on the policy or otherwise acknowledged in writing, was issued, there was no other insurance on the property, but other insurance was subsequently obtained without notice to the insurer and without indorsement or other acknowledgment in writing, the policy, although valid in its inception, became invalid unless the provision as to additional insurance was waived by the insurer or unless the insurer was estopped from insisting thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 856–873; Dec. Dig. § 336.*]

2. INSURANCE (§ 389*)—WAIVER OF FORFEITURE—ISSUANCE OF POLICY WITHOUT OBJECTION.

Where an insurance company issues a policy with full knowledge of facts which would render it void in its inception, if its provisions were insisted upon, it will be presumed that, though it by mistake omitted to express the fact in the policy, it waived such provisions and estopped itself from setting them up, as a contrary inference would impute to it the fraudulent intent to deliver and receive pay for an invalid instrument.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1028–1031; Dec. Dig. § 389.*]

3. INSURANCE (§ 385*)—FORFEITURE—ADDITIONAL INSURANCE—CONSENT.

Where an insurance policy, which provided that it should be void if assured obtained other insurance without giving notice to the company and having it indorsed on the policy or otherwise acknowledged in writing, was issued without an indorsement or acknowledgment permitting other insurance, and the policy was in assured's possession for 17 months before additional insurance was obtained and 22 months before a fire, the company was not estopped to assert the invalidity of the policy, even assuming that assured in negotiating for the policy asked the company's secretary to send a permit for additional insurance with the policy, which he promised to do, and that, on being told a few days later of the intention to procure additional insurance, he said, "All right," since, while this showed notice to the company, indorsement on the policy or other acknowledgment in writing was necessary to make the secretary's consent to the additional insurance effective.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1020–1023; Dec. Dig. § 385.*]

4. INSURANCE (§ 376*)—FORFEITURE—ADDITIONAL INSURANCE—CONSENT.

A holder of a policy of insurance would be presumed to have contracted with reference to conditions of the policy, imposing limitations on the authority of the insurer's secretary to consent to additional insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 952–955; Dec. Dig. § 376.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. INSURANCE (§ 136*)—CONTRACT—OPERATION AND EFFECT—FAILURE TO READ.
Where an assured was a successful business woman fully able to comprehend and protect her interests, and there was nothing to prevent her from reading the policy, she was bound to take notice of, and was not excused because she omitted to acquaint herself with, its provisions, and it would be presumed that she was so acquainted.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219–230; Dec. Dig. § 136.*]

6. INSURANCE (§ 336*)—FORFEITURE—ADDITIONAL INSURANCE—CONSENT.
Where in the negotiations for an insurance policy the insurer's secretary, on being told that assured wanted a permit for additional insurance, stated that it would be necessary to present the request to the board of directors, there was no agreement by him that the permit would be issued.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 856–873; Dec. Dig. § 336.*]

7. INSURANCE (§ 371*)—FORFEITURE—WAIVER OR ESTOPPEL.
To constitute a waiver or an estoppel as to a forfeiture of an insurance policy, the assured must have been misled by some act of the insurer, or the insurer must, after knowledge of the breach, have done something which could only be done by virtue of the policy or have required something of the assured, which he was bound to do only under a valid policy or have exercised a right which it had only by virtue of such a policy, and neither an estoppel nor a waiver can be inferred from mere silence or inaction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 943–946; Dec. Dig. § 371.*]

8. INSURANCE (§ 396*)—FORFEITURE—WAIVER OR ESTOPPEL.
Where the secretary of an insurance company, who, under the articles of association made a part of a policy, had no power or authority to adjust losses, subsequent to a fire, refused to indorse on a policy a permit for additional insurance, and at the same time told assured that she had 20 days to get in the proofs of loss, that he did not think there would be any trouble, but that there might be, this was not a waiver of the forfeiture of the policy by obtaining additional insurance without the consent of the assured as required by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1071–1077; Dec. Dig. § 396.*]

9. INSURANCE (§ 396*)—FORFEITURE—WAIVER—AUTHORITY.
A member of a co-operative fire insurance company would be presumed to have knowledge of the limitations on the power or authority of the secretary relative to the adjustment of losses contained in the articles of association made a part of her policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1071–1077; Dec. Dig. § 396.*]

10. INSURANCE (§ 396*)—WAIVER—FORFEITURE—AUTHORITY.
Where a fire insurance policy had been forfeited by obtaining additional insurance without the consent of the insurer, the retention by the company of proofs of loss was not a waiver of the forfeiture, although it would probably have been a waiver of any irregularity in the proofs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1071–1077; Dec. Dig. § 396.*]

Action on a fire insurance policy by Clara M. Tilton against the Farmers' Insurance Company of the Town of Palatine. Judgment dismissing the complaint.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Henry V. Borst, of Amsterdam, for plaintiff.

Sitterly & Burtch, of Fonda, and Charles S. Nisbet, of Amsterdam, for defendant.

WHITMYER, J. Defendant, a town co-operative fire insurance company, engaged in business in the town of Palatine, Montgomery county, in this state, on or about January 21, 1909, delivered to plaintiff a fire insurance policy, dated October 15, 1908, insuring plaintiff's buildings in said town against loss by fire in the sum of $3,550, for the period of five years from its date. It contained a provision that in case the assured should already have made any other insurance on the property, not notified to the company, or in case the assured, or the assigns of the assured, should thereafter make any other insurance on said property and should not with all reasonable diligence give notice thereof to the company and have the same indorsed on the policy or otherwise acknowledged in writing, the policy should cease and be of no effect. The property was not otherwise insured at this time. On May 31, 1910, plaintiff obtained $3,000 additional insurance thereon, without giving notice thereof and having the same indorsed on the policy or otherwise acknowledged in writing. The property was totally destroyed by fire October 31, 1910, and such notice had not been given and such indorsement or acknowledgment had not been made at that time.

The policy contains a provision which requires a person, who has been insured and has sustained loss or damage by fire, to give notice thereof to the secretary forthwith and within 20 days after loss to deliver a particular account thereof, or of the damage, signed by his own hand and verified by his oath or affirmation, with other particulars therein specified. Plaintiff's husband notified defendant's secretary of the fire two days thereafter and gave him a verified statement or inventory of the loss 19 days thereafter. This did not comply with the policy, but was not returned. On March 10, 1911, he gave him proof of loss, substantially in proper form, and this was not returned.

Section 10 of defendant's articles of association, written upon the face of the policy, provides that the directors shall, after receiving notice of any loss or damage sustained and after ascertaining the same or after the rendition of any judgment therefor, apportion the same among the members thereof as therein set forth. Plaintiff was a member of the defendant company. Insurance, based upon application in writing, a promissory note for the assessments, and subscribing the articles of association, were among the requirements for membership. The policy was issued by defendant's secretary, John Saltsman, who was authorized to take applications, to issue policies, and to consent to additional insurance. So far as appears, written application was not made for the policy in suit, and the note required was not given. Saltsman had issued another policy upon the property, October 15, 1903, upon the same conditions for the same period, and in the same amount. Application in writing was made and a note was given at this time, but it does not appear that the articles were actually subscribed. Plaintiff and her husband claim that they asked for a permit for additional insurance when they made application for the first policy, but that Salts-

man stated that it would be necessary to present the request to defendant's board of directors, after which he would send the permit with the policy. Saltsman denies this. That policy did not contain a permit and plaintiff knew it. It expired October 15, 1908. Saltsman says that he was directed by plaintiff by telephone, just before this, to renew the policy upon the same terms and conditions, and that he then prepared the policy in question, procured the signature of the president, but did not send it until January 21, 1909. Plaintiff says that Saltsman came to her factory for candy December 22, 1908, and that her husband came in while he was there, but did not recognize him, so that she introduced him. Her testimony of the conversation at this time is as follows:

"He (her husband) says, 'You are Mr. Saltsman,' and shook hands and spoke about the permit we did not get. Mr. Saltsman says: 'Your insurance has expired. I better make out a new one and send it down, the new one.' I told Mr. Saltsman I did not want to let it run out and I would let him have the candy for $1.25, which would go for the application. I says, 'Send down the permit with the policy.' He said, 'All right,' and then he went out."

At the close of her cross-examination, however, she testifies that Saltsman said that he would have to present the request to the board. Her husband confirms her testimony as to the reference by himself at this time to the permit in connection with the other policy, and then testifies:

"I said to him, 'I want that permit.' He says: 'I cannot give it now. I will have to bring it before the board of directors.' I says, 'Do it.' Then he said he would send down the policy, he had renewed, he would send it down later."

He also claims that he told Saltsman about ten days later, as he was passing him at a corner, that he was going to take out other insurance, and thinks that Saltsman said, "All right." Saltsman denies all of this, except that he was at the factory. Plaintiff also testifies that she asked Saltsman for a vacancy permit about six days before the fire and that he told her it would be unnecessary. He says that she merely asked whether it would make any difference if the house was vacant while under repair, and that he answered that the company preferred to have it occupied, to which she replied that it would be for only a short time. That permit was not indorsed. She says that the policy was inclosed in an envelope and was lying on the seat of her wagon at the time. Saltsman says that he did not see it. She also says that the envelope was opened by her husband after the fire and that she did not see the policy until then. Her husband says that he saw the policy for the first time after the fire, that the envelope was open at the time, and that he did not open it. One or two assessments were collected early in 1909, but none after the additional insurance was effected.

Plaintiff's husband notified Saltsman of the loss two days after the fire and at the same time requested him to make the necessary indorsement for additional insurance, stating that he had overlooked the requirement as to other insurance, but Saltsman refused. He had the other policies with him and showed them to Saltsman, who did not

know about them or about the additional insurance before this and told him that he ought to have given notice of them, to which he replied that he thought it was unnecessary because no other company required it. He testifies that Saltsman then said to him: "You have got twenty days to get in the proof of loss. I do not think there will be any trouble. There may be." Then, that he did not recollect that he said anything about making up the proof, only that one man had not sent his in, and, finally, that "we should put in our proof of loss, he did not think there would be any trouble, but there might be." Saltsman testifies that the proofs were not talked about very much and that all he said was that "the rule was for 20 days after the fire." The verified statement or inventory, referred to above, was delivered by plaintiff's husband. He says that he asked Saltsman at that time to attend a meeting of the adjusters for the other companies, and that Saltsman promised, but that he did not attend, that he then asked him by telephone to attend an adjourned meeting, and that Saltsman said he would try, but that he did not come, whereupon he telephoned again, and Saltsman told him that the policy was void. Plaintiff then talked with Saltsman by telephone and he told her the same. She called upon him after this, in January, 1911, and asked him to call a special meeting of the board. He told her he could not and referred her to the president, A. V. Dockstader. She saw the president a little later and told him her mission. He replied that the policy had been considered void, whereupon plaintiff said that she thought he might, possibly, reconsider; that she had seen some of the directors; and that they seemed to favor his calling a special meeting and permitting her to be present to explain. His answer was that he could not, because two meetings had already been held and that the board had concluded not to pay. However, her request was complied with, the meeting was held January 21, 1911, and plaintiff and her husband were invited by telephone. The latter appeared and asked the board what they wanted. The president said that the board did not want anything, but desired to know what he wanted. He said that the claim ought to be allowed. The president told him that the policy was void, because of failure to obtain a permit, to which he replied that he had made two applications for one and that the secretary told him each time that it would be necessary to present the request to the board. At this time, failure to present proofs of loss, excessive insurance, and the claim, in effect, that the fire was of doubtful origin, were assigned as additional reasons for the refusal to pay. As to the proof of loss, plaintiff's husband says that the president told him at that time that it was not a proof and was not sworn to, and that he then offered to make any correction desired, stating that the affidavit to it had been prepared by Justice of the Peace Dockstader (not the president), who had said that it was all right. There is no evidence that defendant requested anything, and plaintiff's husband left the meeting threatening suit.

This review, in detail as it is, has been made necessary because of the contradictions in the testimony, and because, under the motions of plaintiff and defendant at the close of the case, all questions are here for determination.

[1] The additional insurance had not been procured when defendant's policy was delivered, but was subsequently obtained, so that the policy was valid in its inception and became invalid because of the subsequent additional insurance without notice thereof to defendant and without indorsement thereof on the policy or without other acknowledgment in writing as required by the policy (Gray v. Germania Fire Ins. Co., 155 N. Y. 184, 49 N. E. 675), unless the provision as to such insurance was waived by defendant or unless defendant is estopped from insisting upon it. Plaintiff claims that permission for additional insurance was a condition upon which it was agreed that the policy should be issued and that she had the right to rely upon the agreement, without examination of the policy, so that, having issued it, knowingly, without an indorsement, and having thereafter collected assessments thereon, defendant is now estopped from insisting upon that provision.

[2] It is well settled that where an insurance company issues a policy, with full knowledge of facts, which would render it void in its inception, if its provisions were insisted upon, it will be presumed that it by mistake omitted to express the fact in the policy, waived the provisions, or held itself estopped from setting them up, as a contrary inference would impute to it a fraudulent intent to deliver and receive pay for an invalid instrument. Gray v. Germania Ins. Co., 155 N. Y. 184, 49 N. E. 675; Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; Robbins v. Springfield F. & M. Ins. Co., 149 N. Y. 477, 484, 44 N. E. 159.

[3] Plaintiff invokes this principle here. Of course, there would be no question about its applicability, if the additional insurance had been in force, to defendant's knowledge, at the time of the delivery by it of its policy. Defendant's secretary had authority to consent to additional insurance. It could only be effected, without affecting the validity of the policy, by notice thereof and by indorsement on the policy or other acknowledgment in writing. Notice to the secretary was notice to the company, but the policy also required indorsement thereon or other acknowledgment in writing to make his consent effective.

[4] The conditions of the policy and the limitations to the authority of the secretary appeared on the face of the policy. They were a part of the contract, and plaintiff is presumed to have contracted with reference to them. Quinlan v. P. W. Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; Baumgartel v. P. W. Ins. Co., 136 N. Y. 552, 32 N. E. 990; Skinner v. Norman, 18 App. Div. 616, 46 N. Y. Supp. 65. The policy was issued without a new application and without a permit for additional insurance. It was delivered to plaintiff and remained in her custody thereafter, without objection and without examination. Upon its delivery and acceptance, the contract of insurance was complete in all its terms and binding upon both parties.

[5] Plaintiff is a successful business woman, fully able to comprehend and protect her interests, and there was nothing to prevent her from reading the policy. She was bound to take notice of, and is not excused because she omitted to acquaint herself with, its pro-

visions, and it must be presumed that she was so acquainted. 1 May on Insurance, § 167; Quinlan v. P. W. Ins. Co., supra: Baumgartel v. P. W. Ins. Co., supra: Skinner v. Norman, supra. The policy, it is true, was in defendant's possession from October 15, 1908, to January 21, 1909; but nothing was said or done to mislead her about its provisions or to induce her not to read or to prevent her from reading it, after she obtained it. Seventeen months elapsed before the additional insurance was obtained and 22 months before the fire occurred, and the policy could have been read by her and produced for indorsement at any time. The case is therefore distinguishable from Manchester v. Guardian Assurance Co., 151 N. Y. 90, 45 N. E. 381, 56 Am. St. Rep. 600, upon which plaintiff relies.

[6] Under those circumstances, there is no estoppel, even if it be assumed that plaintiff asked Saltsman, at the time of the meeting in the factory, to send the permit down with the policy, and that he said, "All right," as plaintiff testified, or if it be assumed that plaintiff's husband told Saltsman ten days after that meeting, and before the delivery of the policy, of his intention to procure additional insurance and that Saltsman then also said, "All right." And, if Saltsman told plaintiff that it would be necessary to present the request to the board, as plaintiff stated at the close of her cross-examination, and as her husband stated in each instance, that was not an agreement to issue the permit. However, the application for the first policy did not refer to additional insurance in any way and there was no written application for the one in suit. Plaintiff and her husband say that permission for additional insurance was asked for on each occasion. Saltsman says not. Neither policy gave permission. Plaintiff admits that she knew that the first one did not and says that she did not read the one in suit, because she supposed that it had been properly indorsed. The life of the first policy was five years, and the one in suit had been in plaintiff's possession for about seventeen months, when the additional insurance was effected. The fire occurred about five months after this, and plaintiff's husband then said, in effect, that the requirements as to additional insurance had been overlooked. The evidence shows that such was the fact.

[7] There was a forfeiture, and it remains to be determined whether defendant has waived or is estopped from claiming it. The circumstances and acts required to constitute a waiver or an estoppel are well established. In the absence of express waiver, some of the elements of an estoppel must exist. The insured must have been misled by some act of the insurer, or it must, after knowledge of the breach, have done something which could only be done by virtue of the policy, or have required something of the assured, which he was bound to do only under a valid policy or have exercised a right which it had only by virtue of such a policy; but neither an estoppel nor a waiver can be inferred from mere silence or inaction. Gibson Electric Co. v. Liverpool, L. & G. Ins. Co., 159 N. Y. 426, 54 N. E. 23.

[8] There was no express waiver here, but it is claimed that defendant's secretary directed or requested plaintiff to present her proof of loss in time. This claim is based upon the testimony of plaintiff's

husband. He testified that Saltsman, when notified of the loss, said: "You have got twenty days to get in the proof of loss. I do not think there will be any trouble. There may be." He then testified that he did not recollect that Saltsman said anything about making up the proof, and, finally, in answer to a suggestive question, that he said "we should put in our proof of loss, he did not think there would be any trouble, but there might be." His testimony is contradictory, but we will assume that Saltsman used the language last above set forth. The policy required that notice of loss be given forthwith to the secretary. It did not require service of proof of loss upon him and did not give him power or authority to adjust a loss.

[9] Under the articles of association, the power or authority to adjust was in the board of directors. These articles were written upon the face of the policy, and plaintiff was a member of the company, so that it must be presumed that she had knowledge of the limitations to the power or authority of the secretary. Moreover, there is no evidence that the board gave him the power or authority to adjust in this case. In any event, the direction or request to present proof of loss, if made, was, at the most, only a qualified one and shows on its face that Saltsman did not intend thereby to bind defendant, even if he had the power so to do. Plaintiff could not have been misled by it. Saltsman says that they did not talk about the proofs very much and that he said nothing more than that "the rule was for twenty days after the fire." That was simply a statement relating to a policy requirement, and no direction or request can be inferred from it. Moreover, Saltsman had just refused the request of plaintiff's husband to indorse permission for additional insurance on the policy, so that it seems improbable that he followed such refusal with a direction or request to present proof of loss in time. It seems to me that plaintiff's husband is mistaken in his interpretation of what was said to him by Saltsman.

[10] The retention of the verified statement or inventory, presented 19 days after the fire, and proof of loss thereafter presented, do not operate as an estoppel. Plaintiff was not misled thereby. Her rights were lost before presentation, and her position was not changed because defendant ignored it. Perry v. Caledonian Ins. Co., 103 App. Div. 113, 93 N. Y. Supp. 50. The irregularity in the statement or inventory would probably have been waived by such retention, if there had been no forfeiture; but the forfeiture itself was not waived thereby. The statement of Saltsman to plaintiff's husband that he would attend, or try to attend, a meeting of the adjusters for the other companies, if it was made, does not affect the matter. He did not attend. And the meeting of the directors, subsequently held, to which plaintiff and her husband were invited, and which the latter attended, was held at the special request of plaintiff herself, and nothing was said or done at that meeting to recognize the validity of the policy or to mislead plaintiff. Her husband left the meeting, threatening suit. The policy was declared void immediately after the fire, and was not recognized by defendant thereafter. Defendant did not request plaintiff to present proof of loss or to perform any other act under the policy, did

not itself exercise any right thereunder, and did not mislead plaintiff in any way.

The complaint must therefore be dismissed, with costs. Findings may be prepared accordingly.

(158 Misc. Rep. 196.)

DOUGLASS v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

MASTER AND SERVANT (§ 279*)—INJURIES TO SERVANT—CAUSE OF INJURIES.

In an action for the death of a freight conductor, killed by a rear-end collision, plaintiff was entitled to recover against defendant railroad company upon showing that the collision was due to the negligence of one of three vice principals, although not showing which one.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973–975, 978–980; Dec. Dig. § 279.*]

Smith, P. J., and Woodward, J., dissenting.

Appeal from Trial Term, Schenectady County.

Action by Satie L. Douglass, administratrix of George H. Waters, deceased, against the New York Central & Hudson River Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD and WOODWARD, JJ.

Visscher, Whalen & Austin, of Albany (Robert E. Whalen, of Albany, of counsel), for appellant.

Homer J. Borst, of Amsterdam, for respondent.

JOHN M. KELLOGG, J. The plaintiff's intestate met his death in a rear-end collision on the defendant's road. The evidence as to the defendant's negligence and the intestate's freedom from contributory negligence is satisfactory. The collision was caused by the negligence of a signalman at Crawford's Grade, or of a signalman at Rotterdam Junction, or of the engineer upon the engine which collided with the intestate's train. Perhaps the negligence of more than one of these vice principals brought about the result. The court refused to charge, at the defendant's request, that the jury must be satisfied which one of these vice principals committed the negligent act and caused the injury. The court charged, in substance, that a recovery could be had if either one committed the negligent act, and that it was not necessary for all of the jurors to agree as to which one of the vice principals caused the injury. If the defendant is right in its contention, it would be almost impossible to recover in this case. It is clear that the defendant is liable for the negligence of either of the three persons, but it is very difficult from the record to determine which one caused the injury. If a defendant negligently pulls the wrong lever and thereby causes an injury, and some witnesses think he pulled it with the right hand, and others think he pulled it with the left hand, and others think that his foot

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

caused the lever to move, it is entirely immaterial which is right, so long as it is clearly established that the negligent act of the defendant caused the injury.

I favor an affirmance.

LYON and HOWARD, JJ., concur. SMITH, P. J., dissents.

WOODWARD, J. (dissenting). On the 27th day of January, 1912, trains scheduled to run upon the main line of the defendant's railroad were detoured, owing to a wreck upon the road, and were passing over the tracks of the West Shore road. To give right of way to passenger trains, a fast freight train, No. 3,107, bound west, had been brought to a standstill directly opposite the signal tower R. J. at Rotterdam Junction. Shortly before the accident resulting in the death of plaintiff's intestate this train had been released and had gone forward on its journey. The intestate was the conductor of freight train No. 3,105, a train consisting of about 40 cars, which had, under cautionary orders from the block signalman at Crawford's Grade, run into the yard at Rotterdam Junction, and had come to a standstill about 500 feet inside the yard limits; the train being en route west. The intestate was in the caboose of this train, and the last seen of him alive was while he was standing at the desk in the caboose at the east end of the train. Train No. 3,010, proceeding westerly, was given a clear signal by the towerman at Crawford's Grade, which indicated that this train had the right of way with a clear track to Rotterdam Junction, though it appears as a matter of fact that train 3,105 was occupying the track inside the yards at Rotterdam Junction. Crawford's Grade signal tower appears to have been about 3 miles from Rotterdam Junction, and train 3,010 continued west to a point about 3000 feet east of Rotterdam Junction, where a yellow signal was displayed under the operation of the signalman at Rotterdam Junction tower, which under the rules, required the engineer of train 3,010 to proceed cautiously and be prepared to stop. He had already passed two torpedoes, which admonished him to slow down and bring his train under control, and he had, it appears, brought his train down from 15 to 20 miles an hour to 10 or 12 miles an hour. At the easterly yard limit of Rotterdam Junction there was a signal requiring the engineer to slow down to 8 miles an hour and be prepared to stop his train within the range of his vision, and there is nothing in the case to which our attention is called which tends to overcome the presumption that these signals were seen and obeyed by the engineer of train 3,010. While the latter train was rounding a sharp curve the forward brakeman of train 3,010 called to the engineer that there was a flagman ahead, also a rear end, which appeared some 500 feet ahead, and almost instantly the collision occurred, resulting in the death of Conductor Waters, plaintiff's intestate.

Signalman Smith of the Rotterdam Junction tower testified in behalf of the plaintiff that he signaled by telegraph to the man at the Crawford Grade tower that train 3,107 had cleared, but that he made no such report as to train 3,105; but the man at Crawford's Grade testifies as plaintiff's witness that he received word by telegraph from Smith that both trains had cleared, and that in consequence he gave

no caution card, but rather a clear signal, to Engineer Frayer of train 3,010. If we assume that one of these signalmen made a mistake, that either Smith telegraphed that both trains had cleared, or that the towerman at Crawford's Grade misunderstood Smith's telegram, and thought both trains were reported out of the block at Rotterdam Junction, it is not entirely clear that this error was the proximate cause of the accident. Train 3,105 was inside the yard limits, and was protected by torpedoes exploded upon the track and a cautionary signal 3,000 feet east of the yard limits, with a second signal requiring the train to slow down to 8 miles an hour and to be prepared to stop within the range of the engineer's vision, so that, if there was error at the time train 3,010 passed Crawford's Grade, the evidence warrants the conclusion that the train was in control on entering the yard at Rotterdam Junction, and the accident appears to have been due to the fact that train 3,105 came to a standstill immediately after passing around a sharp curve, and at a point where it was impossible to stop the oncoming train soon enough to avoid the accident, although such train was in control and could have been stopped within the reasonable range of the engineer's vision, which, fairly construed, means that the train should have been in such control as to be stopped in time to avert an accident where the usual precautions had been taken to protect the rear end of the train, which is done by sending out a flagman a sufficient distance to give warning. The undisputed evidence is that train 3,105 had been inside the yard for at least 30 minutes, and this would certainly give ample opportunity for the flagman to go out far enough to signal the oncoming train in time to avert any possible accident, yet the evidence indicates that the flagman and the rear end of train 3,105 were discovered practically at the same moment, and that the exposed train was only about 500 feet away at the time of this discovery. Plaintiff's intestate was the conductor of train 3,105. He was in physical control or direction of the movements of the train, and was, under the provisions of section 42a of the Railroad Law, a vice principal of the defendant; and, had the accident resulted in the death of the engineer or any of the employés engaged in the operation of train 3,010, his negligence, if any, would have been the negligence of the defendant, and yet we find no evidence in this case to show that plaintiff's intestate exercised any reasonable degree of care to protect his train. He was in a position to know that his train had come to a standstill directly after passing around a sharp curve, for he was in the rear end of the train. He knew, or was charged with the duty of knowing, that his train was upon the main track, and he was operating it over a strange railroad under circumstances which demanded more than ordinary care, and yet there is not a particle of evidence that he had taken any precautions, and the only fair inference from the evidence is that the flagman was out only a few hundred feet from the rear end of the train, which was hidden from view by the curve. It was his duty to see that his train was protected, that trains which might be following him were not exposed to any unnecessary dangers by his position upon the main line, and the evidence does not disclose that this vice principal was doing anything of the kind, and the jury

was not justified in finding a verdict for the plaintiff under such circumstances.

The evidence did not disclose facts sufficient to show which one of the three vice principals was responsible for the accident, although the court charged that both signalmen and the engineer of train 3,010 were, under the statute, such vice principals; and I am of the opinion that the court should have granted the defendant's request to instruct the jury that:

"In order for plaintiff to recover at all, they must first be satisfied of the precise person whose negligence, if any, caused the accident."

It can hardly be that a jury would be justified in finding the defendant negligent when a portion of the jury thought the negligence of the Crawford Grade signalman was the proximate cause, while others attributed the accident to the negligence of Smith, while still others concluded that it was due to the negligence of the engineer of train 3,010, and yet others might have believed that it was caused by the negligence of plaintiff's intestate in not taking proper precautions under the circumstances of the case. It is still necessary, I think, to point out definitely the negligence of the master, by showing that some one, for whose conduct the master is liable, has been guilty of an act of negligence which has been the proximate cause of the accident from which the damages arise.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to appellant to abide the event.

(158 App. Div. 239)

HALL v. WIDGER.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

WITNESSES (§ 275*)—CROSS-EXAMINATION—IMMATERIAL QUESTIONS.

Where, in an action for an alleged assault upon plaintiff at her residence, the testimony was conflicting as to the fact of the assault, it was error to permit counsel for plaintiff, on cross-examination of defendant, to ask concerning another woman, whose name nowhere else appeared in the record; the only purpose being to prejudice defendant before the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967–975; Dec. Dig. § 275.*]

Kellogg, J., dissenting.

Appeal from Trial Term, Cortland County.

Action by Margaret Hall against Byron E. Widger. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

James F. Dougherty, of Cortland, for appellant.

Thomas E. Courtney, of Cortland, for respondent.

PER CURIAM. The judgment appealed from was entered upon a verdict awarding the plaintiff damages for an alleged assault commit-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ted by defendant upon plaintiff at her residence on the afternoon of May 22, 1912. It was conceded upon the trial that earlier in the afternoon plaintiff, who had had considerable dealings with defendant relative to house furnishings, called defendant by telephone and inquired if he had a charcoal flat iron. Defendant said he had not, but had a gasoline flat iron and would send it down. Within a half hour he took it to plaintiff's rooms, adjusted it, and showed plaintiff how to use it. It was immediately following this that the plaintiff claims the assault occurred. There were no other persons present at the time, although plaintiff says she told defendant that her sister was there in plaintiff's rooms. The plaintiff does not claim to have suffered any physical injuries, other than the nervous shock which accompanied defendant's acts of placing his hand on her arm and making improper proposals. The defendant denied that he committed any assault or used any improper language.

Upon the cross-examination of the defendant the following appears in the record; the name of the woman and of her husband being omitted in this opinion:

"Q. Do you know Mrs. ——— in Cortland? (Objected to. Objection overruled. Exception.) A. Yes. Q. How long have you known her? (Objected to as incompetent, inadmissible, and improper. Objection overruled. Exception.) A. A year, I think. Q. She lives where? (Objected to as incompetent, improper, and immaterial. Objection overruled. Exception.) A. She lives on Otter Creek Place, I think. Q. Her husband is ———? (Objected to as incompetent, inadmissible, and improper. Objection overruled. Exception.) A. I think his name is ———. Q. Did you ever call on Mrs. ——— at her place? (Objected to as incompetent, immaterial, and improper. Objection overruled. Exception.) Q. Did you ever call on Mrs. ——— at her house? (Objected to as incompetent, inadmissible, and improper. Objection overruled. Exception.) A. I called at their house; yes, sir. Q. Did you call on her? A. No, sir. Q. Who did you call on? (Objected to as incompetent, inadmissible, and improper. Objection overruled. Exception.) A. I called on Mr. ———. Q. For what purpose? A. Collect bills. (Objected to on same grounds. Objection overruled. Exception.) Q. How often did you call there? (Objected to on same grounds. Same ruling. Exception.) A. I called until I got my money. Q. Frequently? A. No, sir."

Upon the direct examination of the defendant he was not questioned regarding this woman or her husband, and nowhere in the record do their names appear, or any reference whatever to either of them. The fact that this examination, which was clearly immaterial and improper, was considered prejudicial to the defendant, furnishes the only reasonable explanation for its being had. That its effect may have been to influence the verdict of some of the jurors is not at all improbable, in view of the flat contradiction which existed between the testimony of the plaintiff and defendant.

For error in the admission of this testimony, the judgment must be reversed, and a new trial granted, with costs to the appellant to abide the event.

JOHN M. KELLOGG, J. (dissenting). I think the evidence fairly sustains the recovery, and that the questions referred to in the opinion were not an abuse of the rights of an attorney in cross-examination,

but were fairly within the discretion of the court. The answers were harmless, and show that the questions were without foundation and unreasonable.

I favor an affirmance.

(158 App. Div. 258)

TOWN OF QUEENSBURY v. HUDSON VALLEY RY. CO.

PEOPLE ex rel. BLACKBURN, Highway Com'r, v. SAME.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

STREET RAILROADS (§ 38*)—FRANCHISE TO USE BRIDGE—DUTY AS TO REPAIRS.

The provision of the franchise granted a street railroad company by towns to use their bridge, that it "shall strengthen the stringers of said bridge to the amount necessary to carry safely the cars of said company and any other weight which may at the time be on said bridge," contemplates that it shall strengthen the bridge to the extent necessary to take care of the increased weights from its use, so that, it subsequently increasing the weight of its rolling stock and loads, it must, to take care thereof, strengthen the stringers it has put in, if necessary, by trusses or supports.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 99-111; Dec. Dig. § 38.*]

Kellogg, J., dissenting in part.

Appeal from Special Term, Washington County.

Action by the Town of Queensbury against the Hudson Valley Railway Company, and proceeding by the People, on the relation of John Blackburn, Commissioner of the Highways of the Town of Moreau, against said company, consolidated by stipulation. From the judgment (75 Misc. Rep. 197, 135 N. Y. Supp. 200), plaintiff and relator appeal. Modified and affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Jenkins & Barker, of Glens Falls, for appellant Town of Queensbury.

Wm. S. Ostrander, of Saratoga Springs, for appellant Blackburn.

James McPhillips, of Glens Falls, for respondent.

SMITH, P. J. The Hudson river forms the boundary between the town of Queensbury, Warren county, and the town of Moreau, Saratoga county. The village of Glens Falls, in the town of Queensbury, and the village of South Glens Falls, in the town of Moreau, adjoin one another on opposite sides of the river, and are connected by a highway which passes over a highway bridge erected in 1890. In 1896 a franchise was granted by said towns to the Glens Falls, Sandy Hill & Ft. Edward Street Railroad Company to use said bridge upon complying with certain requirements, one of which was as follows:

"The said company shall strengthen the stringers of said bridge to the amount necessary to carry safely the cars of said company and any other weight which may at the time be lawfully upon said bridge."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thereupon said railroad replaced two lines of stringers under the roadway of the bridge upon its west side, where the track was to be located. The old stringers were 8 inches in height and weighed about 17¼ pounds per running foot, while the new stringers were 12 inches in height and weighed about 40 pounds per foot. The track was then laid above the new stringers, and cars were operated thereon without any objection raised until 1905. In 1901 said railroad was merged in and became a part of the system of respondent, the Hudson Valley Railway Company, which has continuously used said bridge from that time. In 1905 complaint was made regarding the condition of the bridge, and by the direction of the State Board of Railroad Commissioners it was examined by an engineer. This expert recommended certain repairs and alterations as necessary to render the bridge safe under the then existing loads, and drew up plans and specifications therefor. A controversy arose as to who should pay for such repairs and alterations, and in 1907 the town of Queensbury commenced an action against respondent, alleging that its use of the bridge created a danger, on account of the great weight of its cars which the bridge was unable to sustain with safety. Judgment was demanded that the respondent be compelled to remove its track and to cease to operate its cars over the bridge. About the same time the commissioner of highways of the town of Moreau obtained a show-cause order for a writ of mandamus to require the respondent to strengthen said bridge, so as to bear safely the weight of respondent's cars in addition to the usual highway traffic over the bridge. Thereafter said action and special proceeding were in effect consolidated by a stipulation, signed by all parties, to the effect that respondent should proceed at once to make the needed repairs, and that all questions as to the right to use said bridge and the liability of any or all parties for the repairs to be made should be decided later in said action and proceeding. Evidence was thereafter taken at Special Term, and a decision rendered by the court, in which it was held that the total cost of repairs, the sum of $10,294.11, which had been expended by the respondent, should be apportioned as follows: That the cost of two additional lines of stringers under the tracks and additional cross-supports for the roadway amounted to 26.22 per cent. of the total amount expended, or $2,699.12, for which the respondent was liable, but that the cost of the balance of the work, amounting to $7,594.99, should be borne equally by said towns. Judgment was thereupon entered against each town in the sum of $3,797.49 in favor of respondent, with interest and costs, from which judgment appeals have been taken by the towns of Queensbury and Moreau.

It appears that the bridge in question was a pin-connected, single span, parabolic truss bridge, 177 feet 10 inches long, of standard make and construction, although in some respects not quite up to the most recent standards of bridge construction for heavy highway traffic. There is no evidence, however, that the bridge as originally constructed would not have been, at the time of the repairs in 1907, a safe and satisfactory structure to carry both the highway travel and also cars of the type that were used by the original owner of the franchise

in 1896 and for some years thereafter. Such cars ranged in weight from 11 to 15 tons, and no freight cars were then in operation. Prior to 1907 the cars operated over said bridge had increased in weight and carrying capacity, so that in 1907 cars weighing from 11 to 30 tons and motors weighing 40 tons and hauling each a freight car weighing 20 tons were used. Thus the maximum weight supported by said bridge at any one time on account of respondent's rolling stock has increased from about 15 tons to more than 60 tons. The repairs which were concededly necessary in 1907, if the bridge was to be subjected to such a user, consisted principally of an extra third truss running from pier to pier underneath the floor of and along the center of the bridge, and it is to be relieved from paying for this principal item of repairs that the said two towns have appealed.

The contention of the appellants is, inasmuch as this bridge was rendered unsafe by the excessive load placed thereon by the respondent, and was adequate for all highway purposes except the use to which it was subjected by the defendant, that the defendant is bound, both under the terms of franchise and of the statute, to pay all costs of strengthening, or, if necessary, rebuilding, the said bridge to sustain the load which the defendant itself should place thereupon. The claim of the respondent, however, is that there is no obligation under the statute for it to rebuild or strengthen this highway bridge, which is used in common by the defendant with the public, and that under the franchise it was simply bound to replace the stringers, and for the expense of replacing the stringers the defendant has already been charged by the judgment. It seems clear to me, however, that the franchise should have a broader interpretation. Replacing the stringers was apparently all that was necessary to support the load that was contemplated in the use of the bridge by the defendant road or its predecessor, to whose obligations it succeeds. That the duty was a continuous one, and applied to all loads that might thereafter be placed upon the bridge by the defendant, is not questioned. As I read the franchise, the duty "to strengthen the stringers of said bridge to the amount necessary to carry safely the cars of said company and any other weight which may at the time be upon said bridge" is not satisfied by simply replacing the stringers, which under the form of construction then existing would not be sufficient to carry the greatly increased load which defendant later placed upon the bridge; but those stringers must be strengthened, if necessary, by trusses or supports in such a way as to make the bridge safe for the use of the public in connection with the use to which the defendant might put it. It was clearly the intention of the parties that the increased load should be taken care of by the defendant, and such intention expresses only the natural obligation of the defendant, in the light of which this franchise must be construed. Inasmuch, therefore, as the repairs were rendered necessary solely for the increased weight placed upon the bridge by the defendant, the towns of Queensbury and Moreau were not liable to make any contribution thereto, and the judgment should be modified, so as to place the entire cost of construction upon the defendant, and to charge no part thereof to either of the towns ap-

pealing. In view of the construction which I deem should be given to the franchise itself, it is unnecessary to discuss what obligation may exist upon the defendant to bear the entire cost of the repairs under the Railroad Law of the state.

Judgment modified as per opinion, and, as modified, affirmed, with costs to each appellant. All concur, except—

JOHN M. KELLOGG, J. (dissenting). The defendant used the westerly part of the bridge in common with the public. The provision in the franchise only required it to strengthen the bridge so that it would safely carry the cars and any other weight lawfully upon it. It was assumed, and I think very properly at the time, that strengthening the stringers under the tracks was a fair compliance with the requirement; but the agreement was a continuing one, and not only required the company to maintain the stringers, but, when read with the provisions of law applicable to the case, required it to keep its half of the bridge in safe condition and repair. Nineteen and two-tenths per cent. of the expenditures in question were actually expended in putting additional stringers under the railroad track. It is evident that the defendant must pay that. A new truss was put through the center of the bridge, and stringers upon the easterly side, and the bridge was generally strengthened. Perhaps it would be equitable to charge upon the towns the cost of the stringers upon the easterly side of the bridge; but the record does not indicate such cost, and neither party deemed it important to consider that item separately. We may therefore disregard it.

It is evident from the reports of the engineers that it was considered that the bridge must be strengthened, not only under the railroad tracks, but upon both sides. The railroad company, before the litigation began, expressed a willingness to strengthen and make safe its half of the bridge. The real controversy was whether it must strengthen the whole bridge. Heavy traffic, aside from that of the railroad, passed over the bridge, and the other traffic caused it to shake and vibrate much more than did the passing of the cars. I think the railroad company is fairly obligated to keep in proper condition the westerly part of the bridge, excluding the sidewalk, and the towns are to maintain the easterly part and the sidewalks. In my judgment the railroad company should be charged 19.2 per cent. of the entire cost. The remaining 80.8 per cent. should be charged, one half upon the railroad company and the other half upon the towns, each town paying one-half thereof, thus making the railroad's share 59.6 per cent. and the share of each town 20.2 per cent.

The judgment should be modified accordingly.

(158 App. Div. 306)

SIPPLE v. FICKETT.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 221*) — ACTION — EVIDENCE — SUFFICIENCY.

Evidence, in an action upon notes by an executrix, *held* not to sustain a finding by the jury that there was no consideration for the notes, and that they were given for the accommodation of the testator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901–903½, 1858, 1861–1863, 1865, 1866, 1871–1874, 1876; Dec. Dig. § 221.*]

2. EXECUTORS AND ADMINISTRATORS (§ 221*)—EVIDENCE—ADMISSIBILITY.

In an action upon notes by an executrix, it was error to admit in evidence a decree of the Surrogate's Court showing that the executrix had had an accounting, and that her account had been surcharged with $687.75, and she had been required to invest the funds of the estate in securities and deposit with the county treasurer, as it was immaterial, and only tended to prejudice plaintiff's case.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901–903½, 1858, 1861–1863, 1865, 1866, 1871–1874, 1876; Dec. Dig. § 221.*]

3. WITNESSES (§ 275*)—CROSS-EXAMINATION OF PARTY.

Where, in an action by an executrix upon notes, the defense was that the consideration of the notes was for a rental of land from decedent, and that decedent died before delivering possession of the land, and the issue was whether in fact this was the consideration for the notes, it was error to refuse to permit plaintiff, on cross-examination of defendant, to ask her if she had ever demanded possession from the executrix.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967–975; Dec. Dig. § 275.*]

Appeal from Trial Term, Sullivan County.

Action by Marie Sipple, as executrix of Edward Sipple, deceased, against Lodie Fickett. From a judgment in favor of defendant, plaintiff appeals. Reversed, and new trial granted.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Elmer Baker, of Roscoe, for appellant.

Carpenter & Rosch, of Liberty, for respondent.

JOHN M. KELLOGG, J. The action was brought to recover upon two negotiable promissory notes made by the defendant to Edward Sipple, one dated April 1, 1907, for $150 and interest, payable three months from date, and the other dated May 1, 1907, for $100 and interest, three months from date. The making and delivery of the notes is conceded. The answer alleged that the only consideration for the notes was an agreement by the payee to rent his farm to the maker for one year, that the payee died before the term began, and that the maker never had possession of the premises, and therefore the notes were without consideration.

[1] The defendant's wife is the daughter of the payee, and she swears to the leasing of the farm by herself and husband at $250 per

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

year, the term to begin at the expiration of the lease to the tenant Harts; that her father produced the two notes, and stated that he was short of money, and asked the defendant if he would sign the notes in order to raise some money; that he would keep them renewed every three months, and whatever the defendant liked to pay upon them from time to time would apply upon the rent for the next year. Both notes were signed the same day. The evidence shows that at the time the inventory was taken the defendant and his wife were both present, and the notes were exhibited to them by the appraisers; that the defendant and his wife each, in substance, stated that the notes had been paid, and neither of them said anything about the rental of the farm, or that the consideration of the notes had failed, or that they were given for the accommodation of the payee. One of the appraisers was a merchant, the other a justice of the peace of the town, both apparently disinterested. The defendant and his wife severally deny that they made any statement that the notes were paid. Neither of them claim that, when the appraisers produced the notes, they made any suggestion that they were invalid, or were given without consideration, or for the accommodation of the payee, or on account of the rental of the farm. The defendant was entirely irresponsible, and for that reason the notes were stated upon the inventory with no value carried out. The notes were payable at the bank, but were never presented to the bank or offered for discount. If the notes were given upon the same day to enable the payee to raise money upon them, it is difficult to understand why they should be dated a month apart, and it is difficult to understand how the note of a man who is entirely irresponsible would enable the payee to raise money. These facts, and the fact that neither the husband nor wife gave any explanation as to the notes, except the allegation that they were paid, throws a great doubt upon the testimony of the wife, and I am satisfied that the verdict is against the evidence.

[2] The executrix had had an accounting before the surrogate, and the decree surcharged her account with $687.75, and required her to invest the funds, $1,113.63, in bond and mortgage and deposit the securities with the county treasurer, and charged upon her $91.64 for the services and disbursements of the attorneys of Mrs. Fickett and the other contestants. This decree was received in evidence over defendant's objection. It could have no possible bearing upon the case, and clearly indicated to the jury that the plaintiff's administration of the estate was not approved of by the court, and at least cast a reflection upon her and her management of the property. This, coupled with the fact that the defendant's wife would eventually be entitled to one-third of the estate, was clearly prejudicial.

[3] The defendant's wife, after swearing that the notes, in part, at least, represented the rental of the farm, and that the use of the farm was lost to them by the death of the testator before the term began, was asked if she ever demanded possession of the farm from the executrix, and the objection of the defendant was sustained, and the answer excluded, to which the plaintiff excepted. This evidence was directed to the point in issue, whether the notes did in any manner represent the

rental of the farm. If they did, it would not be reasonable that the defendant and his wife, the lessees, would make no effort to obtain possession of it. It is incomprehensible, if her story is true, that they should not have claimed the possession of the farm, or that the notes, having been given for the rental and for the accommodation of the testator, were invalid. These rulings were prejudicial to the plaintiff, and also call for a reversal of judgment.

The judgment and order should therefore be reversed upon the law and the facts, and a new trial granted, with costs to the appellant to abide the event. The findings of fact disapproved of are that the notes were without consideration and for the accommodation of the testator, and did not represent an actual indebtedness. All concur.

(158 App. Div. 241)

OLIVER v. McARTHUR.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

MASTER AND SERVANT (§ 74*)—WAGES—WHEN DUE.

Under a contract for farm labor for a period of eight months, fixing the wages at a certain amount per month, but not stating when wages are to be paid, payments from time to time must be considered within the contemplation of the parties, especially where certain payments are made while the services are being rendered; so that services need not be rendered for eight months before anything is due, but the laborer, quitting before expiration of that period, may recover wages for the time he worked, with right in the employer to counterclaim for damages for his quitting.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 103; Dec. Dig. § 74.*]

Smith, P. J., and Woodward, J., dissenting.

Appeal from Delaware County Court.

Action by Milton Oliver against John W. McArthur. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

John T. Shaw, of Delhi, for appellant.

O'Connor & O'Connor, of Hobart, for respondent.

JOHN M. KELLOGG, J. Plaintiff worked for the defendant eight months, from February 1st to October 1st, and he was concededly under contract to work for eight months. The plaintiff swears that the contract term began February 1st; defendant swears it began March 1st. It is clear the plaintiff was to receive $20 a month for February, March, and April, and $25 per month for the remainder of the time. From time to time while the services were being rendered the defendant paid the plaintiff on account of his services various sums, aggregating $75, and by the judgment appealed from has recov-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ered the balance. There was a question of fact whether the contract term began February 1st or March 1st, although it is conceded that the plaintiff did work for the defendant during the month of February. It is evident that there might easily have been a misunderstanding as to just when the eight-months term began. While the price was fixed for monthly service, the contract in express terms does not state that the wages are to be paid monthly; neither does it state that they are not to be paid until the end of the term.

A farm hand is not a capitalist, and usually requires money from time to time, and is fortunate if his wages have not been drawn and expended at the expiration of his term. The conduct of the parties is a very material circumstance to determine what the contract was. In fact, the contract is made up of the intention of the parties as expressed by the language used and the circumstances under which the employment was made and the services rendered. Clearly the laborer must be clothed, and must have some spending money during the term.

Mernagh v. Nichols, 132 App. Div. 509, 118 N. Y. Supp. 59, is nearly on all fours with this case. In that case the agreed price was $250 per year, and the servant quit before the year had expired. From time to time while the services were being rendered payments were made, the plaintiff having received about one-half of the wages earned at the time he left service. The plaintiff swore that the defendant was to pay from time to time during the year. In this case the defendant did pay from time to time during the year, indicating clearly that that was the intention of the parties. The judge, in substance, charged that the contract was severable, and that it did not require the performance of the entire eight months of service before payments were due, but that if the plaintiff had quit before the services were fully rendered the defendant was entitled to counterclaim any damages he had sustained. The rule seems to be just. A contract with a domestic servant to work for a year at $4 a week does not mean, and cannot be understood to mean, that the servant is to receive nothing until the year is up. The servant is working because she wants the money to use. Payments from time to time must be fairly within the contemplation of the parties making a contract for farm labor.

I favor an affirmance.

SMITH, P. J. (dissenting). This action was brought to recover a balance claimed to be due on account of services as a farm hand, rendered during the season of 1911, between the 1st day of February and the 3d day of October. The contract of hiring was a verbal one; the respondent claiming that he was to work eight months, beginning February 1st and ending October 1st, and was to receive $20 per month for the first three months and $25 per month for the remaining five months. Appellant testified that respondent was to work for $20 during the month of February and that the eight-months period was to begin March 1st and was at a rate of $20 per month for March and April and $25 for the rest of the term. Respondent, during the total period that he worked, lost 11 days' time, and was paid in all $75. The complaint alleged that the sum of $110 was due and unpaid on ac-

count of the services rendered, while the answer claimed that the contract in question was an entire contract, not a severable one, and that it was abandoned by respondent without cause prior to its completion. A further defense and counterclaim was set up for damages in the sum of $100, resulting from respondent's alleged failure to complete the term of his employment. The action was originally brought in justice's court, where the jury returned a verdict for respondent for $100 damages. Upon a retrial in the County Court the jury rendered a verdict for respondent for $85.50 damages, and from the judgment entered thereon this appeal is taken.

It might well have been left as a question of fact for the jury whether the contract was to end on the 1st day of October or November, and if the case had been so submitted the verdict would stand. But the learned County Judge went further, and charged the jury that, although the contract was not to end until November 1st, still it was a severable contract, so that the respondent could recover for any sums unpaid him on the contract. The jury may have found, therefore, that the contract was for eight months' service from March 1st, and still have given plaintiff a verdict for service rendered to October 1st. This charge we think was erroneous. The contract testified to contained no provision as to when payments thereon should be made. No custom was shown as to when wages are ordinarily paid farm laborers hiring out for the season. Under all the circumstances we cannot agree with the statement in the charge that:

"In the absence of any agreement it would be presumed that the payments were to be due monthly."

Such a presumption upon the facts in this case seems directly contrary to the understanding of both parties to the contract. The respondent never demanded any monthly wages prior to the time of his leaving. He occasionally asked for and received money, but at no regular periods. He at the time of leaving had not been paid half of the total wages that would be due for the entire period. The conduct of the parties entirely negatives any understanding, express or implied, that his wages should be paid monthly. When the contract itself is silent as to certain points, the actual intent of the parties thereto in these respects can best be ascertained by noting what they have in fact done under such contract. See Osgood v. Paragon Silk Co., 19 Misc. Rep. 186, 189, 43 N. Y. Supp. 271; Fox v. Coggeshall, 95 App. Div. 410, 416, 88 N. Y. Supp. 676; Anderson v. English, 105 App. Div. 400, 403, 94 N. Y. Supp. 200. Judged by this rule of interpretation the wages were not payable at any fixed time, but at the most certain advancements from time to time on account of the total amount of wages to become due were contemplated. But such advancements at irregular intervals would not change the rule as to the contract being entire, and that it was in its nature entire seems indicated by the testimony of both parties. It was for a definite and particular time, a farm season of eight months, which comprises practically the whole period when outdoor work can be done upon a farm. The respondent admittedly was hired especially to run a sulky plow, and the eight months testified to by the appellant would cover both the spring and fall plowing. Such

a contract seems clearly under the authorities an entire, indivisible contract, such that full performance must be shown as a condition precedent for the recovery of any moneys due thereunder. See McMillan v. Vanderlip, 12 Johns. 165, 7 Am. Dec. 299; Thorpe v. White, 13 Johns. 53; Jennings v. Camp, 13 Johns. 94, 7 Am. Dec. 367; Reab v. Moor, 19 Johns. 337; Lantry v. Parks, 8 Cow. 63; Marsh v. Rulesson, 1 Wend. 515; Smith v. Brady, 17 N. Y. 173, 187, 188, 72 Am. Dec. 442; Henderhen v. Cook, 66 Barb. 21; Casten v. Decker, 3 N. Y. St. Rep. 429; Munsey v. Tadella Pen Co. (Sup.) 38 N. Y. Supp. 159; People v. Grout, 179 N. Y. 417, 426, 72 N. E. 464, 1 Ann. Cas. 39; Davis v. Maxwell, 12 Metc. (Mass.) 286, 290.

The cases cited by respondent upon this point are clearly distinguishable. In Walsh v. N. Y. & Ky. Co., 88 App. Div. 477, 483, 485, 85 N. Y. Supp. 83, holding a salesman's salary contract for one year separable as to the monthly installments, it appears that the annual salary of $5,000 was payable in equal monthly installments, and the court, in stating the general rule applicable, expressly mentions this "provision for periodical payments during the time." In Delmar v. Kinderhook Knitting Co., 134 App. Div. 558, 119 N. Y. Supp. 705, it was held that a complaint setting up a salesman's contract, "to hold good" until a certain time and to pay him $35 per week stated a good cause of action, although one judge dissented on the ground that even this contract was entire. In Mernagh v. Nichols, 132 App. Div. 509, 118 N. Y. Supp. 59, a farm laborer sued to recover unpaid wages, although he had abandoned the contract without cause before the expiration of the term, and a recovery was allowed. It will be observed, however, that the plaintiff there testified "that the defendant was to pay right along as the year went, and when the year was finished he would be fully paid up," and defendant did not contradict this evidence. Thus full payments to date at intervals were provided for by the contract. Moreover, the contract in the case cited was for a year, and so was more like the various mercantile contracts of hiring by the year than the shorter term contract now before us, where the hiring was for the season. The longer the term of hiring, of course, the stronger is the possible presumption of fact that payments of salary or wages are not intended to be deferred to the end of the term.

It may be noted that the rule laid down in some of the old cases, that a contract for a fixed period is entire, even if payments are to be made by the week or month, has been changed in this state, so as to allow a recovery of wages earned, subject to a recoupment by the employer of his damages sustained by the breach, and such modification seems both more just and more suited to modern contracts of hiring than the former rule mentioned. See Tipton v. Feitner, 20 N. Y. 423, 427. But we are referred to no authority changing the former rule when there is no provision for the payment during the continuance of the contract of wages, as such, earned during the contract, but merely for advancements from time to time. The idea of advancements includes a later payment and settlement in full between the parties, having reference to the entire contract, and if this payment is expressly or by implication deferred till the completion of the term of service, such a

completion by the employé is naturally a condition precedent to a recovery of the balance of the wages unpaid.

Judgment and order appealed from should be reversed, and a new trial granted, with costs to appellant to abide the event.

WOODWARD, J., concurs.

(158 App. Div. 247)

In re KOPOZYNSKI.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

COURTS (§ 189*)—CITY COURTS—PLEADING—COUNTERCLAIM.

Laws 1906, c. 477, § 113, provides that the rules obtaining as to pleading in justice courts shall apply to the City Court of Elmira. Code Civ. Proc. § 2940, provides that in justice court a pleading need only be such as to enable a person of common understanding to know what is intended. Plaintiff instituted in the City Court of Elmira summary proceedings against defendant for nonpayment of rent. Defendant denied all the allegations, except that of ownership, and set up that he leased the premises for two years at a monthly rental of $18, that plaintiff was to furnish the water, that because of nonpayment of the bill by plaintiff the water was shut off, and he had been deprived of full use of the premises, and tendered $9.39 as rent, and $6.35 costs. *Held*, that the answer was sufficient to enable a person of common understanding to know that defendant was claiming a deduction from the rental, and was sufficient.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. § 189.*]

Smith, P. J., dissenting.

Appeal from Chemung County Court.

Summary proceedings by Josephine Kopozynski to remove Albert Kurper from premises as tenant for nonpayment of rent. From a judgment of the County Court, reversing a judgment of the City Court, defendant appeals. Reversed.

Argued before SMITH, P. J., and KELLOGG, LYONS, HOWARD, and WOODWARD, JJ.

Disney & Danaher, of Elmira, for appellant.

Harry H. Hays, of Elmira, for respondent.

JOHN M. KELLOGG, J. The plaintiff instituted summary proceedings to remove the defendant from her premises as a tenant for nonpayment of rent. The lease was made in the name of her husband as the lessor for two years from March 15, 1911, at a monthly rental of $18 in advance. The defendant occupied the premises as a butcher shop. Water was supplied to the shop through the same meter that supplied the tenants on the second floor and the tenant in another building belonging to the plaintiff. City water was furnished to the defendant without additional cost until February 20, 1912, when the supply was cut off by reason of plaintiff's not paying the bill. Thereupon the defendant refused to pay the rent due March 15th. All previous bills had been paid by plaintiff.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The defendant in his answer denied all the allegations in the petition, except the ownership of the plaintiff, and then set up the facts above stated, and alleged that the defendant has been deprived of the full use, enjoyment, and possession of the premises mentioned in the petition, by reason thereof. He also alleged damages of $50 because plaintiff's tenants on the upper floor had allowed water to leak down into his premises.

The defendant paid into court as a tender $9.39 for rent and $6.35, the costs to date. The plaintiff claimed that it was agreed before the lease was signed that she should pay $3 of the water rates and the defendant the rest. The defendant denied this. The justice dismissed the proceedings, with costs, thereby finding all the disputed facts in favor of the defendant. The County Court reversed the judgment, on the ground that there had been no eviction, that the defendant had alleged no damages in the answer and no counterclaim, and therefore was in default for the entire rent. The court in its opinion finds that the defendant was right on the questions of fact.

The leased premises being supplied with water through a common meter, and the plaintiff having paid the water rates without question for a part of the term, it is evident that the understanding of the parties was that the plaintiff was to pay the water rates. The City Court and the County Court properly so found.

The judgment in favor of the defendant was reversed for a defect in the pleadings, in that the answer does not in form set up a counterclaim, and does not allege damages by the wrongful act of the plaintiff in not paying the water rates. Such determination, I think, overlooked the provision of section 2940 of the Code of Civil Procedure, which provides that in justice court:

"A pleading is not required to be in any particular form; but it must be so expressed to enable a person of common understanding to know what is intended."

The rules obtaining as to the pleading in justice court apply to the City Court of Elmira. Section 113, chapter 477, of the Laws of 1906.

It is evident that the answer did not intend to set up an eviction, because the proceeding was brought upon the theory that the defendant was in possession and he was seeking to retain that possession. The allegations as to the terms of the contract, the conduct of the parties, the shutting off of the water, and that the defendant had been deprived of the use and enjoyment and possession of the premises mentioned thereby were evidently intended for some purpose, and when the defendant paid into court the costs and a part of the rent, withholding the other part, it became evident that the defendant was claiming some deduction from the rental on account of the wrongful act of the plaintiff in depriving him of water. It is true that he states no exact amount of damages he has sustained, but the facts alleged show that he was damnified. It appeared from the evidence that the plaintiff had failed to pay $8 water rates, which she should have paid, and that by reason thereof the defendant's butcher shop had been deprived of its supply of water from February 20th to April 3d, the day of trial. The money paid into court became the property of the plaintiff. The

damages, therefore, allowed the defendant by the court, were $8.61. We cannot say that the amount is unreasonable, or that it is not justified by the evidence.

The defendant, therefore, paid into court all arrearages of rent, together with the costs, and the judgment in his favor was proper.

The judgment of the County Court should be reversed, and the judgment of the City Court affirmed, with costs to the defendant in both courts. All concur, LYON, J., in result, except

SMITH, P. J. (dissenting). Justice KELLOGG says that the County Judge reversed the City Court on the question of pleading, while the opinion of the County Judge puts his reversal both on the question of pleading and on the question of proof. He further says the County Court reversed the judgment on the ground, if there had been no eviction, that the defendant had alleged no damages in the answer, and no counterclaim, and therefore was in default for the entire rent. The County Judge admits the payment into court of part of the rent, and puts his decision upon the ground that the full amount of the rent had not been paid. Because a defendant has alleged an injury, without stating in any way the amount of damages, and without demand therefor, I do not conceive that he has stated a counterclaim. Beyond that, without any word of proof as to the extent of damage suffered, we cannot give to him a counterclaim which is not alleged, and then hold that he has proven that imaginary counterclaim.

I do not see any escape from the conclusion of the County Judge. The defendant has neither alleged his counterclaim for damages nor given a word of proof thereon, and the court clearly is not authorized, even though we could avoid the question of pleading, to supply the lack of proof for the purpose of defeating this summary proceeding. His tender into court was confessedly of only a part of the rent which was due. If he had proven his damage to the extent of the balance of the rent not deposited, a different question would have arisen. It seems to me that the judgment ought to be affirmed, upon the opinion of the County Judge.

(158 App. Div. 201)

ANDERSON v. DODGE.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

1. PARENT AND CHILD (§ 8*)—CHILD'S ESTATE—LEASE BY FATHER.
Under Domestic Relations Law (Consol. Laws 1909, c. 14) § 80, providing that, as to a minor for whom no general guardian has been appointed, the guardianship of his property, with the rights, powers, and duties of a guardian in socage, belongs (1) to the father, and (2) if there be no father, to the mother, the father, as guardian for the son, had the right to lease the property of such ward.
[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 100–110; Dec. Dig. § 8.*]

2. TENANCY IN COMMON (§ 49*)—RENTS AND PROFITS.
Where a minor son was a tenant in common with his mother of property, and the father, as guardian of the son, leased the property, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

father being in the position of tenant in common with the mother, payment of the rent of the whole property to him protected the tenant.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 123; Dec. Dig. § 49.*]

Kellogg, J., dissenting.

Appeal from Sullivan County Court.

Action by Adelaide M. Anderson against Walter L. Dodge. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

See, also, 156 App. Div. 880, 140 N. Y. Supp. 1108.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

John D. Lyons, of Monticello, for appellant.

Ellsworth Baker, of Hurleyville, for respondent.

WOODWARD, J. The complaint alleges that the plaintiff and her infant son are owners in common of a house and lot in Callicoon, in the town of Delaware, Sullivan county, N. Y.; that the house is a double tenement house, and that the defendant occupied one-half of such house from the 1st day of August, 1910, to the 1st day of October, 1911, as a tenant, a period of 14 months, and that during such time he has not paid any rent to the owners of said premises; that the value of the use and occupation of that portion of the house occupied by said defendant was fairly worth the sum of $13 per month, and that at different times during said period the said defendant promised and agreed to pay to this plaintiff, for herself and child, Frank M. Anderson, said rent; that the plaintiff has served written notice on the defendant that she claimed and demanded said rent, and the said defendant has not disputed her claim thereto; that the said infant child of this plaintiff is an infant of the age of less than 14 years; that he has no general guardian, but is under the care and control of the plaintiff as his natural guardian, and she, as such natural guardian, has the care and control of his property interests; and that by reason of such facts the defendant is justly indebted to this plaintiff in the sum of $182, etc.

The answer admits his residence in the county of Sullivan, and denies on information and belief the other allegations of the complaint, and sets up some allegations to the effect that the premises were claimed to be owned by the plaintiff's husband, and that the defendant made payment to him for the rent, and denies that he (the defendant) ever recognized the title or ownership of the plaintiff, or ever promised or agreed to pay her any rent therefor, and alleges that no contractual relations ever existed between the plaintiff and defendant. As a separate defense it is urged that there is a misjoinder of parties plaintiff, in that one Frank M. Anderson claims to be and now is joint owner of said premises with the plaintiff, so far as the plaintiff may own the same, and has equal rights therein with the plaintiff, and has not been joined either as a party plaintiff or defendant hereto.

It was established on the trial of the action, or at least there was evidence from which the jury might properly so determine, that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant entered into an agreement for the rent of the premises with the plaintiff's husband, and there does not appear to be any question that the defendant has paid rent to him for all the time that he occupied the house. It seems that the husband claimed title to the property, and that the defendant, having bargained with the husband, continued to pay rent to him, with an understanding that Anderson would adjust matters, if he did not succeed in his effort to maintain his title to the premises. The defendant appears to have entered into possession under his lease from the husband, and the jury has evidently found that there was never any relation of landlord and tenant existing between the parties to this action.

[1] Assuming that Frank M. Anderson, the infant son, is an owner in common with the plaintiff, it seems clear that the father had the lawful right to rent these premises and to receive the payment of such rent. Section 80 of the Domestic Relations Law (Consol. Laws 1909, c. 14) provides that:

"Where a minor for whom a general guardian of the property has not been appointed shall acquire real property, the guardianship of his property with the rights, powers and duties of a guardian in socage belongs: (1) To the father; (2) if there be no father, to the mother," etc.

And the courts have held that a guardian in socage may lease the lands of his ward for a term as long as he continues guardian, or for any number of years within the minority of the ward, subject to its being defeated under certain contingencies. Emerson v. Spicer, 46 N. Y. 594; Matter of Hynes, 105 N. Y. 560, 563, 12 N. E. 60, 62. In the latter case it is said that:

"Such a guardian had a right to the possession of the ward's lands, and to the receipt of the rents and profits thereof, and could maintain ejectment to recover possession of such lands."

[2] The father is living, and having the right to rent the property of his ward, and to receive the rentals, he was, in such capacity, in the position of a tenant in common with the plaintiff, and any joint owner of land can demand the whole rent from the tenant, and a payment to one joint owner is good as to the others, and will protect the tenant. Griffin v. Clark, 33 Barb. 46, 48. There is no general guardian of the infant, Frank M. Anderson, and his father is therefore his guardian in socage, with all the rights of such guardianship, and having rented his son's interest, as a tenant in common with the plaintiff in this action, and received the rents, the defendant cannot be liable in this action. The judgment and order appealed from should be affirmed.

Judgment and order affirmed, with costs. All concur, except

JOHN M. KELLOGG, J. (dissenting). The rented premises were, on May 9, 1908, deeded by Frank S. Anderson to Adelaide M. Anderson, his wife, and Frank M. Anderson, his infant son, "as joint tenants." The defendant took possession of the premises as tenant in September, 1909. The plaintiff swears that before that time he came and saw her about the property, and she stated the price and gave him the keys to examine it; that while her husband was living with her the

rental was always collected by the husband and paid directly over to her. The defendant admits that he received the keys from the plaintiff, but says he made the arrangement with the husband and paid the husband. In July, 1910, the plaintiff's husband abandoned her and began a litigation with her and the son, seeking to establish title to the property in himself. That case was decided against the husband. About the same time he instituted habeas corpus to have the custody of the child awarded to him. That matter was decided in her favor, and the custody of the child awarded to her August 26, 1911.

There is no pretense that the husband ever rented the premises or received the rent as guardian in socage. Before the abandonment he received the rent as agent for his wife; after that in hostility to her and her son, as the defendant says, under an agreement that "if he lost his case, if he did not hold his property, he would make good to me." It is apparent from this agreement that both expected that, if the husband failed in the litigation, the defendant would have to settle with the plaintiff for the rent, and that the husband would return the moneys he had received and probably take care of the costs. After the determination of the action in her favor, the plaintiff served upon the defendant a notice to vacate the premises or pay the rent. She swears that he said he wanted to remain and agreed to pay her the rent. A lady with her substantially corroborates her statement. The defendant swears, referring to this interview:

"I did not tell her that I would pay her the rent. I told her I supposed I would have to pay her now. My idea was that Mr. Anderson had dropped his cases, and I supposed I would have to pay her."

He says, also, that he told her he would consult a lawyer before he paid. The lawyer he consulted was the husband's father, who apparently agreed to indemnify him if he would make the payments to the husband. The husband was a director in the bank of which the defendant is cashier. The defendant was evidently working in the interest of the husband against the interest of the wife and the son, and it is going too far to protect him and the husband on the theory now that the rent was paid to him for the son. The plaintiff's evidence that the defendant really was her tenant and understood himself to be such is corroborated by the notice which the defendant served upon her November 1, 1911, that he intended to vacate the house the next Tuesday night. It does not appear that he gave any notice to Anderson.

The judge charged the jury that if the defendant knew, at the time plaintiff forbade him to pay the rent to Anderson, that she and her son were the owners of the property, that she could recover from that time. He also charged that they must first find a specific agreement. It is undisputed that the defendant did know at the time. The defendant's claim that he made the original agreement with the husband is not very important, when the fact appears that the rentals were paid by the husband to the wife, and is entirely consistent with the theory that she was the lessor, and he was simply acting for her. It is not pretended that the husband leased the premises as guardian in socage, or for himself. He was clearly acting as agent for his wife, and hand-

ed the rent over to her. If, as defendant claims, he made the arrangement with the husband, that does not justify him in continuing to pay the agent after the principal had notified him to quit or pay rent to her, and he had indicated a willingness so to do. He knew the litigations had resulted in her favor, and that rentals were properly payable to her for the benefit of herself and child, whom she was maintaining. The court should not be active in finding a fiction by which to aid them in depriving the real owners of the income of their property. If the defendant is protected by the husband, the action is in effect one between the wife and the husband to determine whether the moneys shall go for the benefit of herself and son, the owners, or be retained by the husband, who has no possible interest therein.

I think the evidence clearly indicates that the defendant was the tenant of the plaintiff, if not from the beginning, at least from the time when the notice to quit was served and he gave her to understand that he elected to keep the premises. I think that made a leasing from her at the same terms. He occupying as her tenant, the fact that their infant son owned one-half interest in the property is immaterial, as she clearly had the right to maintain the action. She says he agreed to pay the rent to her, and he says that he told her he supposed he would have to, and he then continued in occupation. It naturally follows that he then became her tenant.

The findings of the jury that the plaintiff was not the lessor, and was not entitled to the rent, and that the payments to the plaintiff since the notice were payments of the rent, are against the evidence. I favor a reversal of the judgment upon the law and the facts, and the direction of judgment for the plaintiff for the rent accruing after the notice was served, with interest, and costs in the court below and in this court.

(158 App. Div. 299)

HICKS v. SMITH et al.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

1. APPEAL AND ERROR (§ 927*)—PRESUMPTION—NONSUIT.
On appeal from a judgment of nonsuit, the appellant is entitled to the most favorable inferences that can reasonably be drawn from the evidence, including every fair deduction from the undisputed facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. LANDLORD AND TENANT (§ 162*)—COMMON PASSAGEWAY—DUTY OF LANDLORD.
A landlord of an apartment house is bound to keep the common hallways and stairways in good repair.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 629; Dec. Dig. § 162.*]

3. LANDLORD AND TENANT (§ 162*)—REPAIRS—DUTY OF LANDLORD.
Where a landlord undertakes to make repairs in an apartment house, and permits the same to be occupied by his tenants while such repairs

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

are going on, he is held to a higher degree of care, and is liable for any negligence in making them.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 629; Dec. Dig. § 162.*]

4. LANDLORD AND TENANT (§ 162*)—CONDITION OF PREMISES—LIABILITY OF LANDLORD.

A landlord of an apartment house cannot delegate to another his duty to keep the common stairways in good repair, so as to relieve himself from responsibility.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 629; Dec. Dig. § 162.*]

5. LANDLORD AND TENANT (§ 167*)—INJURY TO GUEST OF TENANT.

A landlord of an apartment house owes the same duty to guests of tenants as he does to tenants.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668–674, 676–679; Dec. Dig. § 167.*]

6. LANDLORD AND TENANT (§ 169*)—INJURY—SUFFICIENCY OF EVIDENCE.

In an action by a guest of a tenant against the landlord for an injury caused by falling down the stairs of an apartment house, evidence *held* sufficient to take to the jury the question of the landlord's negligence.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644–646, 664–667, 681–684; Dec. Dig. § 169.*]

7. LANDLORD AND TENANT (§ 169*)—INJURY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action by a guest of a tenant, for an injury caused by falling down the stairs of an apartment house, against the landlord and a contractor who was making repairs, *held*, under the evidence, that the question of the contributory negligence of plaintiff was for the jury.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644–646, 664–667, 681–684; Dec. Dig. § 169.*]

8. NEGLIGENCE (§ 66*)—REPAIR OF BUILDING—LIABILITY OF CONTRACTOR.

Where a subcontractor, in repairing a hallway in an apartment building, necessarily rendered it unsafe for travel by night unless it were lighted, and no trap was left there by him for unwary persons to fall into, he was not liable to a guest of a tenant remaining in the building while the repairs were being made; she assuming the risk of ordinary obstruction to the hallway as far as the contractor was concerned.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 86–89; Dec. Dig. § 66.*]

Kellogg, Howard, and Woodward, JJ., dissenting in part.

Appeal from Trial Term, Saratoga County.

Action by Grace E. Hicks against Roy W. Smith and another. From a judgment of nonsuit, plaintiff appeals. Reversed as to defendant Smith, and affirmed as to defendant Johnson.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Robert H. McCormic, of Albany, for appellant.

William T. Moore, of Mechanicville, for respondent Smith.

Robert Frazier, of Mechanicville, for respondent Johnson.

HOWARD, J. The defendant Smith is the owner of a building in Mechanicville, the second floor of which was arranged for the occupation of tenants; the defendant himself residing at the time of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

accident just across a driveway from the building. Extensive alterations were being made, and the front stairway leading from the street to the second story had been removed from the center to the southerly side of the building. The defendant Johnson was a subcontractor doing the carpenter work. The principal contractor had agreed to become responsible for all acts and omissions of himself and the subcontractors. There was a common hallway. This was littered with mortar, material, and such other things as are usual at such times. During the alterations some of the tenants moved out. Two tenants remained. There was a back winding stairway, which had not been removed or molested, and which was used by the tenants while the front stairs were being moved. The common hallway was not lighted, although there was an electric light in one private hallway. At the time of the accident the outline of a person's body could be seen in the hallway, but the floor of the landing could not be seen. A loose doorframe had been left at the top of the front stairs leaning against the wall of the building and projecting out over the edge of the top step. The nosing or tread of the top step had not been put on so that the top of the riser was not covered. There were no lights, barricades, or warnings in the common hallway, and the tenants had never been cautioned not to use the common hallway or the front stairway. Late in the afternoon of October 16th, the day of the accident, the plaintiff entered the apartments of Mrs. Floyd, one of the tenants, going up the front stairway and through the common hallway. Shortly after 7 o'clock she started to leave. Mrs. Floyd, the tenant, and a Mrs. Baxter, another guest, accompanied her. The plaintiff walked slowly and carefully, so she says, and reached the front stairs and descended a few steps. Mrs. Baxter, who was next behind the plaintiff, stepped on something at the head of the stairs, which gave way with her, her left heel caught in something, she stumbled and fell against the plaintiff, and they both fell together to the bottom of the stairs, and were injured.

[1] The plaintiff was nonsuited, and is, accordingly, entitled in this court to the most favorable inferences that can reasonably be drawn from the evidence, including every fair deduction from the undisputed facts. Volosko v. Interurban St. Ry. Co., 190 N. Y. 206, 82 N. E. 1090, 15 L. R. A. (N. S.) 1117; Gordon v. Ashley, 191 N. Y. 186, 83 N. E. 686. Assuming, therefore, all the facts proven and all the most favorable inferences that can reasonably be drawn from the evidence, the question arises: Are the defendants, or either of them, liable?

[2] Under normal conditions, and independent of any covenant binding him to do so, the landlord of an apartment house is bound to keep the common hallways and stairways in good repair. McAdam on Landlord and Tenant, p. 1233; Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238; Sciolaro v. Asch, 198 N. Y. 77, 91 N. E. 263, 32 L. R. A. (N. S.) 945.

[3] When the landlord undertakes to make repairs or alterations in an apartment house, and permits the same to be occupied by his tenants while such repairs are going on, he is not released from responsibility, but is held to a higher degree of care, and is liable for the

negligent way in which such repairs are made. McAdam on Landlord and Tenant, 1254; Sciolaro v. Asch, 129 App. Div. 86, 113 N. Y. Supp. 446.

[4] The law imposes these duties upon the landlord, and he cannot delegate them to others, either under normal conditions or while repairs are being made, so as to relieve himself from responsibility. "One who is personally bound to perform a duty cannot relieve himself from the burden of such obligation by any contract which he may make for its performance by another." Sciolaro v. Asch, 198 N. Y. 77, 91 N. E. 263, 32 L. R. A. (N. S.) 945; Shearman & Redfield on Negligence (5th Ed.) § 14.

[5] And the landlord owes the same duty of care to the guests of tenants as he does to tenants. Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580.

[6] Assuming all the facts, and considering all the inferences arising from the evidence, and applying these well-established rules of law, it seems clear that the landlord, the defendant Smith, was liable. He lived only a few feet away from the building; he permitted his tenants to continue to occupy the building while it was being altered; he had never warned them not to use the common hallway or the front stairway; he received rent; he placed no lights in the common hallway, and made no arrangements with the contractors to place lights there; he erected no barricades; he permitted the hallway to be littered and obstructed; he did nothing personally, in short, to insure the safety of his tenants and their guests. Had the landlord been put to his defense, perhaps he would have been able to prove his freedom from negligence; but, as the case now stands, his negligence is apparent.

The defendant Johnson, the subcontractor, apparently paid no attention to the tenants, or in any manner considered their safety. He had been working in the building two weeks, and in the common hallway, and it must be presumed that he knew the apartments were occupied. Notwithstanding this, he left the hallway littered and obstructed; he erected no barricade; he placed no light or lantern on the obstacles; he posted no warning notices; he failed to observe the most simple and ordinary precautions—in fact, he did nothing whatever to guard against accidents. Under these circumstances there can be no doubt of his negligence. "The law imposes on a person engaged in the prosecution of any work an obligation to perform it in such a manner as not to endanger the lives or persons of others. * * *" 29 Cyc. 425; Wittenberg v. Seitz, 8 App. Div. 439, 40 N. Y. Supp. 899; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530.

It is the duty of any person making repairs in a common hallway, or passageway, or street, or place where people are lawfully traveling, to take reasonable precautions against accidents.

The defendant Johnson seeks to relieve himself from the consequences of this rule by pointing out that there were no contractual relations between himself and the plaintiff; but this duty to be careful does not grow out of a contractual relation. It arises from that basic and necessary regulation of civilization which forbids any person, because of

his own convenience, to recklessly, heedlessly, or carelessly injure another. Nobody is permitted by the law to create with impunity a stumbling-block, a trap, a snare, or a pitfall for the feet of those rightfully proceeding on their way. Therefore, as the case stood at the time of the nonsuit, Johnson was guilty of negligence.

[7] Concerning the question of the plaintiff's contributory negligence, that was clearly a question for the jury. It is true that the plaintiff knew the situation—the litter, the lumber, the mortar, the tools, the rubbish, the darkness, the unfinished condition; but she was not a trespasser. She had a right to be there. It was her duty, however, to be careful; in fact, it was her duty to exercise much greater care than would be necessary in an ordinary hallway, where no repairs were being made. But whether or not she was careful was a question for the jury.

From the above reasoning it follows that the nonsuit was improper, and that a new trial should be granted, with costs.

WOODWARD, J., concurs.

SMITH, P. J. [8] I dissent from a reversal as to Contractor Johnson. In the making of the repairs he necessarily obstructed the hallway to an extent, and rendered the hallway unsafe for travel at night unless the hall were lighted. But this was not a public hallway. No pit or trap was left there for an unwary person to fall into. He might reasonably assume that, if a tenant chose to remain while such repairs were being made with her full knowledge, she would assume the risk of ordinary obstruction to the hallway as far as he himself was concerned, and would look to her landlord for such protection as she might need. The covenant of the principal contractor to be responsible for all damages arising by reason of his repairs adds nothing to the liability of the defendant Johnson, who in no way made himself a party to such covenant. It simply made the principal contractor either a principal or a surety for the landlord. The duty of Contractor Johnson is the same as though such covenant had not been made. I therefore vote to sustain the nonsuit as to the defendant Johnson.

LYON, J., concurs.

Judgment reversed, and new trial granted, costs to abide event, as to the defendant Smith. All concur, except KELLOGG, J., dissenting. As to the defendant Johnson, judgment affirmed, with costs. All concur, except HOWARD and WOODWARD, JJ., dissenting.

JOHN M. KELLOGG, J. (dissenting). The building had been generally overhauled. The stairway leading to the second floor had been taken out and was located at a different place. The skeleton of the new stairs was up, but the regular treads were not placed upon the risers and stair frame. Evidently rough boards were nailed on to enable the workmen and others to make temporary use of the stairs. The floors were littered with plaster, dirt, shavings, lumber, nails, and other things. No front door had been placed upon the hall, and the hall had not been wired for electricity, although the upper hallway

leading to the Floyds' apartment was lighted by the Floyds. Prior to the repairs, the light upon the stairs had been maintained by the tenants. During the repairs, for two or three months, the plaintiff had been allowed to occupy her rooms rent free, but had begun to pay rent again, and when the hall was wired and the repairs finished the landlord was to light the hall. The rear stairway opened into a lane, and the Floyds, their visitors, and the other tenant who did not move out, used that stairway, at least until the new stairs were up.

The plaintiff and Mrs. Baxter were visiting the Floyd apartment. They entered during the daytime, and were frequent visitors, and knew well the conditions. They left the Floyd apartment after dark, Mrs. Floyd accompanying them. In going down the stairs Mrs. Baxter fell against the plaintiff, causing her to fall, and causing the injury complained of. Mrs. Baxter says:

"Mrs. Hicks went down a few steps ahead of me, down the steps. I was walking on her right along the wall. My feet struck, stepped on something that gave way with me. I felt for the step with my left foot, and my heel caught in something in the stairs, and threw me downstairs."

There was upon the landing a doorframe, but it is evident that it did not cause Mrs. Baxter's fall, as the frame was found in its correct position, and therefore did not give way. Apparently she slipped upon the plaster, or shavings, or some other substance that littered the stairway, and her foot caught the opening between the riser and the temporary tread; the opening being two or three inches. It is therefore evident that the doorframe had nothing to do with the accident, except that it was an additional warning to the parties, as to the general condition of the stairway and the building, that the stairway was not intended for general use, but was in the hands of the carpenters. The plaintiff evidently knew of the back entrance, as the evidence indicates her frequent visits to the apartment, and unless she shut her eyes when she entered the Floyd apartment she must have seen that she was taking chances in using the stairway in that condition. She took the same chances that any person takes in going into a building which is being built or repaired, and in attempting to use the temporary stairs which are intended for the use of the workmen.

I favor an affirmance.

(158 App. Div. 206)

In re WATER SUPPLY OF CITY OF NEW YORK.

Appeal of STEWART.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

1. EMINENT DOMAIN (§ 134*)—COMPENSATION—MEASURE.

A sand bank upon land condemned for a reservoir site, prior to the location of the reservoir, was practically worthless. Since the location of the reservoir, and because of the demand for sand in the construction of same, the sand bank was made valuable. *Held*, that it was proper to consider such value in fixing the value of the property condemned.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 356; Dec. Dig. § 134.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. EMINENT DOMAIN (§ 205*)—COMPENSATION—SUFFICIENCY OF EVIDENCE.
Evidence in condemnation proceedings *held* to show that $4,500 was adequate compensation for a sand bank.
[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 544; Dec. Dig. § 205.*]

Appeal from Special Term, Columbia County.

Eleanor I. Stewart appeals from an order of the Columbia County Special Term confirming an award of the commissioners fixing the amount of compensation for property condemned for the water supply of the city of New York. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Griggs, Baldwin & Baldwin, of New York City (Martin Conboy, of New York City, of counsel), for appellant.

Archibald R. Watson, Corp. Counsel, of New York City (William McM. Speer, of New York City, of counsel), for respondent.

JOHN M. KELLOGG, J. The order appealed from awards $11,020 and costs for about 50 acres of land appropriated, of which about 32 acres were ordinary farming lands, with the buildings and improvements thereon, and about 18 acres were a sand bank, which was of but little value for agricultural purposes, and the sand had no market value in the bank prior to the location of the Ashokan Reservoir in the vicinity. $7,500 is a liberal award for the 52 acres of land taken, including the buildings and improvements thereon, making no allowance for the sand taken from the property by the city. The farm will be covered by the reservoir and was condemned for flowage purposes. Prior to the location of the reservoir the 18 acres in question, the sand bank, was of but little value. Since the condemnation the city has taken from the Stewart-Winchell sand bank about 134,000 yards of sand, which has been used in making cement for use in the construction of the dam. The completion of the work as contemplated will require abo 250,000 yards more. The Stewart-Winchell bank, so called, contains about 70 acres of sand; but the sand used by the city has been taken from the Stewart property. There are several other sand banks within the properties condemned for reservoir purposes.

[1, 2] The appellant contends that the demand for sand in building the dam has given this sand bank a value of about 10 cents per yard, and the amount contained in the bank is estimated at 742,000 yards. Apparently after the demand of the city is supplied there will be no demand for sand in that locality, and the sand bank will then be of little value compared with the remainder of the farm. While the sand bank had no value prior to the location of the reservoir, the fact that large quantities of sand would be required thereafter in constructing the dam undoubtedly gave this sand bank some value, and such value was proper to be considered in fixing the value of the property taken. It is clear that, if a sand bank had been located immediately outside of the reservoir, the location of the reservoir would have added materially to the value of that bank, if there was not a surplus of sand in the lo-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cality. A purchaser desiring such property would necessarily have to pay a value enhanced by the fact that there was soon to be a market for sand in the locality and that it was the only available supply. The same rule would apply where the sand is located upon property to be condemned.

The contents of the Winchell part of the sand bank is not definitely shown, but on nine other parcels of land taken, aside from the Stewart and Winchell property, are sand banks of greater or less extent. It is evident, therefore, that with the increased demand for sand in the locality for this special purpose the supply was so much in excess of the demand that the sand in the bank had but little value. The commissioners, as we view the evidence, have allowed about $4,500 more than the value of the property aside from the sand, and we are satisfied that an adequate compensation has been given for the property, considering the demand for sand in the locality.

The order should be affirmed, with costs. All concur.

(158 App. Div. 887)

STOLTS v. BLAISDELL.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

Appeal from Special Term, Chautauqua County.

Action by Charles Stolts against William B. Blaisdell. From an interlocutory judgment for defendant, plaintiff appeals. Affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, and MERRELL, JJ.

Hall & Van Vlack, of Cherry Creek, for appellant.

Stearns & Thrasher, of Fredonia, for respondent.

PER CURIAM. Interlocutory judgment affirmed, with costs, with leave to plaintiff to plead over within 20 days upon payment of the costs of the demurrer and of this appeal.

FOOTE, J. (dissenting). If two causes of actions are stated in the complaint, I think they are claims arising out of transactions connected with the same subject of action, within the meaning of subdivision 9 of section 484 of the Code, and so may be united in one action.

Plaintiff's claim is that he had a right to occupy defendant's 10 acres of land and raise crops thereon for the seasons of 1911 and 1912; that this was the agreement between the parties; that by mutual mistake in drafting the lease, such right was not given to him for the second season; that several months after the lease was made it was, in effect, modified by an oral agreement that 3½ acres of this land should be occupied and cultivated for the season of 1911 by defendant for his own benefit, but that defendant should harvest his crops on this 3½ acres and remove all roots and rubbish therefrom early enough in the fall of 1911 to permit the plaintiff to plow that land in the fall of 1911 to prepare it for crops of the season of 1912; and that this the defendant failed to do, thereby causing plaintiff damage

in respect of this 3½ acres, in case he was to have the use of it for the season of 1912. Of course, plaintiff would not be damaged, unless he was to have the use of this land the following season.

Plaintiff began this action on December 22, 1911. The only breach of any agreement between the parties which had then occurred was the failure of defendant to remove his crops and clean up the 3½ acres in time to permit plaintiff to plow it in the fall of 1911. The first year's lease of the 10 acres did not expire until February 29, 1912; hence there had been no refusal of defendant to continue the lease for a second year in accordance with the oral agreement, as plaintiff claimed it to be. Nevertheless plaintiff had the right to bring his action at that time to reform and correct the lease, so as to give him the two-year term, and, unless he should succeed in reforming it, he could not show that he had been damaged by defendant's failure to give him possession of the 3½ acres in time for the fall plowing.

The transaction or transactions between these parties relate to this 10 acres of land. The second agreement as to the 3½ acres modified the first agreement as to the whole. In legal effect, plaintiff's action is to recover damages for breach of the agreement as modified, and to permit of such recovery he must necessarily have the written part of the agreement as embodied in the lease reformed, so as to give him possession of the 10 acres for two years; otherwise, his claim for damages would fail. Hence it seems to me that the case is like those cited on the appellant's brief, where actions were brought to reform insurance or other contracts, and at the same time to recover damages for breach of the contract as reformed.

While plaintiff has drawn his complaint in form to state two causes of action, I think, in effect, it is only one, namely, damages for the breach of a contract, which contract is not correctly expressed in the writing, and which he asks to have reformed and corrected to permit the recovery that he asks.

Moreover, I think that we should take notice of the fact that the season of 1912 has already passed, and when this case comes to trial, if the lease is reformed in accordance with plaintiff's claim, plaintiff will, no doubt, be permitted to recover his damages for the failure of the defendant to give him the use of these 10 acres during the season of 1912, and that then there will be no occasion to separate damages arising from the 3½ acres, and treat that as a separate claim or separate cause of action. It will then be wholly immaterial whether defendant failed to put plaintiff in a position to plow these 3½ acres in the fall of 1911 for the next season's crop, as it will appear that plaintiff was deprived altogether of the use of these 3½ acres for the season of 1912 by the defendant for other reasons.

For these reasons, I think the judgment appealed from should be reversed, with costs, and the demurrer overruled, with leave to the defendant to plead over on payment of the costs of the demurrer and of this appeal.

(158 App. Div. 9)

BURTIS v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. RAILROADS (§ 275*)—INJURIES TO LICENSEE—DEGREE OF CARE REQUIRED.
A railroad company is bound to conduct its operations so as not to injure a boy, employed by a cattle shipper to stand upon the gangway owned by the company and leading from the cattle chute.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 873–877; Dec. Dig. § 275.*]

2. RAILROADS (§ 273½*)—INJURIES TO TRESPASSERS—DEGREE OF CARE.
A railroad company is liable for injuries received by a trespasser upon its property, only when they result from some wanton or intentional act of the company.
[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 273½.*]

3. RAILROADS (§ 297*)—INJURIES TO LICENSEES OR TRESPASSERS—SUFFICIENCY OF EVIDENCE.
In an action by a boy for injuries received by him while standing on a cattle chute owned by the railroad company, evidence *held* to require a reversal of a verdict for plaintiff, on the ground that he was in the employ of a cattle shipper when injured, as against the weight of evidence.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 944–953; Dec. Dig. § 297.*]

Appeal from Trial Term, Jefferson County.

Action by Lloyd Burtis against the New York Central & Hudson River Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Purcell, Cullen & Purcell, of Watertown, for appellant.

La Rue & Slate, of Watertown (Thomas Burns, of Watertown, of counsel), for respondent.

MERRELL, J. The plaintiff, a boy 10 years of age, received serious injuries by having his foot caught between a cattle car and the gangway used in loading cattle and stock upon defendant's cars for transportation at Antwerp, N. Y., on August 24, 1907, which injuries necessitated the amputation of his foot. The plaintiff claims that at the time of his injury he was employed by a cattle shipper to stand upon the gangplank leading from the cattle chute to the car, to watch some stock which had been loaded, and to prevent their escape from the car in which they had been placed through the open car door opposite the loading chute or gangway; plaintiff alleging that while so lawfully engaged the defendant's employés shunted some cars against that opposite which he was stationed, and that the gangplank was shoved and his foot crushed. It is plaintiff's contention that the defendant was negligent in moving the cars and gangplank, and that his injuries resulted solely from such carelessness on the part of the defendant.

[1, 2] The cattle yards and gangways in question were the property of the defendant, and therefore, if plaintiff was lawfully at the place of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the accident, the defendant was in duty bound to so conduct its operations as not to inflict injury upon plaintiff. Of course, if the plaintiff was a trespasser upon defendant's property when he received his injuries, the defendant cannot be held liable therefor, except it appear that such injuries were the result of some wanton or intentional act of defendant.

[3] There was a sharp conflict upon the trial as to just what plaintiff's position was at the time he was injured—whether, as claimed by him, he was lawfully upon the chute at the implied invitation of defendant, who was charged with the duty of keeping the place in a reasonably safe condition and to operate its cars in a reasonably safe manner, or whether he was a trespasser there, to whom the defendant owed no duty, except to refrain from wanton or intentional act that would harm him.

The jury evidently took the former view. Ordinarily I do not think it proper to interfere with the determination of a jury on questions of fact, if there is evidence upon which their action can be predicated. The jury has the great advantage of contact with the witnesses, whose testimony they hear, and they are best able to determine where the preponderance lies. But in this case I think the facts and surroundings point so inevitably to the falsity of plaintiff's contention, and the verdict of the jury seems to me so palpably against the weight of evidence, that I am constrained to recommend the reversal of judgment herein, and of the order denying defendant's motion for a new trial.

It is a rather peculiar circumstance that, while plaintiff was injured August 24, 1907, he waited over five years before bringing this action—a delay for which no satisfactory excuse is given, and hardly conso nant with the positively asserted contention, finally advanced, that defendant was answerable for the injuries which plaintiff sustained.

Upon the trial plaintiff testified that he was then (January 17, 1913) 14 years of age on the 23d of September last; that at the time he was injured he was 9 years old, going on 10. Plaintiff further testified that before the accident he had been employed with other boys by one William R. Smith, a live stock buyer, in driving surplus cattle away from the cattle yards at Antwerp to a pasture three miles away. Plaintiff claims that, shortly before noon on the day in question, he met the shipper, Smith, near the cattle yards, and asked him if he thought there would be any surplus cattle to drive away; that Smith said he did not know, but for plaintiff to hasten back from dinner and he would see; that plaintiff hurried back from his lunch, and met Smith at the yards, and that Smith then separated out six or seven head of cattle, and drove them into the car, and asked plaintiff to watch them, and see that they did not come out. Plaintiff claims he finished driving these cattle into the car, and then stood by the railing, watching the car, when the car was struck by another car, and his foot crushed between the runway and chute.

On cross-examination, plaintiff at first would not testify for sure that there were any cattle in the car when he was hurt, but finally repeated his statement as to the presence of cattle in the car at the time, that he was watching. On cross-examination the plaintiff ad-

mitted that on an occasion about a year after his injury he had a talk with a Mr. Gilligan, defendant's claim agent, and signed a written statement concerning the circumstances under which the accident occurred. This statement appears at page 108a of the record. It was made four years before the bringing of this action, and is quite contradictory in its statements to the testimony of plaintiff, given four years later, when it was perhaps deemed necessary to show his occupation as an employé of the cattle shipper when he was hurt. In this statement he mentions a talk with Smith, and claims to have inquired as to whether there would be cattle to drive, but nowhere mentions his employment to watch cattle in the car. On the contrary, he says he went down to the yards, and that "the men who were to load cattle into the car were at dinner, and I got on the chute to wait for them." In the statement he speaks of other boys playing under the higher chute, and of his warning them of an engine which he saw backing up, and that just as he was about to step up on the fence the car moved and his foot was caught.

This statement cannot be said to have been taken while plaintiff was in distress or suffering. It does not bear the earmarks of fraud, but rather appears to be the sober statement of plaintiff as to what actually occurred, made four years before bringing suit. The plaintiff produced no witnesses corroborating his story of the cattle in the car and of his watch over them. Several of his boy mates were playing about and under the chute, and where they would have known if cattle were in the car at the time; but none were sworn for plaintiff. The plaintiff swore as a witness a farmer named Bellinger, who at about the time plaintiff was injured was engaged in unloading hogs from a wagon 40 feet away, and directly in front of the open car door, and where he could look into the car, and he saw no cattle in the car.

Aside from members of his family, who testified as to his suffering and the medical testimony, plaintiff offered no further evidence. Standing alone, plaintiff's case was at best a weak one when he rested.

The defense first swore Mr. George Smith, who testified that he was at Antwerp on the day in question, and that prior to going to lunch no cattle were placed in the car. William R. Smith, the buyer, was sworn. He testified that no cattle were loaded in the car before lunch. This witness flatly contradicted plaintiff's story that he had told him to stay on the bridge and watch the cattle that were put in the car. Said witness further positively testified that he had put no cattle in the car prior to the plaintiff's injury, and positively denied having said anything to plaintiff upon the subject of watching the car—denied having employed plaintiff for that purpose that day.

One Hicks, a juror serving at Trial Term, testified as to his acquaintance with plaintiff and conversations at the hospital when the witness was a patient, in which plaintiff stated that he was sitting on the cattle yard when a train backed down and hit the chute and injured him, making no reference to his watching cattle in the car at the time. Carl Eagan, a boy four years older than plaintiff, who was playing under the chute when plaintiff was injured, was called by the defendant. While apparently not a willing witness, he testified that he

did not see any cattle loaded in the car prior to the accident, and knew of none being in them, although he had been playing all about the chute and yard most of the forenoon; that, had there been cattle going over the bridge over his head, he would have known it. Aside from some of the train crew, who gave no testimony relating to the matters under discussion, there was no further testimony offered.

It seems clear to me that, considering plaintiff's extremely weak case, so greatly overborne by the testimony of the two Smiths and of the young man, Eagan, all absolutely disinterested witnesses, notwithstanding the labored effort of plaintiff's counsel to make it appear that said witnesses were in some way interested, the jury was led to disregard its duty to render a verdict in accordance with the plain preponderance of evidence, and perhaps through sympathy for an unfortunate youth, who had been injured for life, and feeling that the burden of a money judgment for his benefit would fall lightly upon a wealthy corporation, were prompted to aid him, regardless of legal liability on the part of the defendant.

I think we are compelled to hold that the verdict was against the weight of the evidence, and that the order and judgment appealed from should be reversed, and a new trial ordered, with costs to abide event. I recommend such disposition of the case.

Judgment and order reversed, and new trial granted, with costs to appellant to abide event. All concur.

(158 App. Div. 251)

PEOPLE ex rel. WESTCHESTER ST. R. CO. et al. v. PUBLIC SERVICE COMMISSION FOR SECOND DIST. OF NEW YORK et al.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

1. STREET RAILROADS (§ 55*)—MORTGAGES—POWER TO MORTGAGE.
The right of a railroad company to mortgage its property and franchises, under Railroad Law (Consol. Laws 1910, c. 49) § 8, subd. 10, carries with it the right to make available the mortgaged property, with every incident necessary to that purpose; hence the law contemplates that a purchaser under the mortgage may organize a corporation to take over the property, and that the purchase price may be financed by the issue of stocks, bonds, or other property securities.
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 134; Dec. Dig. § 55.*]

2. CONSTITUTIONAL LAW (§ 93*)—VESTED RIGHTS—MORTGAGES.
Where a street railway company, under Railroad Law (Consol. Laws 1910, c. 49) § 8, subd. 10, authorizing a railroad company so to do, mortgaged its property and franchises, a limitation by a subsequent statute of the right of a railroad company to capitalize its franchises is invalid as to the mortgagee, as it would be an interference with vested property rights under the mortgage.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 176, 177, 181–185, 190–192, 194–200, 208, 213–224, 236; Dec. Dig. § 93.*]

3. STREET RAILROADS (§ 15*)—CAPITAL STOCK.
Stock Corporation Law (Consol. Laws 1909, c. 59) § 55, permits stock to be issued for the value of property purchased, and provides that, in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the absence of fraud, the judgment of the directors as to the value shall be conclusive. Public Service Commissions Law (Consol. Laws 1910, c. 48) § 55, requires that there must be an order of the Commission authorizing the issuing, and that in the opinion of the Commission the property to be paid for by the issuing of the stock is reasonably required for the necessary purpose of the corporation. A mortgage covering the property and franchises of a street railway company was foreclosed, and the purchaser, acting for the owner of most of the bonds secured, paid $912,000 for the property and franchises. The purchaser and associates filed certificates, required by Stock Corporation Law, § 9, and formed a new corporation to take over the property and operate the railroad. The Public Service Commission, under Public Service Commissions Law, § 55, refused to authorize the issue of bonds for the full amount of the purchase price, because the property was not of that value. *Held*, that the capitalization was not restricted to the actual value of the property purchased, but when the good faith of the transaction was established the judgment of the directors was binding on the Commission, and the purchase price was the fair basis of capitalization.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 29; Dec. Dig. § 15.*]

4. STREET RAILROADS (§ 15*)—ISSUE OF STOCK—VALUATION OF PROPERTY.
Under the Public Service Commissions Law (Consol. Laws 1910, c. 48) authorizing the Commission to fix the value of corporate property, the Commission should not have taken into consideration, in fixing the value of the property of a street railway company for the purposes of a stock issue, the fact that the property was weighed down by a five-cent fare franchise, as the power of the Public Service Commission to fix reasonable rates involves the right to increase as well as to lower, and the rates are to be reasonable to the public and reasonable to the corporation.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 29; Dec. Dig. § 15.*]

5. STREET RAILROADS (§ 15*)—CAPITAL—VALUE OF PROPERTY—SUFFICIENCY OF EVIDENCE.
Evidence *held* not to sustain a finding by the Public Service Commission that the value of the property of a street railway company was only $400,000.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 29; Dec. Dig. § 15.*]

Certiorari by the People of the State of New York, on the relation of the Westchester Street Railroad Company and another, against the Public Service Commission for the Second District of the State of New York and others, to review the determination of the Commission, refusing to permit the relator street railroad company to issue more than $434,000 of stock. Reversed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Krauthoff, Harmon & Mathewson (William Greenough and Charles F. Mathewson, both of New York City, of counsel), for relators.

Ledyard P. Hale, of Albany, for respondents.

JOHN M. KELLOGG, J. The Tarrytown, White Plains & Mamaroneck Street Railroad Company's property, rights, and franchises were sold at a foreclosure sale by a judgment of the Supreme Court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for $882,400.73 to one Sutro, who was acting for the New York, New Haven & Hartford Railroad Company. The New Haven Company was the owner of the greater part of the bonds secured by the mortgage foreclosed. Sutro incurred certain legal and other expenses in connection with the purchase, amounting to $29,622.68, making the net cost of the railroad to him $912,023.41.

The purchaser and his associates filed the certificate contemplated by section 9 of the Stock Corporation Law (Consol. Laws, c. 59), and formed the Westchester Street Railroad Company, and upon proper conveyances under that section that company became vested with and entitled to exercise all the rights, privileges, and franchises which formerly belonged to the mortgagor. The mortgage was made pursuant to subdivision 10, of section 8 of the Railroad Law (Consol. Laws 1910, c. 49), which authorizes a company to mortgage its property and franchises.

The Commission refused to allow stock to issue for the cost of the purchase, and limited the issue to $434,000. It valued the property at $400,000, although it was conceded that its reproductive value, less depreciation, was $445,693.98, and in addition to the value it placed upon the property it allowed $34,000 to cover expenses connected with the purchase and with that application. While it concedes that the purchase was made in good faith on competitive bidding, and that the sale was in all respects fair, it bases its valuation, in a great part, upon the ground that the property was weighed down by a five-cent fare franchise, which was binding upon the purchaser (see Public Service Com. v. Westchester St. R. R. Co., 151 App. Div. 914, 135 N. Y. Supp. 1138, affirmed later in 206 N. Y. 209, 99 N. E. 536), and that by reason of such a rate the property could not be operated at a profit, and that a part of the purchase price represented the franchises, which under section 55 of the Public Service Commissions Law cannot be capitalized.

[1] The laws of the state contemplate that a railroad shall be operated by a railroad company. Trojan Railway Co. v. City of Troy, 125 App. Div. 362, 109 N. Y. Supp. 779; Village of Phœnix v. Gannon, 195 N. Y. 471, 88 N. E. 1066. It was therefore necessary for Sutro to form a new company, by filing the certificate and turning the property over to it. Such a company has no property, and no means with which to finance the purchase, except an issue of stock, bonds, or securities. The mortgaged property, aside from a nominal scrap value, is only salable to or for a railroad company. The statute, therefore, contemplates that a purchaser under the mortgage may organize a corporation to take over the property, and that the purchase price may be financed by an issue of stock, bonds, or other proper securities. Otherwise, the result would follow that the mortgagee would be deprived of a substantial part of the security by reason of the fact that the mortgaged franchises cannot be purchased, as no one is authorized to use and pay for them. The result in this case would be that the New Haven Company, by having made the purchase, is paying nearly $500,000 for the privilege of giving the public the benefit of a railroad service. If it can only receive stock for about

half of the purchase price, because in the opinion of the Commission the property is not worth the price paid, it is in serious trouble, for it cannot in its accounts and reports value the stock at double its par value. If the decision of the Commission is right, there would be no purchaser for railroad property sold upon a mortgage sale, as it would not be known what value the Public Service Commission might put upon the property. The statutory right to mortgage carries with it the right to make available the mortgaged property, with every incident fairly necessary for that purpose, and as the property can be purchased for no practical use other than as a railroad, the right to capitalize the purchase price cannot be impaired, after the mortgage, by a statutory provision declaring that the franchise may not be capitalized.

[2] The company is not asking the capitalization of a franchise; it is asking that it may issue stock for the cost of the property on the foreclosure sale. If we were compelled to hold otherwise, this mortgage having been issued prior to the Public Service Commission Law, it would follow that the limitation of the right to capitalize its franchise would be invalid and ineffectual, as interfering with the property rights under the mortgage.

The capitalization of a corporation is not in all cases restricted to the value of the corporate property as the Commission sees it. "But there is no provision in the Public Service Commissions Law that the securities issued shall in no instance exceed the value of the property. Indeed, it contains no expression to that effect at all, though doubtless it was intended by the law to prevent the issue of fictitious or 'watered' securities, and the Stock Corporation Law (section 55) forbids the issue of stock or bonds except for money or labor or property at their respective values." People ex rel. T. A. Ry. Co. v. P. S. Comm., 203 N. Y. 299, 310, 96 N. E. 1011.

The reasoning of Chief Judge Cullen in that case applies with great force to the questions under consideration. There the Court of Appeals held that the new company was entitled to a capitalization equal to the obligations of the old company which are represented in the new. Chapter 289, Laws of 1912, was intended to change that rule so that the former capitalization would not be the measure for new capital. But if we are right in the position taken, that enactment cannot affect the question involved here. We must construe the statutes enacted since the mortgage as not violating property rights; but if such construction cannot be given, we must still see that vested property rights shall not be impaired by them. By the terms of the latter statute the Commission may fix the fair value, taking into consideration the original cost of construction, duplication cost, present condition, earning power at reasonable rates, and all other relevant matters, etc. Certainly the fact of a sale upon bona fide competitive bids at public sale upon foreclosure of a preceding mortgage are relevant matters to be taken into consideration.

[3] Section 55 of the Stock Corporation Law permits stock to be issued for the value of property purchased, and declares that such stock shall be fully paid, and, in the absence of fraud in the transaction,

the judgment of the directors as to the value of such property purchased shall be conclusive.

Section 55 of the Public Service Commissions Law (Consol. Laws, c. 48) does not destroy that provision. The two sections may be read in harmony. The latter, in substance, requires, so far as it relates to an issue of stock for property purchased, that there must be an order of the Commission authorizing the issue, stating the amount, the purpose to which it is to be applied, and that in the opinion of the Commission the property to be paid for by the issuing of stock is or has been reasonably required for the necessary purpose of the company. The requirement that the Commission shall approve of the issue and the purposes for which it is issued was undoubtedly to prevent the issue by the company of watered or fictitious securities. An issue of stock for the purchase price at a public sale of necessary property is not watered or fictitious stock, and is not within the evil intended to be guarded against by this section. The authorization of the Commission to an issue of stock does not carry with it the certificate of the state or the Commission that the property back of the stock is worth the amount thereof. It indicates merely that the stock is issued for a proper purpose, and, if for property purchased, that it was an honest purchase, and for the necessary and proper use of the corporation. The franchises purchased, by the authority to mortgage and by the sale, were property, and all of the property purchased was actually necessary for the use of the company. When the good faith of the transaction was established, the honest judgment of the directors, under the circumstances, was binding on the Commission, and the cost to the purchaser was the fair basis of capitalization.

[4] There are other considerations which call for a reversal of the determination. The Commission should have taken into consideration, in valuing the property, its earning power at reasonable rates. The power of the Public Service Commission to fix reasonable rates involves the right to increase as well as to lower rates. The rates are to be reasonable to the public and reasonable to the corporation. City of Troy v. United Traction Co., 134 App. Div. 756, 119 N. Y. Supp. 474; People ex rel. D. & H. Co. v. Pub. Ser. Com., 140 App. Div. 839, 125 N. Y. Supp. 1000; People ex rel. Bridge Operating Co. v. P. S. Com., 153 App. Div. 129, 138 N. Y. Supp. 434; Home Telephone & Telegraph Co. v. City of Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; Murray v. Pocatello, 226 U. S. 318, 33 Sup. Ct. 107, 57 L. Ed. 239.

[5] The Commission entirely overlooked the physical position of this railroad property with reference to the city of New York, which is growing rapidly towards the territory served, and the rapidly inceasing traffic in the territory, and that the conditions existing at the sale which influenced the bidding are permanent; that the lines of the company connect with the lines owned by other important railway companies to which it is valuable as a feeder, which companies were both active competitors for the property on the sale, and naturally would be competitors upon any future sale. The bidding did not result from the mere whim or fancy or bad judgment of the bidders, but arose from

permanent conditions which made the property valuable. It was proper to deduct from the estimated reproductive cost proper depreciation resulting from age and use; also, if age and use in any way appreciated the value of the property, that should have been considered. The fact that the property was bought as a going concern evidently saved some engineering expenses, interest, and much delay. A settled roadbed, perhaps, is more valuable than one recently graded. The purchase price at public sale is very satisfactory evidence of the value of property, but is not always conclusive. It is evident in this case that in one sense the bidding proceeded upon a false basis. At the first hearing, the evidence of a competent expert, which was not questioned, indicated that the reproductive value of the physical property was $679,567.84. Later, and after the lines had been in part rebuilt, it was found that some of the property, which had been given a substantial value, was practically worthless, and that the property as a whole was not in the condition in which it had seemed to be at the time of the first valuation, and that the actual reproductive value of the property was $445,693.98. In other words, the property was found to be $233,873.86 less valuable than it appeared to be at the time of the bidding. In no other respect can the judgment of the directors of the New Haven Company or the Westchester Company in making the purchase be questioned. But we hold that under all the circumstances the purchaser was entitled to stock for the cost of the purchase.

The order is therefore reversed upon the law and the facts, with costs, and the matter remitted to the Commission for its further action. The finding of fact disapproved of, as against the evidence, is that the value of the property is only $400,000. All concur.

(158 App. Div. 886)

QUIRK v. ROCHESTER RY. & LIGHT CO.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

Appeal from Special Term, Monroe County.

Action by Anna Quirk, as administratrix, against the Rochester Railway & Light Company. From an order of the Supreme Court, setting aside the verdict in favor of the plaintiff and granting a new trial, the plaintiff appeals. Order affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Eugene Raines, of Rochester, for appellant.

George D. Reed, of Rochester, for respondent.

PER CURIAM. Order affirmed, with costs.

KRUSE, P. J. (dissenting). The question involved here, as I view this case, is not merely the broad question whether cast iron was a suitable material for boiler mud drums, or whether mud drums made of cast iron were in general use at the time this boiler was made and

put in commission, but whether this particular boiler, after it had been used eight years, under the conditions and pressure disclosed by the evidence, was reasonably safe for use at a boiler pressure of over 170 pounds, as was usual and as was put upon it at the time of the explosion, and whether the defendant was negligent in continuing its use as it did up to the time of the explosion, in the light of the experience and knowledge which the defendant had or should have had, in the exercise of reasonable care and caution.

The mere fact that cast-iron mud drums were in general use, and that some had been used longer and subjected to greater strain than the one in question, is not a controlling circumstance to show that the defendant was not negligent, and, in the absence of the circumstances and conditions respecting the use and care of the boilers, is entitled to little weight, in view of the fact that boiler inspectors of large experience, who had inspected thousands of boilers, knew of but a few isolated instances where cast-iron mud drums were subjected to a greater pressure than 160 pounds. Nor is it a sufficient answer for the defendant to say that no leaks or defects were discovered or discoverable by ordinary inspection. It is well known that cast iron is brittle, and that it deteriorates in strength with use; and it is evident that the cast iron in this mud drum had reached that stage of deterioration and weakness when it was no longer able to withstand the pressure that had been put upon it when new, since it exploded while operated under normal conditions and at no unusual pressure.

A proper regard for human life required the defendant to be actively vigilant to see that the boiler was not subjected to a greater pressure than it could bear, and even to discard its use altogether if danger could reasonably be apprehended therefrom. It would seem that the hydrostatic test would have disclosed the weakness of the boiler. Such a test would probably have ruptured the boiler, but it would have saved a human life.

I think the learned trial judge was right in submitting the case to the jury, and that the evidence sustains their verdict. I therefore vote to reverse the order and to reinstate the verdict.

(158 App. Div. 208)

MILLER v. WILKE et al.

(Supreme Court, Appellate Division, Third Department. July 8, 1913.)

LANDLORD AND TENANT (§ 124*)—WATER RENT—LIABILITY OF TENANT.

Premises supplied with the regular amount of water by the city were leased by the owner to a laundry. Water in excess of the regular amount allowed was used by the laundry in its business. *Held* that, the lease being silent on the subject, the tenant was liable for the excess water; it being an expense of the business.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 437–440; Dec. Dig. § 124.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Submission of controversy between Charles Miller and Robert F. Wilke and another. Judgment for plaintiff.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Louis F. O'Neill, of Albany, for plaintiff.

Tracey, Cooper & Townsend, of Albany, for defendants.

JOHN M. KELLOGG, J. The plaintiff rented to the defendants his premises, 792–794 Broadway, in Albany, with the buildings thereon. The premises are supplied with city water, for which there is a regular charge against the premises of $4.05 for each six months. In addition to this regular charge, which must be paid in any event, there are charges for excess water, depending upon the amount used. Apparently, by the regulations of the water bureau, the water is metered to the premises at six cents per hundred cubic feet, from which is deducted the regular water rents on the building for the six months, and the difference represents the charge for excess water. This excess water was consumed by the defendants for the purposes of their laundry business, carried on at said premises. The regular water rents on the building and the excess water charges are liens against the property, and during the occupancy the excess water charges were $60.98, which defendants did not pay, and the plaintiff was required to pay to relieve his premises from the lien caused thereby.

The plaintiff claims judgment for that amount, with interest thereon from September 23, 1912. The defendants ask a dismissal of the complaint. Each party asks costs. The plaintiff concedes his liability for the regular service charge made against the building each six months. The lease being silent on the question of water rents, that charge was evidently a tax against the property which belonged to plaintiff to pay. He has no relation to the excess water used in the laundry business; that was an expense of the business, and, like the soap used, must be supplied at the expense of the defendants using it. Under the rules applicable to the city, plaintiff has been compelled to pay for water which the defendants used, and for which they are justly chargeable. It was not a voluntary payment.

The plaintiff should therefore have judgment for the amount claimed, with interest and costs. All concur.

(81 Misc. Rep. 256.)

PEOPLE v. LAUDE et al.

(Nassau County Court. June, 1913.)

1. GAMING (§ 73*)—"BOOKMAKING"—ELEMENTS OF OFFENSE.
Laws 1910, c. 488, which prohibits a person from engaging in bookmaking, with or without writing, does not prohibit ordinary betting, even if repeated from day to day; the offense of "bookmaking" being distinct from the mere making or recording of bets.
[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 187, 188; Dec. Dig. § 73.*
For other definitions, see Words and Phrases, vol. 1, p. 842.]

2. CRIMINAL LAW (§ 493*)—OPINION EVIDENCE—WEIGHT.
Testimony that defendants were bookmakers, being a mere conclusion, was insufficient, in the absence of evidence of such acts and conduct as showed that defendants by their actual practices belonged to the class of professional gamblers called "bookmakers," to show probable cause to believe that defendants had violated Laws 1910, c. 488, which prohibits bookmaking.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1346–1352; Dec. Dig. § 493.*]

Proceeding to determine whether there is reasonable ground to believe one Laude and others guilty of bookmaking, in violation of Penal Law, § 986. Proceeding dismissed.

Charles N. Wysong, Dist. Atty., of Mineola, for the People.

NIEMANN, J. The sole question in this proceeding is whether, from the facts stated by the prosecutor and his witnesses, there is reasonable ground to believe that the defendants named in the information have been guilty of the crime of bookmaking, within the meaning of that term as used in section 986 of the Penal Law (Consol. Laws 1909, c. 40). What is bookmaking? Judge Haight, in People ex rel. Lichtenstein v. Langan, 196 N. Y. 260, 264, 89 N. E. 921, 922 (25 L. R. A. [N. S.] 479, 17 Ann. Cas. 1081), defined bookmaking as follows:

"The term 'bookmaking' originally indicated a collection of sheets of paper or other substances upon which entries could be made, either written or printed."

Prior to the enactment of the Hart-Agnew Law (Laws 1908, c. 507) bookmaking was conducted upon the race tracks of this state in the following manner: The bookmaker prepared a slate, upon which was marked the odds he was willing to lay against the various horses entered in the race. He would then stand upon a platform, hold his slate in his hand, so that it could easily be observed by the people who gathered around him, and solicit bets from the general public. Those who were seeking to bet would, if the odds quoted were to their liking, place a bet upon the horse of their selection. The entry of this bet was made by the bookmaker's clerk, who stood or was seated next to him. The manner of entering such bets was that the clerk would record upon sheets of paper the number of the admission tag held by the bettor,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the amount of the money bet at the odds quoted, and the position in which the horse was played.

This practice of betting on horse races is what was known at that time as bookmaking, and it was this very practice of bookmaking that the Legislature sought to stamp out by enacting chapter 507 of the Laws of 1908. As stated in the opinion of Judge Haight (196 N. Y. 265, 89 N. E. 922, 25 L. R. A. [N. S.] 479, 17 Ann. Cas. 1081):

"The ordinary bookmaker is a person who follows the races and becomes fully informed with reference to the skill, speed, and endurance of the horses that are entered for races. These horses are taken from one meeting to another of the various racing associations, and thereby the bookmakers are enabled to prepare a list of the horses entered for a race, with the odds so arranged as to percentages as to give them a profit, whichever the winning horse may be. These schedules are written out, and either posted or circulated by the clerks or agents of the bookmaker among the persons in attendance upon the races, and their bets solicited, and when a customer is found he is given a check indicating the horse and amount upon which he has placed his money. This was the scheme under which bookmakers were enabled to induce men, women, and persons of immature years to part with their money, thus enabling the bookmaker to reap great profits out of the public and to become the chief supporters of the races. This is the evil which the Legislature sought to prevent by the enactment of the Hart-Agnew bill, chapters 506 and 507 of the Laws of 1908."

The information in the Lichtenstein Case did not allege, nor was there any claim made by the district attorney, that the laying of the odds and publishing the same was by any written or printed instrument, but that it was oral, so that the question presented to the court was whether the laying of odds and orally announcing them constituted bookmaking within the meaning of the statute. The court held that these acts did not constitute bookmaking; but it said, in speaking of what the term "bookmaking" means (196 N. Y. 264, 89 N. E. 922, 25 L. R. A. [N. S.] 479, 17 Ann. Cas. 1081):

"But the term has been used in many ways, and in determining its meaning as used in this statute we must consider the evident purpose and intention of the Legislature in enacting the provision in question, giving to the term its ordinary and accepted meaning as it was understood at that time."

The meaning of the term "bookmaking" as it was understood at that time was this system or practice of gambling by writing or printing odds upon a slate or sheet of paper, soliciting bets from the general public, and recording the same, and it was the evident purpose and intention of the Legislature in enacting the Hart-Agnew Law to prohibit this particular practice. It was not the intention of the Legislature to prohibit the laying of odds and orally announcing them, for that was not considered *at that time* bookmaking. There being, therefore, in the Lichtenstein Case no allegation in the information, or claim by the district attorney, that the defendant did prepare and write quotations of odds on paper or other substance, solicit bets, and record the same, the crime of bookmaking was not charged, within the meaning of that term as it was understood at that time.

In People v. Lambrix, 204 N. Y. 261, 264, 97 N. E. 524, 525, the defendant was indicted in March, 1910, for bookmaking. The evidence showed that he made bets with certain persons on a horse race.

There was no evidence to show that he recorded or registered a bet in any other way than by receiving a memorandum made by the party with whom he bet. The court said:

"It is to be borne in mind, not only that the offenses with which the defendant was charged were committed prior to the amendment of the Penal Law making bookmaking and poolselling, with or without writing, a crime (Laws 1910, c. 488), but that the only question submitted to the jury was whether the defendant had recorded or registered bets. That making a bet or wager unaccompanied with record or registry was not at the time of this transaction a crime was decided by this court in People ex rel. Lichtenstein v. Langan, 196 N. Y. 260 [89 N. E. 921, 25 L. R. A. (N. S.) 479, 17 Ann. Cas. 1081]."

[1] In order to overcome this limitation, and to prohibit bookmaking, no matter how conducted, the Legislature enacted chapter 488 of the Laws of 1910, which prohibits a person from engaging in bookmaking, with or without writing. This brings us, then, to the question: What is now bookmaking? Bookmaking as it now exists is not materially different from bookmaking as it existed prior to the Hart-Agnew Law; but we may now distinguish two kinds of bookmaking, written bookmaking and oral bookmaking. The former was prohibited by the Hart-Agnew Law, while the latter was not. The latter, however, by the amendment of 1910 is now also prohibited.

Ordinary betting, even if repeated from day to day, is not bookmaking. The statutes and the decisions have made a clear distinction between the person who transacts business as a professional gamester, based upon a scheme and plan known as bookmaking, and the man who makes a bet or a series of bets in the ordinary way. People ex rel. Lichtenstein v. Langan, supra. In this case the scheme and the vice of bookmaking are pointed out. The words "with or without writing," inserted in the Penal Law by chapter 488 of the Laws of 1910, did not in any way change the fundamental requirement of the statute that, to constitute the offense, there must be bookmaking as it has always been understood. It may now be oral bookmaking, if that term may be employed; that is, bookmaking without writing. But the evidence must show that the accused belongs to the class of common gamblers, professional gamesters, whose operations are conducted upon the scheme known as bookmaking. "Bookmaking" is distinct from the mere making or recording of bets. People ex rel. Sturgis v. Fallon, 152 N. Y. 1, 46 N. E. 302, 37 L. R. A. 419.

[2] The operatives of the Burns Detective Agency in the course of their testimony referred to the defendants as bookmakers. But a mere designation by the witnesses of these men as bookmakers has no legal force; it is a mere conclusion of the witnesses. There must be evidence of such acts and conduct of the defendants as show that by their actual practices they belong to the class of professional gamblers called "bookmakers." The evidence of these witnesses fails to show such acts and practices as would authorize a finding that there is probable cause to believe that the accused persons have committed the offense of bookmaking, and therefore the court is unable to follow them in their conclusion that the defendants are bookmakers.

What these defendants did constituted, no doubt, a form of gam-

bling; but it must be borne in mind that not every form of gambling is prohibited in this state. Lyman v. Shenandoah Social Club, 39 App. Div. 459, 57 N. Y. Supp. 372. In fact, the constitutional convention of 1894, by an overwhelming vote, refused to make such a sweeping prohibition. Proceedings of Constitutional Convention 1894, vol. 6 pp. 2585, 2601. Here we are dealing with a specific and distinct form of gambling, which consists of certain specific acts distinguishing this form of gambling from every other form of gambling, and specifically designated in the statute as "bookmaking." The information in this case charges that particular statutory offense, and, as the evidence falls short of establishing the crime alleged to have been committed, the proceeding must be dismissed.

Proceeding dismissed.

(81 Misc. Rep. 253.)

PEOPLE v. DELAWARE, L. & W. RY. CO.

(Onondaga County Court. June, 1913.)

WEIGHTS AND MEASURES (§ 5*)—SALE OF COAL—CERTIFICATE OF WEIGHT.

Laws 1911, c. 825, § 384, which makes it a misdemeanor to deliver coal, without also delivering to the purchaser a ticket stating the weight thereof, requires the delivery of the ticket, not only where a sale is made to the ultimate consumer, but also where made to a retail dealer.

[Ed. Note.—For other cases, see Weights and Measures, Dec. Dig. § 5.*]

Appeal from Court of Special Sessions.

The Delaware, Lackawanna & Western Railway Company was convicted of violating Laws 1911, c. 825, § 384, by failing to deliver tickets for coal sold, and appeals. Affirmed.

Charles V. Byrne, of Syracuse, for appellant.

George H. Bond, Dist. Atty., of Syracuse, for the People.

ROSS, J. The section in question reads as follows:

"Sec. 384. Delivery Tickets. No person, firm or corporation delivering coal, coke or charcoal shall deliver or cause to be delivered any quantity or quantities of coal, coke or charcoal, without each such delivery being accompanied by a delivery ticket, and a duplicate thereof, on each of which shall be in ink, or other indelible substance, distinctly expressed in pounds the quantity or quantities of coal, coke or charcoal contained in the cart or wagon or other vehicle used in such delivery, with the name of the purchaser thereof and the name of the dealer from whom purchased. One of such tickets shall be delivered to the purchaser specified thereon, and the other of such tickets shall be retained by the seller."

There is no dispute as to the facts, which are very simple. The defendant is a foreign corporation engaged in mining and shipping coal to various points, and has an office and yards for the storage of coal in Syracuse, N. Y. The Fred R. Peck Company is engaged in the city of Syracuse in dealing in coal and delivering the same as ordered to its customers. An employé of the Fred R. Peck Coal Company brought to the defendant an order for one ton of coal. He handed the order to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an employé of the defendant, had his wagon weighed on the scales in the yard of the defendant, drove to the coal shute, and without any assistance loaded his wagon with the coal he desired, then had the coal and wagon weighed, and started to deliver the coal to a customer of the Fred R. Peck Coal Company.

No ticket was given to the Fred R. Peck Coal Company's employé and no question is raised but that the Fred R. Peck Company intended and subsequently did deliver a ticket to its customer, so that the question narrowly presented is whether the statute in question requires the delivery of the ticket and duplicate mentioned in the statute by the wholesale to the retail dealer; it being the contention of the defendant that the statute in question was intended only as a protection to the ultimate consumer, in other words the man who burns the coal, and, of course, in this case the defendant was under no statutory obligation or duty to Mr. Buckley, the customer of the Fred R. Peck Company.

The defendant advances an ingenious argument that, as the statute refers "to the cart, wagon or other vehicle used in such delivery," the case of delivery from other receptacles is excluded. The above words of description do not necessarily mean the cart, etc., owned or controlled by the seller, but mean the cart used in such delivery, by whomsoever owned or controlled. In other words, the purchaser has the same need of protection, whether the coal is loaded into his wagon or into his cellar. I know of no sufficient reason why the intermediate dealer should not be protected. There is certainly nothing in the statute that indicates that the small dealer should not be protected as well as the large consumer. There is as much necessity for protecting the small dealer, who buys a few tons to retail in small quantities, as there is to protect the large manufacturer, who presumably has means of weighing the coal and protecting himself.

The language of the statute is very explicit, and admits of no reasonable interpretation, except that every sale shall be accompanied by a delivery ticket and duplicate thereof, one of which shall be delivered to the purchaser. In this case the purchaser was the Fred R. Peck Company. Incidentally it may be stated that there was no reason why the Fred R. Peck Company in the case under consideration could not have consumed the coal. Except that the company is engaged in dealing in coal, no fact was brought home to the defendant that indicated that such was not the case.

Judgment affirmed.

(158 App. Div. 899)

VENNER v. BELMONT.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. COSTS (§ 164*)—AMOUNT—EXTRA ALLOWANCE.
Where the action was an ordinary action for libel, and the rules of law governing it simple and elementary, it was not a difficult and extraordinary case, within the statute allowing additional costs for such cases, although the defendant had expended a large amount of money investigating the past life of plaintiff, seeking matter to plead in justification.
[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 620-636; Dec. Dig. § 164.*]

2. LIBEL AND SLANDER (§ 101*)—JUSTIFICATION—PRESUMPTION.
The presumption is that, when one publishes libelous matter, he already possesses information justifying the charge.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 150, 273, 275-280; Dec. Dig. § 101.*]

Appeal from Special Term, Kings County.

Action by Clarence H. Venner against August Belmont. Plaintiff moved for leave to discontinue on payment of costs, and defendant moved for an extra allowance. Leave to discontinue granted, and extra allowance denied, and defendant appeals. Affirmed.

The opinion of Blackmar, J., at Special Term, referred to by the court, is as follows:

[1] This is not a difficult and extraordinary case, within the meaning of the section of the Code authorizing an extra allowance. It is an ordinary action for a libel. The rules of law governing it are simple and elementary. It is true that the defendant has expended large sums of money in investigating the past life of the plaintiff, seeking matter to plead in justification, and has succeeded in discovering enough to enable him to set forth in his answer a biography of the plaintiff stretching over 118 printed pages.

[2] The presumption should be that, when one publishes libelous matter, he already possesses information justifying the charge. The fact that an expensive and elaborate investigation is necessary to secure evidence in justification, while it may indicate that the defense is difficult, does not make the case a difficult one.

Motion to discontinue on payment of taxable costs granted. Motion for an extra allowance denied.

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

Nicoll, Anable, Lindsay & Fuller, of New York City (De Lancey Nicoll and Courtland V. Anable, both of New York City, of counsel), for appellant.

J. Aspinwall Hodge, of New York City, for appellee.

PER CURIAM. Order affirmed, on the opinion of Blackmar, J., at Special Term.

(157 App. Div. 855.)

SCHWEID et al. v. STORANDT.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. BROKERS (§ 60*)—RIGHT TO COMPENSATION—INVALIDITY OF CONTRACT.
Where a broker has procured a purchaser who is able and willing to buy the land at a price and upon terms satisfactory to the owner, although no enforceable contract has been entered into, and the sale there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after fails through the fault of the owner, the broker is entitled to his commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 91; Dec. Dig. § 60.*]

2. Brokers (§ 62*)—Right to Compensation—Default of Principal.

An owner of a block gave an exclusive agency to brokers for its sale at an agreed commission. Thereafter the owner, by mistake, informed the brokers that the block contained one more apartment than it actually did. On the strength of that statement the brokers procured a purchaser who was able and willing to buy at a price and upon terms satisfactory to the owner, although no enforceable contract was entered into. After discovering the misrepresentation as to the number of apartments, the purchaser refused to close the deal. *Held*, that the failure of the deal was due to the fault of the owner, and the brokers were entitled to their commission.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 62.*]

Foote, J., dissenting.

Appeal from Trial Term, Monroe County.

Action by Bernard A. Schweid and another against Carl W. Storandt. Judgment for plaintiffs, and defendant appeals. Affirmed after reargument.

See, also, 155 App. Div. 947, 140 N. Y. Supp. 1144.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Frederick A. Mann, of Rochester, for appellant.

George A. Carnahan, of Rochester (Carnahan, Adams, Jameson & Pierce, of Rochester, of counsel), for respondents.

ROBSON, J. There is no controversy over the question of plaintiffs' employment by defendant as real estate brokers to sell certain real estate owned by defendant, known as the Berlin Block, situate in the city of Rochester, N. Y., and that, if plaintiffs procured a purchaser for such property at the price of $50,000 the defendant would pay them as their commissions the sum of 2½ per centum upon the purchase price. This is admitted by defendant's answer. Plaintiffs further allege that they did in fact procure and produce a purchaser ready, willing, and able to purchase said property at that price upon terms of payment thereof which were accepted by the defendant. The defendant in his answer denies this. The material question to be decided, therefore, is whether plaintiffs did in fact produce such purchaser.

[1] Plaintiffs did procure and submit to defendant a written paper signed by one A. William Black as follows: "Black, Elwood & McCarthy, A. William Black"—which was in form an offer to purchase the premises for $50,000, to be paid and secured as stated therein. Defendant accepted the offer in writing signed by him, but included in the acceptance two further provisions, that $1,000 be deposited "to bind the bargain, transfer to be made on or before March 28, 1912." While the offer appears in terms to be that of three persons, viz., Black, Elwood & McCarthy, when McCarthy's attention was called to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it by service upon him of defendant's acceptance thereof, he at once repudiated the offer as having been made or authorized to be made by him, and it is not claimed that he can be considered as a party thereto. Shortly thereafter, and on March 21, 1912, a meeting was had at which the defendant, one of the plaintiffs, A. William Black, Elwood, and one Louis Black were present. As a result of negotiations at that interview it was agreed that, as McCarthy was not bound as a party to the offer, Louis Black should take his place as a party to the deal; but Louis Black did not in fact sign the offer. The $1,000 required in defendant's acceptance was thereupon paid to him, the amount being furnished by the two Blacks and Elwood, and paid by the check of A. William Black. The date when the transaction was to be closed was also agreed upon.

At this point, if this were all of the transaction, it would seem to be clear that plaintiffs had procured and produced a purchaser willing to buy the property at a price and upon terms satisfactory to defendant; and the ability of these parties to perform is shown. On the face of the papers A. William Black and Elwood were bound by a written contract to purchase on the terms agreed; and it was further agreed that Louis Black was to be substituted in place of McCarthy as one of the purchasers, though not, perhaps, as pointed out by Mr. Justice Foote, actually a party to any written agreement to purchase, and for that reason, doubtless, his agreement would not be an enforceable one against him for the purchase of the property. But, if these parties were both able and willing to perform the terms of the agreement, then, of course, though all may not in fact have been bound by an agreement to purchase enforceable by defendant, yet, being both able and willing to purchase, if the sale did not in fact materialize, due to the after fault of the defendant or his refusal to comply with the terms thereof, the plaintiffs would still have completed their brokers' contract and earned their stipulated brokers' compensation. Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 384, 38 Am. Rep. 441. The sale was in fact not consummated, and the refusal of the prospective purchasers to comply was, I think, due entirely to circumstances for which the defendant owner was solely responsible.

[2] The original brokers' contract described the property simply as the Berlin Block and its location; but it appears that a considerable part of the building was constructed for and used and let as apartments. Its apparent value for rental purposes depended to some extent upon the number of rentable apartments it had, and its investment value also depended upon the amount of rentals it produced. Some months after defendant made the brokers' contract with plaintiffs, and while they were engaged in their efforts to sell the property, the contract being still in full force, defendant furnished them information as to the number of apartments there were in the building and the sum for which they were separately rented. This information was embodied in defendant's presence from his dictation in a written statement prepared by one of the plaintiffs. The purpose for which this information was obtained and the statement prepared was known to defendant: i. e., that it was to be used by plaintiffs in negotiation

with prospective purchasers as a statement showing what the building actually was. The effect of this transaction by defendant with the agents was, it seems to me, to enlarge to that extent the terms of the agency contract, and the representations thus made were thereafter to be treated and considered in relation to the original contract of agency, the same as if they had been actually included therein. The purpose for which the statement was to be used was recognized by defendant, and therefore plaintiffs had at least implied authority to use it as a representation made by defendant with like effect as though originally a part of the agency contract. If it had been contained in the original contract of agency, there could be little doubt that, if false, and the agent relying upon the truthfulness of the representation, and having secured an able and willing purchaser, who also relied on the truthfulness of the representations, and who, on learning their falsity, for that reason refused to purchase, the agent would have earned his commissions. Dotson v. Milliken, 209 U. S. 237, 28 Sup. Ct. 489, 52 L. Ed. 768.

Plaintiffs, using this statement for the purpose for which it had been prepared, showed it to the prospective purchasers, or some of them, before the offer to purchase was made, and Black at the meeting on March 21, 1912, above referred to, asked defendant if the statement had been made by his authority, and was, in effect, assured by him that such was the fact. The agreement to purchase, hereinbefore referred to, was then made, in apparent and warranted reliance on the truthfulness of the statement. It is admitted that this statement was in fact false, in that it represented there was one more apartment than the building actually contained, and the apparent rentals as stated therein were correspondingly increased by the amount of rental of that apartment. After the offer was accepted in the manner and form above described, the prospective purchasers ascertained the incorrectness of the statement. When the parties thereafter met at the agreed time and place to complete the transaction, the purchasers declined to complete the transfer, basing their refusal practically on two grounds, one of which was the misrepresentation in the statement above referred to. It is not necessary to refer to the other objection advanced by them, for the reason that its consideration as a ground upon which such refusal could properly be based was withdrawn by the court in his charge to the jury from their consideration. Both parties seem to have accepted the court's holding in this respect as correct, for no exception was taken to it, and no request to charge otherwise was made. The court further charged the jury that this misrepresentation, concededly made, and for which either the plaintiffs, or the defendant, were responsible, furnished sufficient ground for the purchasers' refusal to complete the transfer. He further left it to the jury to pass upon as a question of fact whether plaintiffs or the defendant were responsible for the misrepresentation, charging that, if the plaintiffs were responsible for it, then there could be no recovery in this action, but, if it was chargeable to defendant, then plaintiffs were entitled to their commissions. The finding of the jury in favor of plaintiffs is amply supported by the evidence.

It follows, if I am correct in my view of the law applicable to this case, that plaintiffs were not required to show that defendant had an enforceable contract with the purchasers, but that it was shown that they had fulfilled their contract with defendant by producing purchasers who were ready, able, and willing to buy the property on defendant's own terms, and that the sale was not completed for the single tenable reason that defendant had by material misrepresentation of the property, for which he alone was responsible prevented its actual consummation.

The judgment and order should be affirmed, with costs. All concur, except

FOOTE, J. (dissenting). Plaintiffs are real estate brokers. They bring this action to recover $1,250 as their commissions for effecting a sale of defendant's real property, called the Berlin Block, consisting of stores and apartments, at the corner of Monroe and Clinton avenues in the city of Rochester. The complaint alleges that plaintiffs were employed by defendant to sell this property, and that defendant agreed, if plaintiffs produced a sale thereof, he would pay them as their commission the sum of 2½ per cent. upon the purchase price; also that on or about March 19, 1912, plaintiffs procured and produced to defendant a purchaser ready, willing, and able to purchase said property at the price of $50,000 and upon certain terms of payment, which price and terms of payment were accepted by defendant. Defendant by his answer admits the employment, and by denial puts in issue the other allegations. The employment proved was in writing, dated April 20, 1911, and gave plaintiffs the exclusive right to sell this property for a period of one year, commission to be 2½ per cent. on the sale price, but no price or other terms of sale were stated in the writing.

The jury were instructed in effect that a contract of sale was effected through plaintiffs' agency between A. William Black and Frederick T. Elwood, as purchasers, and defendant, for the price of $50,000, which would have been binding and enforceable, except for the fact that during the negotiations plaintiffs had represented to these intending purchasers that the block contained 17 apartments to rent to tenants, when there were in fact but 16, and that the rentals were greater by the amount of the rent of one apartment than they in fact were. A written statement of the number of apartments and the amount of the rentals had been prepared by plaintiffs and submitted to the proposed purchasers during the negotiations, and it was not disputed that the statement was erroneous in the respects mentioned. Defendant had given to plaintiffs the information on which this statement was prepared by reading it from his books, and it was a disputed question as to whether the conceded error was due to defendant's mistake in reading the items to plaintiffs from his books, or plaintiffs' mistake in writing them down. No claim was made that this error, whether by one party or the other, was intentional. The jury were instructed that by reason of this error there was such a misrepresentation of the property that the purchasers were not bound to perform,

and were justified in their refusal to complete the purchase on that ground. They were further instructed that, if the error by which the number of apartments was misrepresented to the purchasers was that of defendant, plaintiffs were entitled to recover their commissions, but, if it was the mistake of plaintiffs, they were not entitled to recover anything. Thus it was ruled as matter of law that an enforceable contract for the sale of defendant's property had been made, and that these brokers had fully performed their contract, and were entitled to their commissions, unless the misrepresentation which relieved the purchasers from performance was plaintiffs' fault.

The sole question left to the decision of the jury was as to which of the parties was responsible for the mistake in the statement of the number of apartments and the amount of the rentals. Two principal questions are presented by this appeal: (1) Was any contract of sale made, to which defendant had agreed, which he could have enforced, but for the misrepresentations? (2) If there was an enforceable contract but for the misrepresentations, were plaintiffs entitled to recover an amount equal to their commissions in this action? There is also a further question as to whether defendant is in a position on this record to raise the questions which he urges on this appeal under the exceptions he took at the trial.

I am of opinion that no enforceable contract was made between defendant and any of the proposed purchasers. Plaintiffs, a few days prior to March 16, 1912, had interviews with A. William Black, Frederick T. Elwood, and John McCarthy, as a result of which on March 16, 1912, A. William Black prepared and delivered to plaintiffs an offer in writing to purchase defendant's property for the sum of $50,000; $7,000 to be paid at the time the title was transferred, $3,000 within one year, secured by the promissory notes of purchasers at 3 to 12 months, $37,000 by taking the property subject to two mortgages then thereon, and the balance, $3,000, to be secured by mortgage of the purchasers payable in 5 years, with interest at 5 per cent., the offer to hold good until Tuesday, March 19th, at 6 p. m. This offer was addressed to plaintiffs and signed by A. William Black, as follows: "Black, Elwood & McCarthy, A. Wm. Black." Plaintiffs presented this writing to defendant, who on March 19th, at about 4:30 p. m. signed and delivered to plaintiffs the following, written below the written offer and on the same sheet:

"Acceptance, March 19, 1912, 4:30 P. M.

"I hereby accept the above offer, you to deposit $1,000 to bind bargain, transfer to be made on or before March 28, 1912. Carl W. Storandt."

Three copies of the written offer and this acceptance were made, each of which were signed by defendant and taken by plaintiffs before 6 p. m. of March 19th, and one copy delivered to each of the proposed purchasers. At that time McCarthy learned for the first time that Mr. Black had assumed to use his name in making the written offer, and McCarthy then and ever after refused to be bound by the offer or to be a party to the purchase of the property. No proof was given on the trial that Black had received any authority to use McCarthy's name, and it was conceded upon the trial that McCarthy was not bound

by the written offer, and that defendant could not hold him liable thereon.

It is to be observed that defendant's acceptance is not an absolute one, but is made conditional upon the proposed purchasers agreeing to make a cash deposit of $1,000 and to consent that the transfer be made on or before March 28th. These modifications were never agreed to in writing by Black or Elwood, nor was any notice given to defendant that McCarthy's name had been signed to the offer by Black without authority, and that McCarthy had repudiated the offer.

On March 21st, at plaintiffs' request, defendant went with plaintiffs, or one of them, to the office of A. William Black, and there met A. William Black, Elwood, and Mr. Louis Black, the father of A. William Black. It was there stated to defendant that Mr. McCarthy "had got cold feet," and did not wish to go on with the transaction, and that Mr. Louis Black was to take his place. Defendant made no objection to this. A. William Black inquired of defendant whether he had furnished plaintiffs the information from which plaintiffs had made up a statement of the number of apartments in defendant's block and the rentals, and defendant replied that he had, that he took it off his books and gave it to plaintiffs. Then defendant stated that he was the principal owner of a corporation, the Monroe Theater Company, then occupying part of the Berlin Block, and stated that he thought the Monroe Theater Company was entitled to the first lease, and at a later meeting between the same parties on the same day a five-year lease to the Monroe Theater Company was prepared and signed by defendant in the name of that company, and defendant also signed in his own name a personal guaranty of the obligations to be assumed by the Monroe Theater Company. At one of these meetings on that day, but which one does not clearly appear, A. William Black drew his check to defendant for $1,000, which defendant accepted as the $1,000 to be paid to bind the bargain stated in his acceptance of March 19th, and at that time it was arranged that the parties were to meet on March 28th at the office of the attorneys for Messrs. Black to close the transaction.

The written offer and acceptance had thus been supplemented by an oral agreement by which Louis Black was to be substituted in place of McCarthy as one of the purchasers, and defendant's requirements that $1,000 should be paid to bind the bargain and that the matter should be closed on March 28th were agreed to. The closing of the transaction was deferred by mutual agreement until April 8th, when the parties met at the office of the attorneys for Messrs. Black. A day or two before this meeting defendant had notified the Messrs. Black and Elwood that the Monroe Theater Company withdrew from its offer to take a lease, and that he withdrew his offer to guarantee such a lease. Defendant attended the meeting of April 8th, with his counsel, with a deed of the property executed and ready for delivery, and with certain other documents necessary to enable him to give the title which he was to furnish; but Messrs. Black and Elwood refused to complete the transaction on two grounds: (1) Because defendant had withdrawn the offer of the Monroe Theater Company to take a

lease; and (2) because of the misrepresentations as to the number of apartments and the rentals.

It clearly appears from the testimony that the purchasers refused to consummate the transaction, unless defendant would have the Monroe Theater Company take a five-year lease of a part of this block, which he should personally guarantee, and make a reduction in the price of the block of about $2,500 on account of its containing one less apartment than had been represented to them. The purchasers' attorneys had also raised some objections to defendant's title, but no consideration was given to the question as to whether the papers which defendant's attorneys had there present ready for delivery were sufficient to show good title. As defendant was unwilling to comply with the purchasers' other demands, the parties separated, and shortly thereafter defendant began an action for specific performance against the two Blacks, Elwood, and McCarthy, which was afterward discontinued.

It is apparent that Mr. Louis Black could not be held by defendant to performance of any contract to purchase. He signed no agreement in writing, nor was one ever signed in his name. An oral agreement for the purchase of land is not enforceable, because of the statute of frauds, which requires such agreements to be in writing. But A. William Black and Elwood could not be held liable alone, and compelled to perform the contract as if they were the only purchasers. They had never agreed to purchase the property and assume the obligations for the purchase price, except in association with others. Their written offer was to purchase with McCarthy, and they consented that Louis Black be substituted for McCarthy, and to purchase with Louis Black. Moreover, defendant has never agreed to accept A. William Black and Elwood as purchasers, and to take their promissory notes and mortgage for the part of the purchase money not to be paid in cash. It was incumbent upon plaintiffs to show that they had made an enforceable contract, or that they had secured a purchaser or purchasers for the property for the price and upon terms satisfactory to defendant, and that the sale was not completed because defendant refused to perform. Platt v. Kohler, 65 Hun, 557, 20 N. Y. Supp. 547; Alt v. Doscher, 102 App. Div. 344, 92 N. Y. Supp. 439, affirmed 186 N. Y. 566, 79 N. E. 1100; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441. It was the law of the case that the proposed lease to the Monroe Theater Company, to be guaranteed by defendant, was no part of the contract of sale, for the jury were instructed that the talk about this lease was an after consideration, and that the purchasers could not require defendant to make it. Hence, if there had been no misrepresentations as to the number of apartments, still there was no contract which defendant had agreed to, either orally or in writing, which was enforceable by him against any of the proposed purchasers.

As there was no enforceable contract to which defendant had agreed, and no proposed purchaser who was ready and willing to take the property for a price and on terms which defendant had expressed his willingness to accept, plaintiffs failed to perform their contract as brokers and were not entitled to commissions as upon a sale effected by

them. Plaintiffs' contract of employment was made in writing on April 20, 1911. It gave them the exclusive right to sell this real property of defendant for a period of one year from that date. The writing did not contain any description of the property, except its location and street number, nor is it claimed that any representations were then made to plaintiffs by defendant as to the number of apartments or the rentals. The negotiations to sell the property to Black, Elwood & McCarthy were had nearly a year after the plaintiffs' employment, and the statement as to the number of apartments and rentals which plaintiffs submitted to these purchasers bears date February 28, 1912, and we may assume was made on that date. What the plaintiffs undertook to do was to sell the property as it was and at a price satisfactory to defendant. Had the defendant misrepresented the property to them at or before the time they made their contract with him to sell it as brokers, then they might have ground for complaint, if they entered upon the performance of their contract relying upon those representations and could show that they had been damaged on account thereof; but here their contract was to sell the block as it was, without reference to the number of apartments or the amount of the rentals. It is a performance of that contract alone which would entitle them to compensation in the way of commissions. A misrepresentation, if one was made to them by defendants in February, 1912, as to the number of apartments in the block, was no part of their contract of employment, nor did it excuse performance on their part. If it affords them any cause of action for damages, the damages certainly cannot be based upon the claim that it prevented them from performing their contract. The rule undoubtedly is that, if the owner prevents the broker from earning his commissions, it is a waiver of full performance of the broker's contract, and he is entitled to recover as if he had performed; but here the brokers' contract related to the property as it actually was, not as it was represented to be nearly a year later, and there is no proof that plaintiffs' proposed purchasers were ever willing to buy this property at $50,000, which was defendant's price, with the number of apartments it actually had. On the other hand, the evidence shows that they were unwilling to pay that price for the property. The mistake in stating the number of apartments, if it was defendant's, did not interfere with plaintiffs' performance of their contract. They were still at liberty to find a purchaser for the block as it was, with 16 apartments, at defendant's price of $50,000, and thus earn their commissions.

The cases of Glentworth v. Luther, 21 Barb. 145, Lewis v. Mansfield Grain & El. Co. (Tex. Civ. App.) 121 S. W. 585, Gillespie v. Dick (Tex. Civ. App.) 111 S. W. 664, and Hugill v. Weekley, 64 W. Va. 210, 61 S. E. 360, 15 L. R. A. (N. S.) 1262, were all cases where formal written contracts of sale were entered into between the owner and the purchaser, valid and enforceable on their face, but which could not be enforced because of false and fraudulent representations made by the owner to the purchaser to induce the making of the contract. The case of Sotsky v. Ginsburg, 129 App. Div. 441, 114 N. Y. Supp. 114, is a case where the broker procured a purchaser ready and will-

ing to purchase upon the owner's terms, but before the execution of formal contract the owner refused to perform, except at an advanced price. The cases of Hess v. Investors' & Traders' Realty Co., 67 Misc. Rep. 390, 123 N. Y. Supp. 243, and Dotson v. Milliken, 209 U. S. 237, 28 Sup. Ct. 489, 52 L. Ed. 768, are cases where the owner's misrepresentations as to his property were made to the broker at the time of his employment, and hence entered into his contract of employment. The distinction between these cases and the case before us is apparent, and neither of them is an authority to the contrary of the views of the present case already stated.

If I am right in the conclusion that no contract of sale was negotiated by plaintiffs to which defendant had agreed, and which but for the misrepresentations as to the number of apartments he could have enforced, then the case falls within the rule laid down in the cases of Curtiss v. Mott, 90 Hun, 439, 35 N. Y. Supp. 983, Diamond & Co. v. Hartley, 38 App. Div. 87, 55 N. Y. Supp. 994, and 47 App. Div. 1, 61 N. Y. Supp. 1022, Hausman v. Herdtfelder, 81 App. Div. 46, 80 N. Y. Supp. 1039, Keough v. Meyer, 127 App. Div. 273, 111 N. Y. Supp. 1, and Davis v. Gottschalk (Sup.) 141 N. Y. Supp. 517, to the effect that, where the owner's misrepresentations to the purchaser in reference to the property lead to a refusal of the purchaser to consummate a sale, the broker has not earned his commissions or performed his contract, where the misrepresentations are no part of the broker's contract of employment.

At the close of plaintiffs' case, defendant's counsel moved for a nonsuit, on the ground that plaintiffs had failed to establish a cause of action, and on the ground that it did not appear that the offer to purchase the property had been signed by all the proposed purchasers, or by any one in their behalf. The motion was denied, and an exception taken. At the close of all the evidence defendant's counsel moved for a nonsuit and a direction of a verdict on the same grounds, among others, which motion was denied, and defendant excepted. Thereupon plaintiffs' counsel moved for a direction of a verdict in favor of plaintiffs, and before the court had ruled upon that motion defendant's counsel asked to go to the jury upon all the facts in the case. For the reasons stated, I am of opinion that defendant's motion for a direction of a verdict should have been granted, and I think the exception to the denial of this motion was not waived by the request, subsequently made, that the questions of fact should be submitted to the jury, in view of the fact that this request was made pending the consideration of plaintiffs' motion for a direction of a verdict.

Defendant's counsel also requested the court to charge that, if Louis Black could not be held liable, then there was no contract. This request was refused, and defendant excepted. I think this exception was well taken, and that upon these exceptions defendant was entitled to have his motion to set aside the verdict and for a new trial granted by the court.

It is suggested in the prevailing opinion that misrepresentation by defendant to plaintiffs as to the number of apartments may be treated as a modification of plaintiffs' contract of employment. I think it

may not be so treated as matter of law. It was not so treated at the trial, and no such question was submitted to the jury, nor has it been suggested by counsel. This misrepresentation was treated at the trial as an unintentional one, and a mere mistake. If it had the effect to modify the contract between the parties, it would need to be found by the jury that the parties so intended. It may well be that the parties would have had more evidence upon the question of intention, if that question had been raised at the trial.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

(158 App. Div. 884)

SHEPARD v. PENNSYLVANIA R. CO.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

Appeal from Trial Term.

Action by Mart B. Shepard, administrator of Frank J. Brown, deceased, against the Pennsylvania Railroad Company. From a judgment for defendant, and from or denying a motion for new trial, plaintiff appeals. Affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

John T. Ryan, of Buffalo, for appellant.

Frank Rumsey, of Buffalo, for respondent.

PER CURIAM. Judgment and order affirmed, with costs.

KRUSE, P. J. (dissenting). The plaintiff's intestate was killed by being thrown or falling from a moving freight car, upon which he was standing, while employed as a brakeman in switching cars in defendant's yards, in Buffalo.

The principal question respecting the defendant's negligence, upon which this action is founded, is whether the engineer moved or jerked the cars suddenly, as the plaintiff claims, causing the brakeman to fall and lose his life, or backed carefully and slowly, as the engineer claims, obeying the so-called back-easy signal, which he admits receiving. There was a conflict of evidence upon that question, and if the jury actually found against the plaintiff thereon, as the defendant contends, I should say their finding ought not to be disturbed, if that conclusion was reached without being improperly influenced by outside matters, to which I will now call attention.

The defendant alleged in its answer, and gave proof against plaintiff's objections and exceptions, that the deceased was a member of its relief department, which provides for accident and sick benefits for the member, and in case of his death for the payment of death benefits to his designated beneficiary. By the terms of his membership the deceased agreed that the acceptance of benefits from the relief fund should operate as a release of all claims for damages against the defendant for injuries or death, and that he or his legal representatives

would execute such further instrument as necessary formally to evidence such acquittance. He designated as such beneficiaries, in case of death, his two daughters, or the survivor, providing that, if either was under the age of 21 years, the share of such a one should be payable to his brother in trust for the child, and that the receipt and release of his brother should constitute a further discharge of all liability.

After his death $1,000 was paid out of the relief fund to the brother, neither daughter being then 21 years of age, and the brother acknowledged payment thereof as trustee in full satisfaction and discharge of all claims arising from the death of the intestate against the defendant. It does not appear that either daughter, or her guardian, or the administrator of the intestate, ever received any of the money so paid to the brother, or in any way recognized the trust, or the payment of the money as a payment to them; but the undisputed evidence is quite to the contrary.

While the defendant in its answer specifically alleged that, by reason of the membership agreement and payment of the $1,000, the defendant was released and acquitted from any obligation or liability to the plaintiff on account of the death of the intestate, its counsel frankly conceded upon the trial that the payment of the money to the trustee, and the release executed by him, would not bind the infant children; but he insisted that the evidence showing these facts was competent in mitigation of damages, and it seems to have been received for that purpose.

In his charge the learned trial court said to the jury, in commenting upon the membership of the deceased and payment of the $1,000, that the defendant did not claim that the right to recover in the action was interfered with, but that the payment of the $1,000 at the request of the deceased should be allowed for in mitigation of the amount to be recovered here, adding that the plan is laudable, and no doubt resulted in great good to the employés and their families, and that the jury had the right to consider it, but the payment was not to be treated as a credit.

I think the deceased could not make a contract binding upon his administrator or his next of kin, so as to bar a right of recovery or cause of action such as this, which his personal representatives might have; and the learned counsel for the defendant, as I understand his position, concedes that to be so, but insists now, as he did upon the trial, that the payment of the $1,000 may be considered in mitigation of damages.

The case of Stuber v. McEntee, 142 N. Y. 200, 36 N. E. 878, is cited as an authority for his contention by counsel for the defendant; but in that case the money was received by the person who was subsequently appointed the administrator, and it was held that the defendant was entitled to prove the payment and its application to the expenses of the funeral and burial of the deceased, and to be credited therewith by the jury in making its estimate of the damages which the plaintiff should recover. That is not this case.

I think the evidence fell short of making it proper for the jury to consider in mitigation of damages or otherwise. The plaintiff's counsel objected from time to time as the evidence was offered, and finally

moved to strike it out, which was denied; the plaintiff taking exceptions to the various rulings. I think the evidence should not have been received, and in any event it should have been stricken from the case and not considered by the jury at all.

Of course, if the plaintiff or persons beneficially interested in the recovery had adopted the contract which their intestate assumed to make with the defendant railroad company, or the moneys had actually been received by them, or applied in such a way as to lessen their damages, a different question would be presented. But that question is not here, and the effect of these circumstances upon the plaintiff's right of recovery need not be determined. Here neither the plaintiff, who is the general guardian of the children, as well as the administrator of the intestate, nor any of the beneficiaries, have ever adopted the contract, or recognized it as binding upon them, or received any of the moneys.

It is, however, contended on behalf of the defendant that the jury, having found a verdict of no cause of action, must have reached the conclusion that the plaintiff had failed to make out a case. That would seem to be so unless the jury reached the conclusion that the damages did not exceed $1,000 and took into account the payment of the $1,000. It is true that the jury were told that the payment of the $1,000 should not interfere with the plaintiff's right of recovery, and should not be treated as a credit. But they were also told that the defendant claimed that the $1,000 should be allowed for in mitigation of the amount to be recovered, and the jury was expressly permitted to consider the evidence. While the finding of $1,000 damages would seem small, we cannot say that it is so beyond the bounds of reason that the jury may not have reached that conclusion. Besides his two daughters, the intestate had a wife; but he had not lived with her for some time, and her whereabouts, so far as the record discloses, are unknown. He had the two daughters by a former wife. They lived with him, and kept house for him. He was 45 years of age at the time of his death. The older daughter was 19, and the younger 13, years of age. The older daughter has since married.

While it is entirely probable that the jury found that the plaintiff failed to make out a case, I think we would hardly be warranted in so holding, under all the circumstances. In any event, if the testimony was not competent, as I think it was not, upon the question of damages, I am unable to see what useful purpose it could serve in the case. Indeed, I think it was prejudicial to the plaintiff upon the main question to have the evidence in the case.

For the reasons stated, I think the judgment and order should be reversed, with costs to the appellant to abide the event.

(158 App. Div. 5.)

NEPONSET NAT. BANK v. DUNBAR et al.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. BILLS AND NOTES (§ 49*)—ACCOMMODATION NOTES—LIABILITY OF MAKER.
The maker of an accommodation note is not liable thereon, when in the hands of the one for whose accommodation it was made.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 66; Dec. Dig. § 49.*]

2. BILLS AND NOTES (§ 518*)—ACCOMMODATION NOTE—PERSON ACCOMMODATED—EVIDENCE.
Evidence in an action on a note *held* not to show it was made for the accommodation of plaintiff bank, but to show it was made for the personal accommodation of its president.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816–1820; Dec. Dig. § 518.*]

3. EVIDENCE (§ 471*)—OPINIONS.
Witnesses may not testify to their "understanding" of agreements, without giving the basis therefor, or give explanation of the meaning of letters written by them, thus usurping the province of the jury.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471;* Witnesses, Cent. Dig. §§ 833, 834.]

Appeal from Trial Term, Erie County.

Action by the Neponset National Bank against Harris T. Dunbar and another, as executors of Charles F. Dunbar, deceased. From a judgment for defendants, on a special verdict, and from an order awarding a special allowance of costs to defendants, and from an order denying a motion for new trial, plaintiff appeals. Reversed, and new trial granted.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

John W. Ryan, of Buffalo, for appellant.
F. C. Slee, of Buffalo, for respondents.

LAMBERT, J. This action is brought to recover the principal and interest upon two certain promissory notes, made by Charles F. Dunbar, respondents' testator, to his own order, and which are now held by the appellant. It is conceded that deceased made these notes, and that the amount sought to be recovered thereon has never been paid.

[1] The single defense litigated, and upon which respondents have succeeded, is that these notes were made by deceased for the accommodation of the appellant, and that hence, in the hands of such bank, no liability can be predicated thereon. The sufficiency, in law, of such a defense cannot be doubted. Higgins v. Ridgway, 153 N. Y. 132, 47 N. E. 32. Hence it only remains to examine the facts to ascertain, whether such defense is established.

[2] At all the times here involved Charles H. French was the president of the plaintiff bank. He was a cousin of the deceased, Charles F. Dunbar. Deceased resided at Buffalo, and was a man of some considerable means. A majority of the directors of the plaintiff bank were also relatives. In January, 1903, through correspondence, French

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appealed to deceased for financial assistance. Dunbar was then engaged in the erection, at Buffalo, of a foundry, and his letters indicated that he himself was a heavy borrower in connection with such enterprise. These negotiations finally resulted in the making of the notes in suit, executed and indorsed by deceased, and sent by him to French. These notes were sold to the appellant, and have ever since been held by it. Prior to the making of these notes, various of the officers of the bank, including the president, French, had become interested in the Argonaut Mining & Milling Company, of Nova Scotia, and the bank then held a long line of discounts growing out of this mining project, and which had come to it from various of the interested parties. The proceeds of these Dunbar notes were placed to the credit of the mining company and applied to its purposes.

It is practically undisputed but that this transaction was purely one of accommodation, so far as Dunbar was concerned. He never received any benefit from it, nor was it expected that he should. The appellant contends that the accommodation was extended to, and was intended to be extended to, French personally, and not to the bank. Upon the examination of that question we must go to the circumstances surrounding the original transaction, to determine the intention of French and of Dunbar in adopting the course which they pursued.

There are in evidence letters from French and Dunbar asking the making of these notes for the personal accommodation of French, and nowhere therein is there to be found any intimation that the bank was asking any accommodation. The appeals for assistance are pressing and personal in their tenor, and clearly relate to French himself. The purpose of the accommodation is not disclosed therein, and it is only by tracing the proceeds of the notes that they become involved in the mining matter at all. Therein French explicitly states his purpose of placing the notes in this bank. He mentions the willingness of the bank to accept them, made due six months from their date, and refers to the fact that he has secured in advance the consent of the bank to accept deceased's note or notes for the specified sum without an indorser. These communications are profuse in their declarations and promises that the writer will pay these obligations at maturity, and are replete with expressions of gratitude upon the part of French for the great accommodation to him. This side of the transaction furnishes no room for the assumption that the bank was the party to be accommodated by the making of these notes.

Turning, then, to the letters written by deceased, we find still stronger evidence that this was a personal matter between these cousins. From such it is plain that deceased understood that these notes were made for the express purpose of being sold to the plaintiff bank, and his recognition of his liability thereon seems complete, when he writes of arranging to carry the loan at Buffalo "until such time as the note can be discounted," and of taking care of the notes when due, if French is unable to pay them.

It is thus seen that these written negotiations are devoid of proof even tending to sustain the finding evidenced by the verdict and judgment. Nor is their import changed, when read in the light of the

events which followed. There is much evidence relating to the relations of the bank with the mining company, and evidence of a character that might be corroborative of proof that the bank procured these notes for its accommodation, if this latter proof was in the case. But in its absence there is no fact proven that is not as fully consonant with the contention that these notes were given for French's individual accommodation as that they were given for the benefit of the bank.

It is true that the mine was controlled by individuals constituting a majority of the board of directors of the bank. But that fact does not even tend to support respondents' contention. The bank and the mining company were two separate legal entities, and the fact that the same individuals were officers of each cannot militate against other persons interested in either, but not so situated.

It is equally true that respondents were compelled to seek their proof largely from the officers of the appellant. But that situation cannot dispense with the necessity of some proof sustaining the defense urged. No such proof is presented by the record, and, on the other hand, the proof adduced is directly to the contrary, and to the effect that these notes were made for French's accommodation, and were purchased by the appellant for value.

[3] There are various exceptions urged to the admission of evidence, which seem to have merit. Witnesses were permitted to testify to their "understanding" of certain agreements and negotiations, without giving the basis from which they derived such understanding, thus usurping the province of the jury. A witness was also asked, upon direct examination, to furnish his explanation of the meaning of letters written by him, when such construction thereof is always a question for a jury, if the main inquiry reaches a jury.

However, the judgment and orders appealed from must be reversed, because of the failure of essential proof to sustain the verdict upon which the same are premised, and, as such errors likely will not occur upon a retrial, it is needless to discuss them further. And, as it may be possible to adduce proof in support of the defense urged, a new trial should be ordered, with costs to the appellant to abide the event. All concur.

(158 App. Div. 14)

YOUNG v. ERIE R. CO.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. RAILROADS (§ 348*)—ACCIDENT AT CROSSING—FINDINGS—SUFFICIENCY OF EVIDENCE.

Evidence in an action for the death of a woman found dead at a railroad street crossing *held* not to sustain a finding that deceased was killed by defendant's train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138–1150; Dec. Dig. § 348.*]

2. RAILROADS (§ 316*)—STREET CROSSING—NEGLIGENCE—SPEED OF TRAIN.

Where a railway street crossing was but seldom traveled, and there was no ordinance restricting the speed, it was not negligence for a rail-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

way company to run its train across the crossing from 35 to 50 miles per hour, so long as it gave the proper signals.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1006–1008, 1011, 1012; Dec. Dig. § 316.*]

3. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—SIGNALS—SUFFICIENCY OF EVIDENCE.

Where, in an action for the death of a woman killed at a street crossing, both the engineer and fireman testified positively that signals were given for the crossing, and were only contradicted by the negative testimony of one witness, the evidence was not sufficient to take to the jury the question of defendant's negligence in this respect.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. § 350.*]

4. RAILROADS (§ 314*)—STREET CROSSINGS—OBSTRUCTION.

A railroad company was not negligent in permitting four or five empty coal cars to stand upon a side track at a street crossing, where the cars were only one-half the height of the approaching train, and did not obstruct the view of a pedestrian.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 965; Dec. Dig. § 314.*]

5. RAILROADS (§ 346*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

In an action for the death of plaintiff's intestate, plaintiff cannot recover, when there is no evidence that deceased looked and listened, or exercised any care, before going upon the tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1117–1123; Dec. Dig. § 346.*]

Kruse, P. J., and Robson, J., dissenting in part.

Appeal from Trial Term, Erie County.

Action by Clara Young, administratrix, against the Erie Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Moot, Sprague, Brownell & Marcy, of Buffalo (John W. Ryan, of Buffalo, of counsel), for appellant.

Eugene L. Folk, of Buffalo (E. C. Schlenker, of Buffalo, of counsel), for respondent.

MERRELL, J. Plaintiff's intestate was found dead on the morning of November 22, 1910, a few feet from defendant's track north of Felton street in the city of North Tonawanda, N. Y. It is claimed on the part of the plaintiff that her intestate came to her death by being struck by the north-bound flyer on the defendant's road, which passed across Felton street, north-bound, shortly before 9 o'clock on the evening of November 21, 1910, and it is claimed that her death was caused by negligence on the part of the defendant company in driving its trains across said street at a high rate of speed and without giving proper signals, warning pedestrians on said street, and that the conditions were such that the plaintiff's intestate was relieved from that degree of watchfulness which otherwise would have been required of her. The physical surroundings at the point in question are as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Felton street, at the point where it is claimed plaintiff's intestate was killed, runs substantially in a northeasterly and southwesterly direction. Crossing said street near the point where Mrs. Seeman's body was found were five railroad tracks. Beginning with the easterly track, the first is a switch track operated by the defendant company in switching its cars. Next westerly is the main track of defendant, where it is claimed plaintiff's intestate was killed. The distance between the westerly rail of the switch track and the easterly rail of defendant's main track was 8½ feet. West of defendant's main track, and substantially parallel thereto, runs one of the main tracks of the New York Central Railroad Company. The distance from the westerly rail of the defendant's main track to the easterly rail of the New York Central track was 56½ feet. Proceeding southwesterly along Felton street, there are two other New York Central tracks, each about 10 feet distant from the other. Southwesterly of the third New York Central track, 72 feet therefrom and running substantially parallel therewith, is a highway running along the Niagara river, known as the "River Road." At the junction of Felton street and said River Road there was concededly at the time of the accident an arc electric light burning; said light being placed in the River Road at the end of the northerly sidewalk of Felton street. Upon the switch track of the defendant at the time of the accident, from Felton street southeasterly, were four or five empty coal cars extending from said street southeasterly upon said switch track. The decedent resided on the northerly side of Felton street, from 450 to 500 feet northeasterly of defendant's tracks. Felton street, at the point in question, runs through the lumber district of North Tonawanda, and is unpaved, but has a sidewalk on each side of the street. It would appear that the street was not very frequently traveled, except during the busy hours of the day. For more than a year prior to decedent's death the defendant had maintained a sign in a conspicuous place at said crossing to the effect that a flagman was not stationed at the crossing to warn pedestrians during the hours from 7 o'clock in the evening to 7 o'clock the following morning. There was no eyewitness of the accident, which it is claimed occurred to plaintiff's intestate as before stated.

[1] The evidence shows that, shortly before 8 o'clock on the evening before her remains were found, Mrs. Seeman left her home, and it fairly appeared from the evidence that at that time she was somewhat under the influence of intoxicating liquors. She first crossed the street, and remained at the boiler house of a planing mill near by and at the residence of a nearby neighbor for half or three-quarters of an hour. A few minutes later, one George Wiederman, a son of the owner of the planing mill, who testified that he was standing near the south sidewalk on Felton street, at a distance of 550 to 600 feet northeasterly of defendant's tracks, claims to have seen Mrs. Seeman leave her own house on the northerly side of the street and to proceed in a southwesterly direction towards the defendant's tracks. Wiederman testified that it was a pretty nice, fair night, and was light enough so that he could see plaintiff's intestate proceeding along the northerly

side of the street toward the defendant's tracks. It is entirely upon the testimony of the witness Wiederman that the plaintiff seeks to recover against the defendant, and insists that the verdict of the jury should not be disturbed. He testified that he continued to watch decedent as she approached the defendant's tracks, and that he was able correctly to estimate when he last saw her she was at a point 20 feet northeasterly from defendant's main track. He says that he watched her until she was obscured by the shadow cast by the flyer passing northwesterly along defendant's main track as it crossed Felton street, thus obscuring the rays of the arc light at the junction of Felton street and the River Road before referred to. The witness seems positive as to the distance which Mrs. Seeman was from the main track at the time when his vision of her was cut off by the shadow of defendant's locomotive and train. He testified:

"As soon as she got to that spot, about 20 foot from the crossing, she was 20 foot, and as I looked up she started to walk, and the train approached, and it stopped the view of the light as the end of the street. The train approaching across the street stopped the view; so that, when Mrs. Seeman was about 20 feet east of the main track, the engine went across the street and obstructed the view of the light from this light in the River Road."

And still further:

"I followed Mrs. Seeman with my eye until she was cast in the shadow of the train. * * * The train came here. * * * And as she was walking along, this train came along, and threw the reflection of this light, and I saw her no more."

The plaintiff also offers as a witness one Klinch, employed on the night of the accident as watchman in the lumber yard of White, Gratwick & Mitchell in the vicinity of this crossing. Klinch testifies as follows:

"That evening I saw her a little bit before 9 o'clock; five minutes before 9, or such a matter. * * * When I saw her, I was just going to go down to pull the clock, just before 9 a little while. I saw her there at the end of Felton street; that is, at the point where Felton street runs into the River Road, right at the foot of Felton street; that was west of everything. At the time I saw her there, she was going across; she was just going down there, and I met her there; she was on the west side of Felton street—of the River Road; she was on the River Road on the opposite side of the lumber yard. There is no sidewalk where the lumber yard is. At the time I saw her she was just going along, and I bade her 'Good evening' and went right along. She was west of Felton street at the time."

These witnesses, Wiederman and Klinch, are the only persons claiming to have seen plaintiff's intestate at about the time she is claimed to have been struck. Wiederman further testified that he heard no whistle blown nor bell rung by defendant's train as it crossed Felton street on the occasion in question. He testified that it was a quiet night, and that he could hear the whistle of the train, although he was not listening for it; that there was no reason why he should listen. He does state, however, that he took his attention off of Mrs. Seeman before he actually saw the train, but afterwards testified that he watched her until she got to the dark spot cast by the locomotive of defendant's train shutting off the rays of the arc lamp at the foot of Felton street. Wiederman also testified that the train, which was

known as the "Nine O'clock Flyer," was traveling at the rate of from 35 to 50 miles an hour as it crossed Felton street, and neither the engineer nor fireman contradicts his testimony in this regard.

It seems to me that the testimony offered in support of plaintiff's contention that the plaintiff's intestate came to her death at the time mentioned by being struck by defendant's train falls far short of establishing a prima facie case of defendant's negligence. If the testimony of Wiederman is to be given any credence whatever, it would be a physical impossibility for Mrs. Seeman to have been struck by said train. From the point where Wiederman stood, and where he is positive he followed with his eye the plaintiff's intestate as she approached the track to a point 20 feet northeasterly thereof, where she was lost to view by the train casting a shadow from the arc light, it would be impossible for her to have covered the 20 feet between the point where he last saw her and the defendant's track in time to have gotten upon the track ahead of defendant's train. At the rate stated, 35 to 50 miles an hour, it would have required only a small fraction of a second for the locomotive to have traversed the short distance where it must have been at the time its shadow obscured Mrs. Seeman to the place where it crossed the sidewalk upon which she was walking. Felton street is 50 feet in width at that place, and, assuming that the train was traveling as slow as 30 miles an hour, it would have required only about one second to have crossed the street from its southerly to its northerly side. It therefore seems to me a physical impossibility for plaintiff's intestate to have gotten in front of defendant's locomotive, if the testimony of plaintiff's sole witness, who claims to have seen her immediately before the accident, is to be believed. Then the testimony of Klinch, who testifies that he saw plaintiff's intestate about five minutes before 9 on River Road westerly of all of the tracks in that vicinity, would seem to negative the possibility that she came to her death in the manner claimed.

[2] But, assuming that plaintiff's intestate was struck by the defendant's 9 o'clock train crossing Felton street, I think the testimony fails to show that the defendant operated said train without due care or was in any manner negligent. As before stated, Felton street, at 9 o'clock at night, was but little traveled. The record does not show that any order was ever made compelling the defendant company to maintain gates or flagmen at said crossing. It does, however, appear that for more than a year prior to the death of Mrs. Seeman the defendant company had maintained a flagman at said crossing to warn the public of approaching trains, but that said flagman's hours were confined to the day, and that from 7 o'clock at night until 7 o'clock the next morning no flagman had been stationed at the crossing. Plaintiff's intestate was entirely familiar with that condition. She lived but a few hundred feet from the crossing, and was in the habit of crossing defendant's track several times each week. Nor does it appear that there was any restriction by way of ordinance of the municipality as to the rate of speed of defendant's trains. It was not negligence, therefore, on defendant's part to operate its train at a speed of from 35 to 50 miles an hour, so long as it gave proper signals

of its approach to said crossing. Phelps v. Erie Railroad Company, 134 App. Div. 729, 119 N. Y. Supp. 141.

[3] Plaintiff seeks to show that defendant was negligent in operating its said train by omitting to blow a whistle or ring a bell or give other signal at said crossing. The only witness who testifies on that subject in behalf of plaintiff is the man Wiederman, who claims to have watched plaintiff's intestate until she was lost in the shadow of the passing train. It must be remembered that Wiederman was about 600 feet east of the track. He merely testifies that as the train came along he heard no sounds or signals, or any bell rung or whistle blown. He states that he was not exactly listening for trains, but that it was a quiet night, and he could have heard the whistle, if blown; that there was no reason why he should listen. He further testifies that his attention was drawn to the approaching train before he actually saw it. How, then, was his attention so directed, except by the sounding of some signal warning? If it was alone the sound made by the approaching train that drew his attention 600 feet away from the crossing, how much plainer must have been that noise to plaintiff's intestate, who was within 20 feet of defendant's track and within less than 100 feet of the approaching train. It is not at all strange that Wiederman did not recall having heard the whistle blown or bell rung. With the numerous tracks and frequent passing of trains across said street, it would be strange if the ringing of a bell or the blowing of a whistle would make an impression upon his mind.

As against the negative evidence of Wiederman, we have the positive testimony of the engineer and fireman upon the passenger train that the whistle was blown at said crossing, and that the engine bell, an automatic contrivance, was ringing constantly from the time the train left Buffalo until it reached its destination at Niagara Falls, on the Ontario side. It seems to me that something more is required to discredit the positive testimony of the engineer and fireman on the giving of the signals than the mere negative evidence of Wiederman that he did not hear them. I do not think that the testimony of Wiederman that he heard no signals, contradicted by the positive affirmative evidence of the engineer and fireman, was sufficient to authorize the submission of the question of defendant's negligence to the jury by reason of failure to sound proper signals. Culhane v. N. Y. C. & H. R. R. Co., 60 N. Y. 133; Foley v. N. Y. C. & H. R. R. Co., 197 N. Y. 430, 90 N. E. 1116, 18 Ann. Cas. 631.

[4] But plaintiff also contends that defendant was negligent in permitting the coal cars, four or five in number, to stand upon its switch track parallel with its main track and 8½ feet northeasterly therefrom. It is claimed on the part of the plaintiff that such coal cars obstructed the vision of Mrs. Seeman as she approached the crossing, and that the defendant was guilty of negligence in permitting said cars to stand upon said siding. I do not think that such claim has any merit whatever. The evidence shows that the cars in question were the ordinary coal cars, and were only about half the height of the locomotive and passenger cars on defendant's north-bound train. All of said coal cars stood on the southerly side of Felton street, and plaintiff's

intestate was approaching the crossing on the northerly side of said street in a most favorable position to observe a train approaching from the south on the main track.

Wiederman testifies that, earlier in the same evening he saw plaintiff's intestate approach the crossing, he himself crossed and made certain observations. He said that in passing in a westerly direction, as he came over to the side track and had reached the main track, he looked in both directions to see if a train was coming. To the north, he testifies, the track was straight for about 1,000 feet, perhaps a quarter of a mile, and that to the south he could see about a mile toward Tonawanda station. At the time Wiederman made said observations, he was walking on the southerly side of Felton street, a much less favorable position to observe defendant's main track than that occupied by Mrs. Seeman as she approached said track. Wiederman testifies that even on the south side, and when he was at a point 7 feet east of the main track, he could have seen a north-bound train approaching along the main track for more than a mile before it reached Felton street. Wiederman testifies that the defendant's train as it passed the crossing was brilliantly lighted, and the testimony of the engineer and fireman to the effect that the headlight on the engine was burning is not contradicted. I do not think that the placing of the coal cars upon the side track south of Felton street was a negligent act on the part of the defendant.

[5] But, assuming that the plaintiff's intestate met her death by being struck by defendant's north-bound 9 o'clock train, as plaintiff contends, and assuming that the defendant was in some manner guilty of negligence, I think the testimony in the case fails to show that plaintiff's intestate, at the time she was struck, was observing that care which the law required of her in crossing said track. I find no evidence whatever in the case showing her freedom from contributory negligence. As she approached this crossing she was required to look and listen. There is absolutely no evidence in the case that she did either. The locomotive headlight was burning, and the passenger train was brilliantly lighted. For a considerable distance before she reached defendant's main track, had she looked, notwithstanding the coal cars which plaintiff insists were a condition which would have made an attempt to look on her part unavailing, she could have seen the approaching train and waited for it to pass before attempting to cross the track. In fact, no circumstance appears tending to show that decedent looked or listened, or exercised any care whatever in crossing defendant's track. Wiederman does not attempt to testify that she stopped, looked, or listened. The coal cars did not cut off her vision, because they were only half as high as the locomotive headlight, which was placed upon the boiler, and the lighted passenger coaches. Under these circumstances, it would seem idle to claim that, had plaintiff's intestate looked, she would not have been able to see the approaching train. No other obstruction, except said coal cars, is mentioned. And if the witness Wiederman could hear the approaching train 600 feet away, in how much better position was decedent to hear said train when near the crossing. The record is barren of any evi-

dence showing that decedent exercised any care whatever in attempting to cross defendant's track, nor does it disclose any condition which would have rendered the use of decedent's senses of sight and hearing unavailing. Without such proof plaintiff's case must fail. Wiwirowski v. L. S. & M. S. R. Co., 124 N. Y. 420, 26 N. E. 1023; Wieland v. Delaware & Hudson Canal Co., 167 N. Y. 19, 60 N. E. 234, 82 Am. St. Rep. 707; Lamb v. Union Railway Co., 195 N. Y. 260, 88 N. E. 371.

In the Lamb Case, above cited, the decedent was run over and killed by one of defendant's trolley cars. In that case the night was dark and foggy, and the case otherwise presented much stronger circumstances in favor of the plaintiff's contention than the case at bar. The Court of Appeals in that case held that the facts did not admit of the necessary inferences to find the intestate free from contributory negligence. And the court there held that the circumstances pointed quite as much to the lack of reasonable care, or even to the possibility of suicide, as to the exercise of reasonable care and caution on the intestate's part, and nonsuit should be granted.

As before stated, Mrs. Seeman, on the night in question, was more or less under the influence of intoxicating liquors, and it is probable that she waited within its shadow for the passing of defendant's flyer; that she then proceeded easterly, and was seen by the witness Klinch on the River Road. Frequent trains were passing on the several railroad tracks in the vicinity during the night, and it is entirely probable that decedent was struck by some other train during her wanderings. Both the engineer and fireman testify to their absence of knowledge of the alleged accident, nor were there any marks or indication upon the locomotive of its having struck anything on its trip.

It seems to me that the learned trial court should have granted defendant's motion for nonsuit, made at the close of the evidence in the case, and that in rendering its verdict the jury was permitted to guess and speculate on every essential element in the case. The learned trial court erred in refusing to grant defendant's motion to set aside the verdict rendered.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to the appellant to abide event. All concur; KRUSE, P. J., and ROBSON, J., in result only, upon the last ground stated in the opinion.

Judgment and order reversed, and new trial granted, with costs to appellant to abide event.

(157 App. Div. 876)

PHILLIPS v. CROSSTOWN ST. RY. CO. OF BUFFALO et al.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

MASTER AND SERVANT (§ 240*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Even if the rules of a railway company for the slow going and stopping of a car on approaching a standing car were applicable to the place, the conductor of a standing car, who, having no occasion for haste, started

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from one end of his car towards the other end, going on the track of and towards an approaching car, instead of waiting for it to pass, or going round the other side of his car, was guilty of contributory negligence as matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751–756; Dec. Dig. § 240.*]

Kruse, P. J., and Robson, J., dissenting.

Appeal from Trial Term, Erie County.

Action by Margaret E. Phillips, administratrix of Charles M. Phillips, deceased, against the Crosstown Street Railway Company of Buffalo and the International Railway Company. From a judgment for plaintiff, and from an order denying a motion for new trial, defendants appeal. Reversed, and new trial granted.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Roscoe R. Mitchell, of Buffalo, for appellants.

George H. Kennedy, of Buffalo, for respondent.

LAMBERT, J. The facts are very fully and fairly stated in the dissenting opinion, and their repetition seems unnecessary. The single question of moment is as to intestate's freedom from contributory negligence. It must be conceded that, except for the claimed right of intestate to rely upon the observance of rules 50 and 50a, by the motorman of the car which injured him, there could be no question for a jury. I understand such concession to be made by the dissenting opinion. The question, then, is the effect of such rules upon the respective duties of intestate and such motorman. Both rules are fully set forth in the opinion of Mr. Justice KRUSE.

It is obvious, from the mere reading of these rules, that their primary design was to protect persons alighting from standing cars in usual operation. They were evidently not designed especially for the protection of employés when not so alighting. It is also doubtful whether they have any application to the unusual, and in a way emergency, situation presented by the facts of this case. They were designed for the ordinary operation of the road, rather than for the temporary requirements occasioned by the repairing of this bridge. If they have no application, then intestate had no right, as it is claimed he did, to rely upon same in governing his course of conduct.

Rule 50 simply provides for slow speed while passing standing cars. Such requirement is somewhat elastic, and would vary when construed by different employés, and the proof shows no flagrant violation in this particular. It is upon rule 50a that chief reliance is placed; it being urged that the stopping of the car as required by this rule (assuming it has application) would involve such a slackening of its speed as would have permitted intestate to reach the door by which he sought to enter his car. The defect in such argument lies in the rule itself in connection with the proven facts. Such rule does not require the stopping of the moving car until its forward end was in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

juxtaposition with the rear end of the standing car. It is undisputed that intestate received his injuries somewhat prior to the time when the moving car reached that position, and hence it cannot be argued with much force that the failure so to stop in any wise contributed to the accident. Nor does the proof demonstrate that the car was moving at such a rate of speed, at the time intestate was injured, that it could have been thereafter stopped as required, in strict compliance with rule 50a.

However, in the view we take of the controlling facts in this case, it is not necessary to determine whether such rules have application; for, beside the application of these rules to this situation, there is a principle of law applicable which would seem to defeat a recovery. When the fender or lifeguard of the car had been changed, intestate then stood in a place of safety. There was no duty for him to perform, which required him to pass along this "devil strip." Neither was there any apparent occasion for haste upon his part in entering his car. There still remained ahead of his car another standing car, for the crossing over of which he must delay moving his car up to the bridge. His objective point, it is true, was the open door at the further end of the car, opening onto the "devil strip." Eventually he would have to reach that door. Of course, he knew of the presence of the moving car, for he was awaiting its departure. His failure to observe its approach would be the grossest negligence upon his part. We must assume he saw it, as it is only upon that theory that there can be any pretense of a recovery in this action. Thus situated, and so observing this oncoming car, intestate had a choice of several courses of action. The obviously safe thing for him to do was to wait until the car passed him, if he especially desired to adopt a course along this "devil strip." Or, desiring to at once proceed, he could take a few additional steps required to pass the other side of his car, along the driveway outside the tracks. Either of such courses of action was perfectly safe and embodied no element of danger whatever. It neither required consideration of the application of any rules of the company, nor was dependent, for its safety, upon the conduct of any other employé. While this presented a choice of action, and with no emergency apparent to distract his attention or affect his judgment, intestate chose the only way that embodied any element of danger, and started along the "devil strip" in the very face of the oncoming car. Not only that, but it is very conclusively shown by the evidence that he realized his danger almost from the time he started, and undertook a contest of speed with this moving car, to see which should reach the open door first.

Such conduct, by intestate, would seem to be squarely within the decision of the Court of Appeals in the case of Hogan v. N. Y. C. & H. R. R. Co., 208 N. Y. 445, 102 N. E. 517, which I read to hold that where an employé has his choice of two ways of passage, the one of which is obviously open and safe, and the other of which involves an element of danger, his voluntary selection of the latter renders him guilty of contributory negligence, as a matter of law. However regrettable the results to the plaintiff, I see no justification for holding

the defendant responsible for an accident wholly chargeable to error in judgment upon the part of intestate.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur, except KRUSE, P. J., and ROBSON, J., who dissent in an opinion by KRUSE, P. J.

KRUSE, P. J. (dissenting). The plaintiff's intestate, a street car conductor, was caught and crushed between his car, which was standing on one track, and a moving car on another track, receiving injuries resulting in his death. It is claimed that the motorman of the moving car was careless in approaching the standing car at an unusual speed and without stopping his car or slowing down and approaching it cautiously. Under the provisions of section 64 of the Railroad Law (Laws of 1910, c. 481 [Consol. Laws 1910, c. 49] art. 3, § 64), the defendant railway companies are liable for the negligence of the motorman who was in physical control of the moving car.

That the motorman was negligent is well established by the evidence. Indeed, the finding of the jury that the motorman was negligent does not seem to be seriously questioned. It is urged, however, that the plaintiff's intestate, the conductor who lost his life, was guilty of contributory negligence in voluntarily placing himself in the place of danger. He had come with his car from the east upon a west-bound track. His car was waiting to take its turn in loading passengers. It was standing on the west-bound track, with one or two cars ahead of it. His passengers had left the car, alighting at the front or west end of the car on the right or north side, walking westerly over a bridge to a car on the west side thereof, to convey them westward into the city. The bridge was being repaired, so that no cars passed over it; the west-bound cars, after unloading, running from their track over a cross-over to the east-bound track, and there taking on passengers coming from the west side of the bridge, and then returning eastward on the east-bound track. The space between a car standing on the west-bound track and a passing car on the east-bound track was about 10 inches.

The car which did the harm was crowded. There were several passengers in the front vestibule, standing with the motorman. The speed of this car as it left the starting point east of the bridge and passed the standing car of the conductor who was killed is in dispute. But that the car did not stop when it reached the standing car is not in dispute. While the passengers were alighting, the conductor of the standing car and his motorman commenced to prepare their car for the return trip. They closed the rear or east door on the south side, and opened the front or west doors on the north side, of the car. The fender or lifeguard was taken from the front or west end, and carried around to the east end, and there attached to the car. After that had been done, the conductor started west on the south side of the car. He must have seen the approaching car, which was lighted and coming towards him, for he walked or ran directly toward it. The inference is permissible that he thought he would have time to reach the west end of his car, and the finding from the evidence is warranted that he

could have done so if the approaching car had stopped, or even slackened its speed, as plaintiff contends the rules of the company and reasonable prudence required.

I think the conductor would be chargeable with negligence as a matter of law in being where he was when struck, were it not for the rules and practice usual in moving cars past standing cars. Rule 50a, introduced by the plaintiff, is as follows:

"Endeavor wherever possible to meet cars going in opposite direction between blocks, thereby avoiding the necessity of making a stop. Inside city limits of Buffalo, do not pass a car standing on opposite track, but bring car to a full stop, the front end thereof even with the rear end of the other car. Do not start until receiving go-ahead signal, two bells."

That rule was admitted by the defendants to have been in force at the time of the accident, but it was claimed that it had no application to this situation, and at the suggestion of defendants' counsel rule 50 was introduced, which provides that:

"When passing standing cars, gong must be rung and car brought to slow speed."

Plaintiff contends that the defendants practically concede that rule to be applicable. At all events, its own chief instructor in the school for instructing defendants' employés respecting their duties seems to so claim and testify, but states that rule 50a applies to cars standing at a street crossing, while the car is taking on or unloading passengers. But the testimony of the defendants' division superintendent indicates that rule 50a applied to the situation here, and the learned counsel for the defendants seemed to recognize that the question was one of fact, since in connection with his exception to that part of the charge in which the judge referred to the right of Phillips, the intestate, to rely upon the rule in regard to the car stopping, he asked the judge to leave that question to the jury as one of fact, to which the judge replied that he had undertaken to do so, and went over the ground again.

Defendants' counsel contends, further, that the conductor was guilty of contributory negligence in opening the door at the southwest corner of his car before crossing over to the east-bound track. While I think that the evidence is such that the jury could find that that was contrary to the rules of the company, I do not see how the opening of the doors could possibly be a proximate or contributing cause to the accident. But in any event it was a fair question of fact as to whether it was not customary to do that at this place under these circumstances, and the court seems finally to have left that question to the jury fully as favorably to the defendants as they were entitled.

The real question respecting the contributory negligence of the conductor in going toward the west end of his car depends largely upon whether these rules applied. If rule 50a applies, and had been observed, the conductor would have had abundant time to reach the west end of the car. But, even if that does not apply, I still think it would be a question of fact as to whether the motorman was negligent. There is testimony to the effect that the car started off at a rapid rate, about 10 miles an hour, and that its speed increased as it approached the standing car, so that at the time of the accident it was going about

14 or 15 miles an hour. While we may assume that the conductor who was killed must have seen the lighted approaching car, I think it cannot be held as a matter of law that he knew or should have known just how fast the car was approaching, or that it would not stop or slacken its speed when it reached the standing car. Even if rule 50a does not apply, it would seem that he could rely to some extent that the car would go slow and approach with caution the standing cars, as rule 50 required, and as common prudence would seem to suggest.

The only other question is that of damages. The verdict was for $10,000. The division superintendent himself testifies that the conductor was one of the best men he had ever had work under him; was careful, very reliable, and was about to be promoted. He was 35 years old at the time of his death. He left two children, besides his widow. His earnings as conductor were $75 to $80 a month. He was in excellent health, industrious, temperate, and his family were dependent upon his earnings for support.

I think the verdict was not excessive, and that the judgment and order should be affirmed.

(157 App. Div. 804)

CURTISS v. TELLER.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. APPEAL AND ERROR (§ 931*)—PRESUMPTIONS—FINDINGS IMPLIED.
Where both parties moved for a direction of the verdict, neither party asking to go to the jury upon any question, and at an adjourned day of the term the court directed a verdict, every question of fact must be regarded as having been found against the defeated party.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762–3771; Dec. Dig. § 931.*]

2. USURY (§ 80*)—EFFECT OF USURY.
Plaintiff, for a loan of $10,000, executed his note for $15,000, and as collateral security pledged 160 shares of stock. Defendant sold the stock under an agreement with plaintiff that the proceeds should abide the event of an action on the note. Before an action by plaintiff to recover the proceeds of the stock, defendant tendered to plaintiff the amount in excess of the principal and lawful interest. *Held*, that the note and pledge were both void for usury, and that defendant acquired no title to the stock.
[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 158–160; Dec. Dig. § 80.*]

3. USURY (§ 80*)—RECOVERY OF STOCK PLEDGED AS COLLATERAL.
Except for plaintiff's acquiescence in the sale of the stock, he could have maintained an action of trover for the stock.
[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 158–160; Dec. Dig. § 80.*]

4. USURY (§ 102*)—RECOVERY OF COLLATERAL PLEDGE.
Plaintiff can recover the proceeds of the sale of the stock in an action for money had and received, without returning or offering to return the money actually received.
[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 197, 241, 242, 244–258; Dec. Dig. § 102.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. USURY (§ 88*)—PENALTIES AND FORFEITURES.

General Business Law (Consol. Laws 1909, c. 20) § 376, in the chapter relating to usury, provides that every person who shall pay or return the usurious interest taken or received shall be acquitted and discharged from any other or further forfeiture, penalty, or punishment which he may have incurred by having taken the interest. *Held* that, in view of preceding legislation on the subject, this section includes only obligations or securities which, under section 373, the court may declare void and enjoin prosecution thereon, and the fact that the lender has returned the amount in excess of the principal and lawful interest does not prevent the borrower from recovering stock pledged as collateral without payment of the principal or lawful interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 176–187; Dec. Dig. § 88.*]

Appeal from Trial Term, Erie County.

Action by Harlow C. Curtiss against George R. Teller. From a judgment in favor of plaintiff for less than the amount claimed, he appeals. Reversed.

See, also, 140 App. Div. 940, 126 N. Y. Supp. 1126.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

James McCormick Mitchell, of Buffalo, for appellant.

Adelbert Moot, of Buffalo, for respondent.

KRUSE, P. J. The controversy is over 160 shares of Wood Products Company Stock, or the proceeds of the sale thereof. The stock belonged to the plaintiff, and was pledged as collateral security for the payment of a certain note made by him for $15,000, dated January 8, 1904, payable three months after its date, to his order, and indorsed by him in blank. The note, thus indorsed, together with the certificates for the stock, assigned by the plaintiff in blank, was delivered by the plaintiff to one William T. Jebb, for the purpose, as he claimed, of raising money to put into a business venture. The defendant discounted the note for Jebb, paying him $10,000, and the note was transferred by Jebb to the defendant, together with the stock as security therefor. The defendant thereafter sold the stock, receiving therefor the sum of $14,000, which the plaintiff seeks to recover in this action.

The defendant brought an action in the Supreme Court to recover upon the note, which was resisted, and the complaint was dismissed by default. Thereupon this action was brought. The plaintiff contends (1) that the note had no legal inception before its delivery to the defendant, and that therefore the defendant has no right to the collateral or the proceeds realized from the sale thereof; (2) that the note and collateral were intrusted by the plaintiff to Jebb as his agent for a particular purpose, and diverted contrary to such purpose, and discounted by the defendant, with full knowledge of its diversion; (3) that the defendant made an agreement with the plaintiff, permitting the defendant to sell the stock and pay the proceeds over to the plaintiff, upon a favorable termination of the action upon the note. After the sale of the stock, and before the commencement of this action, and on or about

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

September 4, 1909, the defendant tendered to the plaintiff the sum of $2,682, which he claims is the usurious excess, and that by returning the usurious excess he became acquitted of any further forfeiture, and is entitled to retain the amount advanced, with lawful interest.

At the close of the trial the defendant moved for the direction of a verdict in his favor, except as to the amount tendered, conceding as to that, with interest, the plaintiff was entitled to recover. Thereupon the plaintiff moved for the direction of a verdict in his favor for the full amount claimed, with interest. The matter was left in that shape till a later day in the term; defendant's counsel remarking that an exception might be noted for the defeated party. Neither party asked to go to the jury on any question. On the adjourned day a verdict was directed in favor of the plaintiff for the amount tendered, with interest from the 10th day of September, 1909.

[1] I think it is well settled that under such circumstances every question of fact must be regarded as having been found against the defeated party. Respecting the claim that there was a diversion of the note, and the claim that an agreement was made permitting the sale of the stock, with the understanding that the proceeds should abide the event of the action upon the note, I think that, so far as there is any evidence tending to support the plaintiff's claims in this respect, there is evidence to the contrary which warrants a finding against the plaintiff's contention, although the sale of the stock seems to have been made with the acquiescence of the plaintiff.

[2] As to the claim that the note was usurious, I am of the opinion that, if it had no legal inception until it was discounted by the defendant, it is void for usury. But the question arises whether or not the defendant, who discounted the note in good faith (as I think we should assume), is entitled to the proceeds realized from the sale of the stock to the extent of the amount he actually advanced on the note and stock, as is claimed in his behalf. As we have seen, the stock was sold with the plaintiff's acquiescence before the commencement of this action, and the proceeds applied by the defendant upon the loan. The amount realized was less than the face of the note, but more than the amount of the money advanced, with legal interest. Thereafter the defendant tendered the excess, together with interest thereon from the date of sale, to the plaintiff. While the plaintiff acquiesced in the sale, he did not consent to the application of the proceeds as defendant assumed to apply them. He claimed that the transaction of discounting the note and transferring the stock was usurious and void, and that he was entitled to the stock and the proceeds.

The defendant contends that the plaintiff's action is founded upon a claim of forfeiture; that by tendering back the excess over and above the moneys advanced by him, with legal interest, he was acquitted of the forfeiture under the provisions of section 376 of the General Business Law, in the article relating to usury (Consol. Laws, c. 20 [Laws 1909, c. 25] art. 25, § 376), which reads as follows:

"Sec. 376. Return of Excess a Bar to Further Penalties.—Every person who shall repay or return the money, goods or other thing so taken, accepted or received, or the value thereof shall be acquitted and discharged from any

other or further forfeiture, penalty or punishment, which he may have incurred, by taking or receiving the money, goods or other thing so repaid, or returned, as aforesaid."

The usury statute does two things: (1) Declares the usurious transaction void; and (2) provides for forfeitures and penalties against the usurer. General Business Law, art. 25. Section 372 provides:

"Sec. 372. Recovery of Excess.—Every person who, for any such loan or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received, and his personal representatives, may recover in an action against the person who shall have taken or received the same, and his personal representatives, the amount of the money so paid or value delivered, above the rate aforesaid, if such action be brought within one year after such payment or delivery. If such suit be not brought within the said one year, and prosecuted with effect, then the said sum may be sued for and recovered with costs, at any time within three years after the said one year, by any overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county, in which the payment may have been made."

Not only does the statute avoid usurious transactions, but provides for the surrender and cancellation of obligations and securities taken by the lender in violation of the statute. General Business Law, § 373. The section reads as follows:

"Sec. 373. Usurious Contracts Void.—All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void. Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt, has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled."

Then follows section 376 above quoted. Section 377 provides as follows:

"Sec. 377. Borrower Bringing an Action Need Not Offer to Repay.—Whenever any borrower of money, goods or things in action, shall begin an action for the recovery of the money, goods or things in action taken in violation of the foregoing provisions of this article, it shall not be necessary for him to pay or offer to pay any interest or principal on the sum or thing loaned; nor shall any court require or compel the payment or deposit of the principal sum or interest, or any portion thereof, as a condition of granting relief to the borrower in any case of usurious loans forbidden by the foregoing provisions of this article."

[3-4] The position of the learned counsel for the defendant is this: The defendant having tendered to the plaintiff the excess over and above the lawful rate of interest on the money he actually advanced upon the stock, and the plaintiff having consented to the sale of the stock, the plaintiff is not now in a position to maintain his action on contract for moneys had and received, contending that, if he desires to recover the proceeds of the sale of the collateral, he must pay the defendant the amount advanced by him with lawful interest, that the obligation to surrender the pledge or proceeds without payment of the debt, pursuant to sections 373 and 377 above referred to, is another or

further forfeiture which the defendant may have incurred, but from which he has been acquitted and discharged by the return of the usurious excess pursuant to section 376, and that such acquittance covers all forfeitures under the statute.

I do not see that the sale of the collateral changed the situation of the parties. If the plaintiff had consented to the application of the proceeds of the sale, as made by the defendant, I think his recovery would be limited to the usurious excess. Seymour v. Marvin, 11 Barb. 80, 90; Smith v. Marvin, 27 N. Y. 137; Williams v. Fitzhugh, 37 N. Y. 444.

It is true, as counsel contends, that in People v. Young, 207 N. Y. 522, 101 N. E. 451, Judge Willard Bartlett, in speaking for the court, stated that the phrase, "forfeiture, penalty or punishment," contained in section 376, relative to restitution, comprises only such forfeitures, penalties, or punishments as are mentioned in the General Business Law itself. It is therefore urged that by inference the section is there held to include all such forfeitures, penalties, or punishments. I do not think that conclusion follows. What was there said was by way of limiting the effect of the section. The court does not assume to point out the condition under which a lender may be acquitted under the provisions of that section. The question there was whether restitution of a usurious excess, taken contrary to the Banking Law, discharged the offender from criminal liability, and it was there held that it did not, and the statement was made in that connection.

Some of the provisions of the present usury law have been in our statutes for many years. As early as 1717 the law-making body of the colony passed an act against usury which by its terms expired in five years (1 Colonial Laws, p. 909, c. 328), and a similar act was passed in 1737 which avoided usurious contracts and obligations, and imposed upon the lender a penalty or forfeiture of treble the value of the money loaned, and upon a broker who took brokerage in excess of the rate fixed in effecting a loan a forfeiture of £20. and costs, one half of the forfeitures to be paid to the king, and the other half to the person suing. 2 Colonial Laws (Comp. Stat. Rev. Comm. p. 980) c. 660. After the colony became a state, and in 1787, an act was passed which retained the essential provisions of the colonial act, but reduced the amount of the forfeiture to the unlawful excess, giving one half to the person suing and the other half to the use of the poor of the town or place where the offense was committed, and in connection therewith provided for filing a bill of discovery against the lender or broker who had taken unlawful excess. Laws 1787, c. 13. This act was republished with the Revised Acts of 1801 (1 K. & R. 57), and with the Revised Laws of 1813 (1 R. L. 64). While the statute declared usurious obligations void, the courts recognized the moral obligation of the borrower to repay the money which he had actually received, and in the courts of equity he was required to repay or offer to repay the sum, together with interest, in order to obtain relief. Fanning v. Dunham, 5 John. Ch. 122, 9 Am. Dec. 283, decided in 1821; Early v. Mahon, 19 Johns. 147, 10 Am. Dec. 204, decided in 1821. In the last case above cited, Chief Justice Spencer declared:

"I consider it entirely settled that, notwithstanding the security be usurious, the money lent is a debt in equity and conscience, and ought to be repaid. This principle has long been acknowledged and acted upon in courts of equity."

The question there was whether, when money was lent upon a usurious contract, which had been avoided, there existed such a moral and equitable duty on the part of the borrower that a subsequent promise by him to pay the money actually lent could be enforced at law in an action founded upon the promise. On that subject it is said:

"Here the lending, and the usurious agreement, were contemporaneous acts. The usury infected the whole transaction; but I do say, in the words of Mr. Justice Lawrence: 'The usury could not annihilate the sum of money itself, nor the fact of the receipt of the money.' And it does not admit of a doubt that the defendant having had the plaintiff's money, without any consideration or security, but a void bond, the promise subsequently to repay this money was founded upon a moral and equitable duty."

In 1827 the commissioners for revising the statutes proposed various changes in the usury law. They proposed to avoid the security, but to permit the lender to recover the money actually loaned, and to exempt from the consequences of taking usury all negotiable paper in the hands of bona fide holders for value. They further proposed that the usurious lender should not be entitled to recover any interest, and that the borrower who paid more than the legal rate might within one year recover from the lender three times the amount of the excess. The provision for filing a bill of discovery was retained, and also for the acquittance and discharge of the lender upon making restitution. Respecting the bill of discovery, it was proposed that it should not be necessary for the debtor to pay or offer to pay any interest on the sum or thing loaned, but he should deposit with the clerk of the court the principal sum admitted by him to have been loaned. See Revisers' Report of R. S. pt. 2, c. 4, tit. 3; 3 R. S. (2d Ed.) p. 611 et seq.

It will thus be seen that the commissioners proposed to retain in effect the principle, which the Court of Chancery had applied, of requiring the borrower to pay back the money which he had received from the lender as a condition of equitable relief. The Legislature, however, rejected all the new provisions save the one which excepted negotiable paper and the other which dispensed with the necessity of the borrower paying or offering to pay the interest as a condition for filing a bill of discovery. See R. S. pt. 2, c. 4, tit. 3; 1 R. S. 771, § 1 et seq.

[5] In the section dispensing with the payment of interest it was also provided that no court of equity should require or compel the payment or deposit of the principal, or any part thereof, as a condition of granting relief to the borrower in the case of a usurious loan (1 R. S. pp. 772, 773, § 8); but it was held that that provision did not apply to a bill of discovery. In Livingston v. Harris, 11 Wend. 329, decided in 1883, the practice which obtained upon a bill in chancery for a discovery and the relief granted in case of usurious loans are set forth, and the provisions of the Revised Statutes, which took effect in 1830, dispensing with the payment of interest on the loan and the

payment or deposit of the principal sum, are discussed. It is there said:

"Previously to the adoption of the Revised Statutes, the principles upon which a party to a usurious contract could, in a court of equity, compel discovery of, and obtain relief against, the usurious premium, were perfectly well settled. Neither discovery nor relief could in any case be obtained in the Court of Chancery, without a repayment of the sum actually lent, with lawful interest, because the borrower could not, in any case or under any circumstances, be *equitably* entitled to keep the money which he had actually received from the lender, and for which the lender had received no consideration. He was therefore met by that cardinal maxim of a court of equity, that 'he who asks for equity must do equity,' and could obtain no aid from that jurisdiction, in getting rid of or recovering back the amount which had been improperly exacted from him, until he repaid the amount which in justice and equity was due from him to the defendant. *Relief*, under such circumstances, where the complainant did not ask for or need a *discovery*, was refused exclusively upon this principle; but where he had no legal evidence of the usury, and the object of his bill was to compel the defendant to disclose or admit the fact, he had an additional difficulty to encounter, to wit, that a court of equity will not compel a defendant to answer upon oath, and thus become a witness for his adversary and against himself, where such answer may subject him to a criminal proceeding, or to a penalty or forfeiture, or to any loss in the nature of a forfeiture. In such a case, therefore, he was bound to waive the forfeiture and pay the amount actually loaned, not only because it was just and equitable, but in order to guard against the possibility of the defendant's answer being made the means of subjecting him to a forfeiture."

After succinctly stating the provisions of the Revised Laws of 1813 (1 R. L. p. 64), the law as it stood before the revision of 1830 is stated thus:

"Every usurious contract, and every instrument, of whatever kind or description, taken as the evidence of such contract, were absolutely void; and when sued upon such contract, all the borrower had to do was to prove the usury, and no recovery could be had against him. He defeated the recovery, not only of the usurious excess, but of the sum actually loaned. If he had legal and sufficient evidence of the usury, his defense was perfect at law, and he had no occasion to invoke the aid of a court of equity. If the knowledge of the usury was confined to himself and the lender, then it became necessary for him to go into a court of equity, and by a bill of discovery to call upon the lender to admit or deny the usury. He was then, for the reasons which have already been stated, bound to waive the forfeiture, by paying or offering to pay the sum actually loaned with interest. And in some cases, where the form of the security was such as to enable the lender to collect it without a suit either at law or in equity (as a bond and warrant of attorney, or a mortgage), the borrower, although he had competent evidence of the usury, still, as he had no opportunity, from the form of the proceeding, to avail himself of it at law, was compelled to file his bill, and ask *relief* in equity. In such a case, also, although he sought and required no *discovery*, a court of equity would not relieve him from the usurious excess, except upon the equitable condition of his repaying the sum actually loaned."

As will be seen by reading the case, the courts were still struggling to require the borrower to pay back the money he had received, as a condition of obtaining any relief in a court of equity. That principle seemed so just, and had been so long applied, that courts were unwilling to recede from that doctrine, unless required to do so by clear and positive statutory enactment.

These questions provoked much discussion and some criticism of the courts in their reluctance to recede from the equitable rule. As

illustrating the earnestness and ability with which these questions were discussed, I may call attention to the opinions in Livingston v. Harris, supra, and Henry v. Bank of Salina, 5 Hill, 523, 533–537. The contest which had been going on between those who contended that the borrower should return at least the sum obtained from the usurious transactions and those who were utterly opposed to the lender receiving anything, and favored punishing him criminally besides, culminated in the act of 1837 (Laws 1837, c. 430), making the usury law more drastic. By section 1 of the act of 1837, section 5 of title 3 of chapter 4 of part 2 of the Revised Statutes was amended by striking out the provisions excepting commercial paper in the hands of a bona fide holder from the effect of the usury statute, making usurious contracts void, but in terms saving such commercial paper as had been made and transferred before the act of 1837 took effect. Section 2 of the act of 1837 provided that whenever in an action at law the defendant should plead or give notice of the defense of usury, verifying the same by affidavit, he might, for the purpose of proving the usury, call and examine the plaintiff as a witness. Section 3 provided that the offender might be compelled to answer on oath any bill in chancery for relief or discovery, or both, thus covering substantially the provisions of section 6 of title 3 of chapter 4 of part 2 of the Revised Statutes, except that it was extended to bills for relief as well as discovery. Section 4 of the act of 1837 provided that whenever any borrower should file a bill in chancery for relief or discovery, or both, against any violation of the act, or of the title of which the act was a part, it should not be necessary for him to pay or offer to pay any interest or any principal, and a court of chancery should not require or compel the payment or deposit of the principal sum or interest, or any portion thereof, as a condition of granting relief or compelling or discovering to the borrower usurious loans, covering the essential provisions of section 8 of title 3 of chapter 4 of part 2 of the Revised Statutes, except that the payment of interest and principal was extended to both bills for discovery and bills for relief. Section 5 of the act of 1837 further provided that, whenever it should satisfactorily appear by the admissions of the defendant or by proof that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt had been taken or received in violation of the provisions of the act, or of the title of which the act was a part, the Court of Chancery should declare the same to be void and enjoin any prosecution thereon, and order the same to be surrendered and canceled. Section 6 made it a misdemeanor for a person to receive usury. Section 7 enjoined upon the courts to charge the grand jury especially to inquire into violations of the usury statute. Section 8 made false swearing perjury, but provided that the testimony given by the plaintiff or the answer of any defendant should not be used against him before the grand jury, or on the trial of an indictment. Section 9 repealed so much of title 3 of chapter 4 of part 2 of the Revised Statutes, which related to usury, as was inconsistent with the act. Section 10 made the act effective July 1, 1837. The act did not contain the section of the Revised Statutes relating to making restitution; neither did it expressly repeal it. Sections 6, 7, and 8

were repealed by subdivision 12 of section 1 of chapter 593 of the Laws of 1886; but the taking of usury had been made a misdemeanor by section 378 of the Penal Code (Laws 1881, c. 676), which was passed July 26, 1881, and became effective December 1, 1882. Penal Code, § 727, as amended by Laws 1882, c. 102. It was amended by chapter 72 of the Laws of 1895 and chapter 661 of the Laws of 1904.

To recapitulate, after the amendment of 1837, the usury statute stood about as follows: (1) All usurious contracts, obligations, and securities were void. (2) Excess interest above the legal rate was recoverable by the party, or under certain conditions by certain designated officers. (3) The lender could be compelled to deliver up all usurious obligations, contracts, and securities, without borrower paying back anything. (4) The taking of usury was a misdemeanor. (5) Immunity to the lender upon making restitution. These provisions in their essential features are contained in the present General Business Law relating to usury (Consol. Laws, c. 30 [Laws 1909, c. 25] art. 25), except that the provision for criminal liability is omitted, and the provisions relating to discovery and relief have been made to conform to the present practice; the Court of Chancery having been abolished, and what was formerly called a bill in equity would now be called the complaint.

Article 25, above referred to, covers the statutes relating to usury and unlawful brokerage, and affecting loans upon real estate. These provisions, except those relating to loans on real estate security, which were added by chapter 467 of the Laws of 1895 to section 1 of article 1 of title 19 of chapter 20 of part 1 of the Revised Statutes, were together in the Colonial Statute of 1737 and in the act of 1787, above referred to; but in the Revision of 1830 the provisions relating to brokerage and those relating to usury were separated (1 R. S. 709, § 1 et seq.; Id. 771, § 1 et seq.), and so remained until the consolidation of the statutes of 1909, when they were again put together in the same article. But the provisions relating to usury and unlawful brokerage are not included together in the same sections, as they were in the act of 1787. As will be seen by the Report of the Board of Statutory Consolidation (volume 2, pp. 2034–2036) section 376 was evidently taken from section 7 of the usury law (R. S. pt. 2, c. 4, tit. 3, § 7), and sections 381 and 382 come from the statute regulating brokerage charges (R. S. pt. 1, c. 20, tit. 19, art. 1, §§ 2, 3, 5). This very likely accounts for having two provisions so similar in the same article in the consolidation of 1909.

As we have seen, under the provisions of the act of 1787, the provision for immunity was connected with and included in the same section which provided for the filing of a bill of discovery, and under the practice in the Court of Chancery the borrower was required to pay both principal and interest before filing his bill; so that the lender only forfeited the excess interest, unless, of course, he was compelled to resort to a court of law to enforce his obligation, and practically the only forfeit he incurred was the excess interest, and when he made discovery and a restitution he was absolved from any further penalty or forfeiture to the borrower or to the public officers

who could sue and recover the excess interest. But when the act of 1837 took effect, and a provision was made for surrendering up and canceling the usurious obligations and securities without the borrower paying principal, interest, or any part of it, the forfeiture in practical effect was not limited to the excess interest.

The contention of the defendant, in effect, amounts to a restoration of the old chancery rule, which saved to the lender the money which he had actually advanced upon the usurious loan, together with interest thereon. I do not think the consolidation of 1909 has had that effect. I am of the opinion that the provisions of the General Business Law are substantially the same as were those of the Revised Statutes before the consolidation took effect. In the Revised Statutes the provision for immunity, although not in the same section as in the act of 1787, immediately follows that for discovery and relief, and compelling the lender to surrender usurious obligations and securities without return by the borrower, and that arrangement has been adhered to in the General Business Law, except that there are two intervening sections, prohibiting corporations from interposing the defense of usury and withholding from a transferee of a cause of action to cancel a usurious instrument the right which the borrower has to relief without paying or offering to repay the sum loaned. I think the repayment or return of "the money, goods or other thing so taken, accepted or received, or the value thereof," which acquits the lender, referred to in section 376, includes obligations or securities which, under the provisions of section 373, the court may declare void and enjoin prosecution thereon, and order surrendered and canceled. It is true that, if a lender makes so complete a restitution, there would seem little or nothing left for which he could be prosecuted under any provision of the usury article, irrespective of the acquittance under section 376, with the possible exception of the forfeiture under section 372, unless he would still be liable to criminal prosecution under Penal Law (Consol. Laws 1909, c. 40) § 2400. But that would seem not to be barred, if the general language of Judge Bartlett is given full effect. However, it should be noted, as I have already pointed out, that the question involved in that case was whether the offender had been acquitted of an offense against a provision of the Banking Law (Consol. Laws 1909, c. 2).

As has been pointed out, the identical language of the act of 1787 and of the Revised Statutes respecting the making of restitution is embodied in section 376, except that no reference is made to a discovery or bill of discovery. That was omitted. I do not regard that omission as at all significant or important, because the purpose and intent of the consolidation of the statutes, of which section 376 is a part, is declared, so far as the statutes have been reproduced in such consolidation, to be of the same force and effect as before the enactment of such consolidation. Laws 1909, c. 596.

The heading or caption to the section, "Return of Excess a Bar to Further Penalties," might itself seem more significant, but there is nothing in the General Business Law itself or in the General Construction Law (Consol. Laws, c. 22; Laws 1909, c. 27), or the other act which declares the effect of a statutory construction, to which I

have just adverted, from which so radical a change as is contended for on behalf of the defendant may be inferred.

Without prolonging this discussion, I will simply state my conclusions: (1) The note and collateral were both void for usury; (2) the defendant never acquired any title to the stock; (3) except for his acquiescence to sell the stock, the plaintiff could have maintained an action of trover for the stock at any time; and (4) he can recover the proceeds of the sale in this action for money had and received. If I am right in that conclusion, the motion for the direction of a verdict in favor of the plaintiff for the full amount demanded in the complaint, with interest, should have been granted, and the exception to the refusal of the court to do so was well taken. I think, under the provisions of section 1317 of the Code of Civil Procedure (as amended by Laws 1912, c. 380), that may now be done.

The judgment should therefore be reversed, and the plaintiff's motion granted, and judgment directed for the plaintiff and against the defendant for the full amount claimed, with interest, with costs in the trial court and of this appeal. All concur.

(158 App. Div. 263.)

In re COMMON COUNCIL OF CITY OF LACKAWANNA.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. CONSTITUTIONAL LAW (§ 61*)—MUNICIPAL CORPORATIONS (§ 907*)—LEGISLATIVE POWERS—DELEGATION TO COURT—LEGALIZING MUNICIPAL BONDS.

General Municipal Law (Laws 1911, c. 769) art. 2a, as to legalizing by the court of proceedings for issuance of municipal bonds, is not a delegation of legislative power to the court, and so unconstitutional; its effect, under sections 22, 23, 26, 28, being to delegate no discretionary power to the court, but merely to enumerate irregularities in the proceedings preliminary to the issuance which shall be considered immaterial, and to permit an ascertainment of the facts by the court, and a determination whether they bring the case within the operation of the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 103–107; Dec. Dig. § 61;* Municipal Corporations, Cent. Dig. § 1895; Dec. Dig. § 907.*]

2. MUNICIPAL CORPORATIONS (§ 867*)—BOND ISSUES—LEGALIZING PROCEEDINGS—IRREGULARITIES.

The charter of a city (Laws 1909, c. 574, § 86) requiring the vote of the citizens on the question of an expenditure for an improvement to be on the amount specified in the estimate of the council and in the notice of election, the fact that the ballot specifies $5,000 more than the resolution and notice is not a mere irregularity, within General Municipal Law (Laws 1911, c. 769) art. 2a, as to legalizing proceedings for issuance of municipal bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. § 867.*]

3. MUNICIPAL CORPORATIONS (§ 867*)—EXPENDITURES—ELECTION—ESTIMATE, NOTICE, AND BALLOT.

The charter of a city (Laws 1909, c. 574, § 86) providing that, when the council resolve that an extraordinary expenditure ought to be made for a purpose set out in the resolution, it shall make an estimate of the sum necessary therefor, and publish such resolution and estimate, with notice of a special election to determine whether the amount of such ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

penditure shall be raised by taxation, and providing that the ballot shall state the amount of the expenditure, requires the amount stated in the ballot to be the same as estimated by the council and published in the notice.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. § 867.*]

Lambert, J., dissenting.

Appeal from Special Term, Erie County.

In the matter of the application of the Common Council of the City of Lackawanna for an order legalizing proceedings prior to the issue and sale of $130,000 road improvement bonds. From an order legalizing the same, an intervening taxpayer appeals. Reversed, and application denied.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Lewis L. Delafield, of New York City, for appellant.

Myron S. Short, of Lackawanna, for respondents.

KRUSE, P. J. [1-3] I concur in the construction Mr. Justice LAMBERT puts upon the statute under which this proceeding is brought and all he says upon that subject. It seems to me, however, that the conclusion which he reaches, that the infirmity in the proceedings was a mere irregularity or technicality, is not well founded. The charter of the city of Lackawanna requires the common council to publish the resolutions and estimates, together with the notice of the time and place of the special election, and the specific question to be decided at the special election, according to the statute, is whether the amount of such expenditure shall be raised by tax. The ballot is required to state the amount of the expenditure. I think the statute requires that this amount shall be the amount as estimated by the common council and published in the notice.

I think the application should have been denied.

Order reversed, with $10 costs and disbursements, and application denied, with $10 costs.

ROBSON and FOOTE, JJ., concur.

MERRELL, J. (concurring). I think the legislation enacted by article 2a of the General Municipal Law is an attempted delegation by the Legislature of purely legislative functions, and therefore unconstitutional. Applied to this case, it in effect permits the court to dispense with a jurisdictional prerequisite to a bond issue provided by statute. Furthermore, it seems to me that the variance between the amount of the advertised bond issue and that actually submitted is more than an irregularity. The object of the publication under section 86 of the Lackawanna City Charter must have been, not only to advise the taxpayers of the proposed improvement, but *principally* what it would *cost*. What would prevent the common council publishing an estimate and proposed expenditure of a trifling sum, thus leading the taxpayers to refrain from attending the election because of the small amount proposed to be raised, and, when actually submitted,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

swell the amount to whatever proportions might be wished? If an increase of $10,000 can be made, as was in the case at bar, why not more?

I think the order appealed from should be reversed, with costs to the appellant.

LAMBERT, J. (dissenting). This is a proceeding brought under article 2a of the General Municipal Law (chapter 769, Laws of 1911). Its purpose is to have declared legal the preliminary proceedings underlying certain bond issues of the city of Lackawanna, Erie county. These bonds are sought to be issued pursuant to section 86 of the charter of such city (chapter 574, Laws of 1909), which section provides, in part, as follows:

"Taxpayers to Vote on Extraordinary Expenditures.—Whenever the common council shall resolve by the affirmative vote of at least three of its members that an extraordinary expenditure ought, for the benefit of the city, to be made for any specific purpose set forth in the resolution, it shall make an estimate of the sum necessary therefor and for all such purposes, if there be more than one, and publish such resolutions and estimates once in each week for three successive weeks, in the official newspaper, together with a notice that at a time and place therein specified a special election of the taxpayers of the city will be held to decide whether the amount of such expenditure shall be raised by tax."

Then follow the regulations for the holding of such elections. Three sets of bonds were sought to be issued in this manner for paving purposes. Question arises only as to two of such issues of bonds, and the sole irregularity urged in connection with same is that the estimates, having been made by the council for the sums of $25,000 and $40,000, respectively, the propositions, when submitted to vote of the taxpayers, were submitted at the sums of $30,000 and $45,000, respectively an increase of $5,000 in each instance.

By section 22, article 2a, of the General Municipal Law, it is provided that proceedings taken by a municipal corporation for the issuing of bonds pursuant to statute "may be legalized and confirmed by the Supreme Court in the manner and with the effect" provided by such article. By section 23 of the same article, provision is made for the filing of a petition with such court, either in behalf of the municipality or any other person in interest, and which petition is required to identify the statute under which it is sought to issue the bonds, to state the amount of such bonds and the time of their maturity, and to set forth in detail the steps taken in respect to the issuance and sale thereof. Such petition is required to pray that such court "investigate the law and facts in relation to such proceedings and determine whether such proceedings substantially complied with the statute under which it is proposed to issue and sell such bonds." And it is permitted also to include in such petition specific mention of any particular in which the applicant deems that such statute has not been complied with. The article then makes provision for the giving of general notice of such application for at least 20 days prior to the hearing of same by both publication and posting. At any time before such hearing, any person in interest is permitted to file a verified answer

to such petition. Further provision is then made for a hearing by and before such court, and for the ascertainment of the facts involved, by the examination of witnesses, if required, and by the filing of proof by affidavit.

By section 26 of such article it is enacted:

"If, after such hearing and investigation, such court is satisfied * * * that the proceedings taken by such municipal corporation, its officers, agents or voters, prior to the issuance and sale of such bonds, * * * substantially complied with the statute under which it is proposed to issue such bonds, * * * the court may, by order, legalize and confirm the proceedings taken prior to the issue and sale of such proposed bonds, * * * with the same force and effect as though all the provisions of law in relation to such proceedings and form had been strictly complied with. The court may determine that such statute was substantially complied with * * * notwithstanding any irregularity or technicality in the form of the proposition or resolution proposing or authorizing such issue, or in the notice of the election or of the meeting of the board or body adopting such resolution or authorization, or in the time or manner of service thereof, or in the conduct of the election or meeting at which such proposition or authorization was adopted, * * * or notwithstanding any other technical or formal irregularity of like nature in such proceedings. If the court is satisfied that the proceedings for the issuance and sale of such bonds did not substantially comply with the statute * * * he [the court] may make an order accordingly, specifying the particulars in which he [the court] deems that such proceedings failed to comply with such statute."

By section 28 of such article the effect of a determination of validity by the court is declared as follows:

"Effect of Determination.—If the order of the Supreme Court legalizes and confirms such proceedings, upon the expiration of the time to appeal therefrom, if no appeal be taken, or upon the entry of the final order of the Appellate Division confirming such order of the Supreme Court, such proceedings shall be deemed legalized and confirmed, * * * and the validity of such bonds shall not thereafter be in any manner questioned by reason of any defect or irregularity in such preliminary proceedings and notwithstanding any such irregularity or defect shall be legal and binding obligations upon the municipal corporation issuing and selling the same. * * *"

Appellant, an intervening taxpayer, attacks the order appealed from, not only upon the alleged defect in the preliminary proceedings above mentioned, but also upon a claim that the entire scheme of article 2a of the General Municipal Law is unconstitutional, in that it is an attempted delegation by the Legislature of strictly legislative functions to the judicial arm of the state government. This, it is claimed, is in derogation of article 3, section 1, and article 6, section 10, of the state Constitution.

That the power to fix the prerequisites of a valid bond issue by a municipality rests with the Legislature seems beyond question, and the argument follows, with great force, that the power to vary those prerequisites, when once established, rests with the same body having the initial power to fix the same. It is also a matter of common knowledge that, prior to the enactment of article 2a of the General Municipal Law, the aid of the Legislature was frequently invoked to correct, by special enactments, technical and other defects and irregularities in municipal bond issues. In fact, a custom became more or less prevalent among purchasers of such securities of requiring such

special enactments in a majority of cases for the purpose of insuring such bonds from technical attack. It is our understanding that this statute here in question was designed to relieve the Legislature from such burden, and to accomplish, to some extent, at least, by its general provisions, the results sought through such special enactments.

While the undoubted power existed in the Legislature to ratify, despite irregularities in such bond issues, and has been exercised without question for many years, and while the Legislature has undoubted power to delegate, within constitutional limitations, its powers and functions (Village of Saratoga Springs v. Saratoga Springs Gas & Electric Company, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713; Tifft v. City of Buffalo, 82 N. Y. 204), yet it seems plain that an attempted delegation by the Legislature to the judiciary of legislative powers would offend the constitutional inhibition against the performance by the judiciary of such functions.

However, the construction which we place upon this statute does not offend such constitutional provisions. A careful study of the statute discloses that no legislative function is committed to the court. By section 26 of the article the sole question submitted to the court to determine is whether, in the preliminary proceedings had, there has been a substantial compliance with statutory requirements, and even that determination is hedged about by legislative declaration, found in such section, of what character and class of irregularities may be excused and overlooked in reaching the determination of substantial compliance. The determination of the question of substantial compliance involves no element of discretion upon the part of the court. It is merely the determination of a question of fact. The court may not suspend or ignore any statutory requirement. It can only ascertain the facts, and determine whether such facts bring the case within the operation of the statute. If defects exist, other than those mentioned in section 26, the court not only is not permitted to grant the legalizing order, but is expressly required to refuse to do so. Such determination of a question of fact is most fittingly committed to that branch of the government which customarily has such matters in charge.

It is, perhaps, the form which the order is required to take—i. e., that of legalizing and ratifying the bond issue—which gives rise to the argument that a discretion and a power to suspend statutory requirements of a valid bond issue is committed to the court. But that there was a contrary legislative intent seems clear. The effect of the court's determination is not left to be inferred from the form of the order. By section 28 it is expressly declared that, from the time that the court has finally determined that there has been a substantial compliance with the statutory requirements, the same shall be deemed legalized and confirmed. There is, then, found in article 2a of the General Municipal Law a simple and comprehensive legislative scheme, whereby the Legislature has declared in advance that all municipal bond issues shall be valid, wherein the sole objection thereto lies in certain specified and defined technical irregularities, and whereby there is committed to the Supreme Court the purely judicial func-

tion of determining, in each instance where the statute is invoked, the question of fact of whether there are, or not, any other irregularities than those mentioned in such statute. It is thus made clear that the bond issues acquire their validity solely from the legislative enactment, and not from the court, and there is, therefore, no legislative function committed to the court. Such construction gives a permissible and logical effect to every portion of the statute, and it is, therefore, our duty to adopt it as the true construction, rather than one which would lead to prohibited and unconstitutional results. Admiral Realty Co. v. City of New York, 206 N. Y. 110, 99 N. E. 241; People ex rel. Simon v. Bradley, 207 N. Y. 592, 101 N. E. 766.

The court at a Special Term decided that the increase of $5,000, submitted to a taxpayer's vote in each of the two bond issues, over and above the "estimate" published, constituted an irregularity within the meaning of the statute, and made the order appealed from evidencing such decision. Having reached the conclusion that the statute is constitutional, the order made should be sustained, in the event either that such a departure in the amount of the "estimate" and vote was an irregularity, or, on the other hand, that the preliminary proceedings met the requirements of the city charter.

Excepting Mr. Justice MERRELL, my Associates agree with the conclusion here reached, that the statute is constitutional, but conclude that the variance above mentioned is such a departure from the commands of the charter that the proceedings, taken as a taxing scheme, are void; in other words, that it is a jurisdictional defect. Of course, if such a construction is warranted, and the variance is properly classified as a jurisdictional defect, the result is not disputed that the bond issues would register an illegal obligation.

All legislative power of government, including the creation of a municipality, rests in the state Legislature, and no one would dispute the power of the Legislature to create this bonded indebtedness against this municipality, provided same was for its benefit. The Legislature could delegate and has delegated such powers to the municipality, with the limitations and conditions contained in the charter. Hence it is to the charter that we must look, in determining whether there has been a proper exercise of such delegated powers, and, if not a strict compliance therewith, whether the variance is of a substantial or of a technical character.

It is to be noted, that in its reference to the amount to be expended for the improvement the charter uses the term "expenditure" in every instance, except in reference to the making of the "estimate" and its publication. Following the determination of the council that the "expenditure" ought to be made, the council is required to "estimate" the amount necessary therefor and to publish such "resolutions and estimates," together with a notice of a special election to decide whether the amount of such "expenditure" shall be raised by tax. Later it is provided that "the common council shall cause the sum or sums of money thus voted" to be assessed, provided that "the sum or sums of money thus appropriated" shall not exceed 2 per centum of the assessed valuation; but, in case "the sum or sums of money thus voted"

shall exceed such amount, then bonds shall be issued as therein provided, and, further:

"After such special tax or taxes shall have been authorized, * * * the common council may proceed to authorize the expenditure of the amount thereof, for the purposes specified in its published statement as aforesaid and sanctioned by such election."

From such provisions I see no indication of an intention to limit the amount of the expenditure to the amount of the estimate. The section certainly does not specifically so provide, nor do I find therein any inference of such intent upon the part of the Legislature. The initial determination of the advisability of the improvement is left to the council. The use of the word "estimate," in the provision for the making of such and its publication, clearly indicates that it was not of a fixed or permanent character, because it could not be definitely ascertained in advance of bids for the work, but was merely an approximation of the amount required. The provision for publication of an "estimate" furnishes the principal argument that the amount of the estimate is to be the amount voted upon. But I see no necessity of giving it such significance. By its publication, although the needed amount remained uncertain and indefinite, the community and the taxpayers are afforded some intimation of the probable cost of the improvement and were given notice that at a later and specified time an opportunity to decide by vote whether the amount of the "expenditure" required for such improvement should be authorized. Had it been intended to limit such vote to the amount of the estimate, such intention could have been clearly so declared, by the use of the word "estimate" in such provision for the holding of the election. Apparently, then, the way is left clear for the council to ask authorization for the expenditure of such an amount as would prove safely adequate for the contemplated improvement, and without limitation, flowing from their previous published estimate.

But in this connection it is urged that such construction results or may result in a fraud upon those voters who might rely upon the estimate so published, and, being willing that such an amount be expended for the improvement, might refrain from attending such election, only to find that by such election a sum had been authorized in excess to an amount for which they would have voted, if present.

There are several answers to such suggestion. With the scope of the statute understood, no one would be misled. Then, too, with the way left open for all such voters to protect themselves, I see no justification for reading something into this statute, or for giving it a strained construction, to protect those electors who do not avail themselves of the means at their command for their own protection. Further, the authorization by vote does not finally apply these moneys. Any wasteful or illegal expenditure thereof is still within the control of the courts, upon the application of any taxpayer. I am unable to see wherein the preliminary proceedings fail to comply with the charter requirements. But if a construction of the various charter provisions is to be adopted, such as will require the vote to be upon the same amount specified in the estimate, then it would seem that the

failure to so comply was of a technical, rather than of a substantial, character. The sole province of the electors is to limit the amount of the expenditure. There is vested in the taxpayers no control over the actual expenditure of the money, but their action simply affords authority to the council to proceed to expend such moneys, up to the amount voted. Viewed in this light, there would seem to be no material deviation from such statutory provisions, even under such strict construction.

The order appealed from should be affirmed, with costs.

(157 App. Div. 819)

HERMAN v. CITY OF BUFFALO et al.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. MUNICIPAL CORPORATIONS (§ 857*)—TORTS—NUISANCE—BUILDING—DEFECTIVE FOUNDATION.

Plaintiff's intestate, an employé of a contractor doing the superstructural work on a building for the defendant city of Buffalo, was working on the roof of same when it collapsed, causing his death. The collapse was due to an insufficient foundation. *Held* that, in order for plaintiff to recover on the theory that the foundation was a nuisance, the foundation must have been so obviously dangerous and of such a character as to render the structure a menace and an impending danger to persons in the enjoyment of their legal rights.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1812; Dec. Dig. § 857.*]

2. MUNICIPAL CORPORATIONS (§ 857*)—FINDINGS—SUFFICIENCY OF EVIDENCE.

Evidence in an action for the death of an employé of a contractor who was doing the superstructural work on a building for the city of Buffalo, caused by the collapse of the building, *held* to sustain a finding that the foundation was so insecure and dangerous as to constitute a nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1812; Dec. Dig. § 857.*]

3. APPEAL AND ERROR (§ 216*)—OBJECTION BELOW—SUFFICIENCY—INSTRUCTIONS.

Where a party was an agent of defendant in some respects, though not in all, a charge that he was the agent of defendant was not available error, where there was no request by defendant to limit the charge.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216;* Trial, Cent. Dig. § 627.]

4. MUNICIPAL CORPORATIONS (§ 847*) — TORTS — DEFECTIVE BUILDING — NUISANCE.

The contract between the city of Buffalo and the principal contractor for the erection of a building provided that the principal contractor could not sublet the work without the consent of the city. The principal contractor did sublet the contract for roofing without such consent. An employé of the subcontractor was killed when the building collapsed because of a defective foundation. *Held* that, whether the city had formally given its consent or not, as the employé was there with the knowledge of the officers of the city, it would be assumed that he was rightfully there, and with their implied invitation, so as to render the city liable for its negligence whereby he was killed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1803; Dec. Dig. § 847.*]

Foote, J., dissenting in part.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Erie County.

Action by Louise M. Herman, administratrix, against the City of Buffalo and others. From a judgment in favor of plaintiff, defendant City of Buffalo appeals. Affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

George E. Pierce, of Buffalo, for appellant

Charles L. Feldman, of Buffalo, for respondent.

KRUSE, P. J. The plaintiff's intestate was at work upon the roof of the new pumping station engine house, which was being constructed for the city of Buffalo. The building collapsed, and he was killed. The accident occurred June 30, 1911, and the building was nearly complete when it fell. The action is for his death; it being contended that the building was obviously insecure and dangerous and a nuisance. Several contractors and subcontractors who did work upon the building and the architect who planned it were joined with the city as parties defendant. At the close of the plaintiff's case, motions for a nonsuit were made by the various defendants and denied, with exceptions to the rulings. No further evidence was given on behalf of the defendants, and the case was submitted to the jury, with the result that a verdict was rendered against the city, but as to the other defendants verdicts of no cause of action were rendered. The city appealed from the judgment entered upon the verdict against it, and from an order denying its motion for a new trial.

It is contended that the building fell because the east foundation wall of the building was not sufficiently strong nor secure to withstand the lateral pressure against it; that the wall was crowded inward, carrying with it the superstructure sufficiently to weaken the trusses which supported the roof; that the trusses were put out of alignment, and bowed or buckled, and the lower chords put out of tension, thus weakening the trusses, so that they were unable to carry the load which was put upon them, and the roof fell, and the building collapsed. The land upon which the building was located was a part of the park system of the city. The park commissioners consented to the erection of the pumping station thereon, as they were permitted to do (Laws of 1905, c. 111), and named Robert A. Wallace as architect and superintendent of construction for the building. He was so recognized by the commissioner of public works and acted in that capacity.

Wallace was made a party defendant; but, as has been stated, a verdict was rendered in his favor, and the plaintiff does not now claim that the verdict of the jury against the city is founded upon the incompetency of the architect or the insufficiency of the plans made by him. It is, however, contended by the plaintiff that the Wallace plans were not followed; that Samuel J. Fields, the assistant engineer in the water department, was placed in charge of the foundation work, and the work done under the direction of the department of public works, and in such a way that the building was insecure in the respect to which I have called attention.

The work of constructing the foundation was let to the Buffalo Dredging Company in August, 1907. The work was commenced in the spring of 1908, and finished in the fall of that year. The site extends to the shore line of Lake Erie. The ground, or a part of it, was originally low and under water. The site was dredged and excavated to within two feet of bed rock, where a layer of hardpan was encountered. Trenches were dug for the foundation wall through the hardpan, so that the walls rested upon the rock, but were not imbedded in the rock or keyed. The building was rectangular in form, 364 feet by 100 feet. The east foundation wall, the one which became insecure, was 364 feet long, 38 feet high, 5 feet wide at the base, and 3 feet at the top; the slope of the wall being on the inside. The original plans contemplated concrete foundations for two portico entrances on the east side, one near the south end, and the other near the north end. These portico walls were to connect with the east wall and extend down to the rock; but they were omitted, and piles were driven in their stead, to which I will again advert.

After the foundation work was completed, and had been accepted and paid for by the city, the work of filling in the site outside of and around the walls was commenced by the city in the winter of 1908 and 1909, under the immediate supervision of the assistant engineer in the water department. The first filling consisted of ashes, cinders, and the like material, which had been gathered by the city street-cleaning contractor. The work was continued until the filling east of and next the east foundation wall was up about 20 feet. Then the pit or excavation inside the walls was filled with broken stone and earth up to the same height. Thereafter a second filling of about 14 or 15 feet, consisting of earth, was placed on top of the first filling, next to the east foundation wall, and extending to within a foot of the top of the wall. The filling was finished late in 1909, and the work was left in that condition until the spring of 1910, when it was noticed that the east wall was being deflected inward and westward, evidently due to the lateral pressure of the outside fill. Cracks about a half an inch wide running through the wall, about 6 feet from either end, were discovered. Measurements were made in February, 1910, showing a maximum deflection of 6 inches, 150 feet south of the north end; the wall bending toward the west, commencing at the crack at either end of the wall. Within a month or so several other measurements were taken, which disclosed that there was an increasing deflection of the wall. Thereupon the matter was taken under consideration by the assistant engineer and the commissioner of public works and his deputy, and a plan adopted for holding the wall in place by means of buttresses or braces placed on the inside of the wall. Twenty or more of these buttresses, consisting of concrete, each weighing about eight tons, were placed against and attached to the wall on the inside, resting in and upon the broken stone filling in the pit, and secured by a mat or floor of concrete. But it is claimed that the buttresses should have extended down through the broken stone and been imbedded in the rock; that after a time the broken stone filling settled,

so that they were simply hanging to the wall. Whether that is so or not, the proof tends to show that the wall was not held in place.

With the foundation in that condition, the work was turned over to the B. I. Crooker Company, who had taken the contract for the superstructure. Although the contract was let in July, 1909, their work was not commenced until the spring of 1910. A short time after the work of erecting the superstructure had commenced, 15 piles were driven to the bed rock about 3 feet outside of the east wall near the north end, and a like number near the south end, for the portico entrance foundations. The work was done under a separate contract made by the city with a contracting firm and in accordance with the plans prepared by the assistant engineer. This work, like all of the foundation work, was done under the direction of the assistant engineer.

The iron frame of the building consisted of 23 double posts or columns on the east wall and as many on the west wall, 14 feet 8 inches apart, one longer than the other; the longer ones carrying the roof trusses and the shorter ones a track for operating a traveling crane. The ends of the building were brick walls, and the east and west walls were of brick and terra cotta, forming a so-called curtain wall. From the peak or ridge of the building, about 200 feet long, was erected a lantern or skylight of iron and glass, attached to the upper chords of the trusses, extending about 10 feet either side of the peak, the purpose of which was to allow the steam and smoke to escape and to admit light and air. Extending lengthwise of the building purlins were riveted to the trusses. The roof was of reinforced concrete, on top of which tile was being placed at the time the building collapsed, on the 30th day of June, 1911.

It is also claimed that changes were made in the superstructure, which weakened the building, especially in the trusses, and that they were overloaded; but the most that can be claimed for those things is that they contributed to the accident, if the conditions respecting the east wall were as the plaintiff claims and as the jury evidently found. The verdict rests essentially upon the finding that the foundation was insufficient and insecure at the time the work was turned over to the contractors for the superstructure, and that the insecurity and danger increased as the work progressed, finally resulting in the collapse of the building. Upon that question the city attorney asked the court to charge the jury that, although they found that there was a deflection of two inches in the east wall after the building of the buttresses, if the city, through its officers, in the exercise of ordinary care, did not know of such movement, but that its officers believed that the building of the buttresses would prevent further movement, the city is not responsible or liable for creating or maintaining a nuisance, and that the jury must render a verdict of no cause of action in favor of the city; counsel adding, after a colloquy between himself and the court, "If they use reasonable care," to which the court replied: "Reasonable care. I so charge."

It may also be stated, in passing, that the basis of making some of the contractors and subcontractors parties defendant is, in brief, that

they, having knowledge of the insecurity of the foundation, proceeded with their work, and thereby further weakened the foundation and enhanced the danger, upon the principle that whoever participates in the construction of any structure which is obviously dangerous to human life is a party to the creation of a nuisance. But, as has been stated, the jury exonerated them from fault.

[1] The judge, in his charge to the jury, after stating the principle which I have just mentioned, continued by saying that the structure must, however, be so threatening as to constitute an impending danger to persons in the enjoyment of their legitimate rights; that the plaintiff, in order to recover against any defendant in this action, is bound to show by evidence to the satisfaction of the jury that there was some defect in such defendant's work, which as a reasonably prudent man he knew, or should have known, was of such a character as to render the structure a menace or danger to human life, one that was obviously dangerous to human life, one so threatening as to constitute an impending danger to persons in the enjoyment of their legitimate rights. The rule thus laid down by the learned trial judge for determining the defendant's liability is as stated in Cochran v. Sess, 168 N. Y. 372, 61 N. E. 639, and almost in the identical words of Judge O'Brien, who wrote for the court in that case.

In Melker v. City of New York, 190 N. Y. 481, 83 N. E. 565, 16 L. R. A. (N. S.) 621, 13 Ann. Cas. 544, the question of what constitutes a nuisance is discussed at length, and the definition of a nuisance as there stated, applicable to the circumstances of that case, is that, if the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as a matter of fact; but if the act in its inherent nature is so hazardous as to make the danger extreme, and serious injury so probable as to be almost a certainty, it should be held a nuisance as a matter of law. That definition was reiterated, and the rule applied, in the case of Hogel v. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794, 32 L. R. A. (N. S.) 1038.

It is true that the defendant's negligence lies at the foundation of this action, but the nature of the action is one essentially for creating and maintaining a nuisance. As is said by Mr. Justice Woodward in McNulty v. Ludwig & Co., 153 App. Div. 206, 213, 138 N. Y. Supp. 84, 90:

"The existence of a nuisance, in many, if not in most, instances, presupposes negligence. These torts may be, and frequently are, coexisting, and practically inseparable, as where the same acts or omissions constituting negligence give rise to a nuisance."

I will not collate the cases upon the question as to what constitutes a nuisance, nor attempt to point out the limitations of the general definitions by which courts have attempted to define a nuisance. It is sufficient, I think, to say that in my judgment the rule stated to the jury was applicable to this case, and that upon the evidence the jury was warranted in finding the defendant city liable.

[2] As we have seen, the plans for the foundation were materially changed. It was soon apparent that the east wall would not withstand

the lateral pressure. The proof tends to show that according to the original plans the wall was designed as a bearing wall, not as a retaining wall, and it also appears by the testimony of experts that the wall should have been at least 12 feet wide at the base, resting in a trench in the rock, and keyed; that the filling inside should have been done simultaneously with that on the outside of the wall; that the buttresses weakened rather than strengthened the wall, because they were not firmly imbedded and secured at the base, and when the stone foundation settled they were left hanging at the side; that the driving of the piles so close to the east wall further increased the lateral pressure, while, if the concrete foundations originally planned for the porticos had been put in, they would have served to strengthen the wall and resist the pressure of this compact mass of filling—in short, that a foundation had been constructed which was insecure, and that the structure was so dangerous as to constitute a nuisance within the rules to which I have adverted.

It should be stated, however, in fairness to the city and its officers, that they contend that, if there was any fault in the plans or in the construction of the work, it was not their fault; that engineers of skill and experience were employed, and that so far as Mr. Fields, or any of the representatives of the department of public works, had to do with the work, it was not only well planned, but properly done; that the buttresses were entirely adequate, and held the east wall firmly in place; but that there were changes and omissions made in the work, for which neither the city nor its officers are responsible, which caused the collapse. However, the jury was fairly charged upon those questions, and found against the defendant city.

[3] 2. But it is contended on behalf of the city that the plaintiff's intestate was at most a licensee upon the premises, and that the city owed him no active duty to have the building or premises in any particular condition, or to do or refrain from doing any particular act, except not to willfully injure him.

It appears that the Crooker Company, the principal contractor for the superstructure, subcontracted the sheet metal work and roofing to G. H. Peters Company, and the plaintiff's intestate seems to have been doing his work under some arrangement with the Peters Company. He had several men working with him, slating the roof of the building, when it collapsed. It is urged that, under the terms of the contract between the Crooker Company and the city, the Crooker Company could not sublet the work without the consent of the city. The record is silent upon the question as to whether the city consented or not. But, whether the city formally gave its consent or not, I think we may fairly assume that he was rightfully there, engaged in doing his work, furthering the completion of the building, and that the work which he was doing was included in the general contract between the Crooker Company and the city; that the city, through its proper officers, so recognized his status; and that at least he was there by the implied invitation of the city. Under such circumstances I think the city is liable for his death, assuming, of course, that the other necessary facts have been established.

3. Measurements were made after the collapse of the building, showing that the east wall had moved several inches westward after the work on the superstructure was begun, and it is claimed it was error to show this. It is urged that there is no presumption that the wall was not disturbed by the collapse of the building. I think, however, the circumstances were such that it could be found that the location of the wall was not changed by the collapse of the building.

[4] 4. It is further urged on behalf of the defendant city that the trial court erred in instructing the jury that Wallace, as superintendent of construction, was the agent of the city. I deem it sufficient to say that I think the charge was correct. It is possible that he may not have been the agent of the city in all that he did in the way of planning and superintending the works, and to some extent he may have exercised independent judgment; but in some respects, at least, it would seem that he was the agent of the city. If counsel desired to limit the charge in any way, that should have been done by an appropriate request. Furthermore, I do not see how it could affect the result, because the jury found Wallace was not at fault.

There are other exceptions to the charge. They have all been considered, but I think they are not well taken. I think that no error was committed which would justify the granting of a new trial.

I therefore reach the conclusion that the judgment and order appealed from should be affirmed, with costs. All concur except FOOTE, J., who dissents, upon the ground, first, that the plaintiff's intestate was a bare licensee, for whose injury the defendant city would not be liable, because of a nuisance upon its private property; second, that the evidence does not support the theory on which alone the verdict rests, viz., that the collapse of the building was due to the defects in the foundation wall.

(81 Misc. Rep. 298.)

VENNER v. NEW YORK CENT. & H. R. R. CO. et al.

CONTINENTAL SECURITIES CO. et al. v. MICHIGAN CENT. R. CO. et al.

(Supreme Court, Special Term, Albany County. June, 1913.)

RAILROADS (§ 137*)—EQUIPMENT—AGREEMENT FOR PURCHASE—ISSUE OF CERTIFICATES—VALIDITY.

Certain railroad companies entered into an agreement to cause to be built and delivered to a trustee named certain equipment, and the railroads furnished 10 per cent. of the cost price, and the trustee, on receiving the equipment, was authorized to issue certificates to an amount equal to the remaining 90 per cent. of the cost, the proceeds of the sale of the certificates to be used to pay the balance of the cost price. The railroad companies each agreed to lease specified portions of the equipment so purchased, the rent for the same to be applied to paying the trustee for its charges and expenses and the dividends on the certificates, and to retire a portion of the certificates each year. The certificates were authorized by the Public Service Commission. *Held*, that the contract was not ultra vires or illegal.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 435; Dec. Dig. § 137.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Actions by Clarence H. Venner against the New York Central & Hudson River Railroad Company and others, and by the Continental Securities Company and Clarence H. Venner against the Michigan Central Railroad Company and others. Complaint in each action dismissed.

J. Aspinwall Hodge, of New York City, for plaintiffs.

Stetson, Jennings & Russell, of New York City, for defendant Guaranty Trust Co.

Alex. S. Lyman, of New York City, Albert H. Harris, and Thomas Emery, of New York City, for all other defendants.

CHESTER, J. Two actions are presented, which may be considered together. One is brought by a minority stockholder of the New York Central & Hudson River Railroad Company, and the other is brought by minority stockholders of the Michigan Central Railroad Company. In both it is sought to set aside, as ultra vires and illegal, an agreement known as the "New York Central Lines Equipment Trust of 1913." The actions are brought against each of said railroad companies and four other railroad companies affiliated with them, the Guaranty Trust Company, named as trustee in such agreement, and certain individuals, as defendants.

The six railway companies which are defendants are each parties to such agreement, and they are commonly known and named therein as the "New York Central Lines." The agreement in question was made in pursuance of a desire therein expressed that additions to equipment should be provided to enable these lines to transport and care for the traffic which they handle as common carriers, and it was an expediency devised for the purpose of raising the necessary moneys to provide such equipment, which was to consist generally of locomotives, passenger and freight cars, and other structures.

The three individual defendants, who are also parties to the agreement, are described therein as the "vendors." They covenant to cause to be built and delivered to said trustee certain equipment to be specified by the officers of the railroad companies. The railroad companies furnish at the outset 10 per cent. of the cost price of such equipment. The trustee, upon receiving the equipment, is authorized to issue certificates, which are known as "New York Central Lines Equipment Trust Certificates of 1913," to an amount equal to the remaining 90 per cent. of the cost of the equipment. The proceeds of the sale of such certificates are used to pay the balance of the cost price thereof. The six railroad companies each in turn agree to lease from the trustee specified portions of the equipment so purchased and conveyed to it by the vendors. The rent received for the same is applied to paying the trustee for its charges and expenses, taxes, interest, or dividends upon the certificates at the rate of 4½ per cent. and also to retire one-fifteenth of the principal of the certificates each year. The rentals are paid into a common fund for the benefit of the holders of all outstanding certificates, so that at the end of 15 years it is the purpose that all shall be paid, at which time the title to the equipment passes to the respective railroad companies, in accordance with their

agreement as to the division thereof among themselves. The railroad companies make themselves jointly and severally liable to pay the rental secured by the leases, and there is a provision that, in case of the default of any of the railroad companies in the payment of its proportion of any installment of rent due under the lease, the other railroad companies, or such of them as may elect to do so, shall have the right to pay the rental in default and to take possession of the equipment allotted to the company that has failed to keep its obligation. The total amount of certificates authorized by the agreement is $24,000,000, of which $12,547,000 have already been issued, and the equipment represented thereby has been allotted among the several railroad companies. Of this amount, $4,996,050 have been allotted to the New York Central & Hudson River Railroad Company, and $1,099,434 to the Michigan Central Railroad Company, and the balance to the several other railroad companies in various proportions.

The complainants in each case seek for a cancellation of the trust agreement, and of the leases executed pursuant thereto, as well as of the trust certificates issued under the agreement. They also pray for an injunction against the issuing of any more certificates and the further carrying out of the agreement or leases thereunder, and this motion is for judgment upon the pleadings and upon the facts admitted upon the trial. The defendants insist that no cause of action is stated in the complaints, and that upon the pleadings and the admitted facts they are entitled to judgments of dismissal.

Certificates of a like character as those in question here, known as the "New York Central Lines Equipment Trust Certificates of 1907," for $30,000,000, have been held to be obligations of the railroad companies within the meaning of section 55 of the Public Service Commissions Law (Laws 1907, c. 429), which requires the authorization of the Public Service Commission to a railroad corporation before it may issue "bonds, notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof." People v. New York Central & H. R. R. R. Co., 138 App. Div. 601, 123 N. Y. Supp. 125, affirmed on opinion below 199 N. Y. 539, 92 N. E. 1096.

It was stated on the argument by counsel for both sides that like issues of certificates for 1910 for $30,000,000, and for 1912 for $15,000,000, have been authorized and issued, making upwards of $87,500,000 of these securities which have been taken by investors. Up to this time it is not apparent that any question has ever been raised as to the validity of any of these issues. The certificates in question here have been authorized by the Public Service Commission, Second District, of New York, as well as by the Public Service Commission of the state of Ohio and the Railroad Commission of the state of Michigan, and it is stated that no appeals to the courts have been taken to review the orders granting such authority.

The only stock which the plaintiff in the first entitled action holds is in the New York Central & Hudson River Railroad Company, and the only stock which the plaintiffs in the second action hold is in the Michigan Central Railroad Company. Of course, they have no stand-

ing to complain of any acts, as ultra vires or unlawful, of any of the other railway companies in which they are not stockholders. The actions are in equity. Over $12,500,000 of the certificates in question are in the hands of innocent purchasers for value, to say nothing of the large amount remaining unpaid of $75,000,000 of like certificates of prior issues in the hands of investors. None of these purchasers are parties to the actions, and manifestly no judgments can here be made which will in any way affect their rights.

The principal point urged against the validity of the certificates is that the equipment trust agreement is in effect a guaranty by each of the railway companies of the debts or obligations of the five other of such companies, and that such agreement is therefore beyond the corporate power of these companies to make. Many authorities are cited in support of this proposition, none of which, however, covers an agreement at all similar to the one in question here. Much reasoning could be given to distinguish these authorities from the case presented here, but from the view I take of the question this is unnecessary. It should be borne in mind that the corporate power sought to be exercised here was ostensibly, at least, for the purpose of promoting the general objects and interests of each of these railways, and the defendants insist that the acts of their respective boards of directors in sanctioning these agreements were well within their discretionary powers in promoting the general aims and objects of their respective companies.

The following allegations from the answers of the railroad companies, which are admitted to be true, have an important bearing upon the question:

"The railroads owned by the railroad companies which are defendants herein form part of what is generally known as the 'New York Central System.' Those railroads are operated as supplements to each other, and as continuous and connecting lines, forming through routes between many different places of importance. Freight cars owned by any one of said companies, or in its possession pursuant to allotment under section 'Third' of said 'New York Central Lines Equipment Trust of 1913' agreement, are not confined to use on the lines of that company, but go through to destination when the shipments which they contain are consigned to points on other roads in said system. Said railroad companies unite in furnishing and contributing freight cars (including those under the 'New York Central Lines Equipment Trust of 1913'), which to a large extent are used in common on their lines, and are generally and constantly interchanged between them. This common use of freight equipment in through business is necessary to the proper conduct of the transportation business of that section of the country through which said New York Central lines extend, and has grown up in response to the necessities thereof. There is a large volume of through business, both passenger and freight, passing over the lines owned by said companies from points on the lines of any one of them to points on the lines of any or either of the others of them, and it is of importance that said companies should provide for such common use a sufficient amount of equipment to properly care for the same. All of said trust equipment, including passenger cars, freight cars, and locomotives, assigned for service on the different lines, is largely used in the movement of this through business."

This paragraph from the answer in each case clearly shows the needs and the uses for the equipment. The agreement to provide for it is made by solvent corporations, and only in the event of one of them

becoming insolvent would there be any pretense that there was any liability falling upon the others under what is alleged to be the guaranty of the debts of the others. But this agreement cannot fairly be regarded as a guaranty by one corporation of the debts of another corporation. It is rather an agreement that, in case one of the railway companies makes default in its obligation under the lease, any of the others could step in and take the equipment allotted to the defaulting company, by making good the rent in arrears. In other words, the company so stepping in purchases by this method additional equipment for its own use, and agrees to do so at the outset if such a contingency arises. This is a conditional purchase, rather than a guaranty of a debt.

It is urged, however, that in this way a company is likely to get much greater equipment than it needs for its corporate uses; but that is a contingency which is so unlikely to happen in this commercial age, when all railways are suffering from inadequate equipment, that it hardly needs to be considered, and especially not in a case where the additional equipment can find ready and profitable use, if not solely on the line of the company which purchased it, still upon the through lines of its associate companies.

No one questions the right of each of these railroad corporations, acting alone, to contract for all the equipment it fairly needs for its corporate purposes, upon such terms with respect to cost or credit as it can procure, and in such a case no question of ultra vires would be presented. Nor do I think there is anything unlawful in a joint agreement of several railway corporations, made for the purpose of carrying out the objects for which the respective corporations were created, and especially not when they are so closely related or affiliated as the one in question here. Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; 23 Cyc. 453.

Indeed, there would appear to be every advantage of price, quality, and rates of interest on moneys necessary to be borrowed when all act together, over what would obtain if each acted separately; and this view seemed to impress the Public Service Commission in this district, which gave its approval to these certificates on these as well as other grounds, as appears by the order it made. When the entire scheme outlined by the agreement is considered, I think it is well within the corporate powers of each company joining therein.

It is also urged that the agreement is illegal, because it is in perpetuation of an unlawful combination in restraint of trade; the theory being that some of these several lines practically parallel each other and should be competing lines, instead of held under a single control, and therefore they constitute an illegal combination in restraint of trade. But there are many other nearly parallel lines which compete in fact with these lines, and have no association with them, and yet supply railroad facilities for much of the same territory which they occupy. Instead of being in restraint of trade, it would appear under the circumstances that they are potent agencies in promoting trade and in furthering the general welfare of the portion of the country which they serve.

Neither the traveling public nor the commercial interests of the country would now be content with several different lines of railway each covering a portion of the distance between Albany and Buffalo, with the delays, expense, and inconvenience incident thereto. Yet in the early days of railroading these were deemed adequate to care for the then existing traffic. When these lines were combined 60 years ago under the control of a single corporation, making one continuous line between those points, it was not believed that the common law against monopolies and combinations in restraint of trade was being violated, but rather that all interests were to be better served and trade promoted by reason of the combination. The same is true when the further combination was made between the New York Central Railroad and the Hudson River Railroad Companies, forming a single company, bearing both names, and making a single line between New York and Buffalo. The fact that this single company now controls directly or indirectly the Lake Shore, the Michigan Central, the Canada Southern, and other lines carrying traffic between Buffalo and Chicago, when there are several other competing lines between those points and all under governmental control, is not sufficient cause in my opinion to hold that this single control, or the agreement made for the benefit of all concerned in it, should be condemned as a violation of what is known as the "Sherman Act" of Congress.

If by any means or within any view these lines are of the character claimed by the plaintiffs, it is only the federal government which would have any standing to enforce the injunctory relief provided under the Sherman law. The only relief which could be had by an individual under that act would be damages, and these actions are not prosecuted with that in view.

I am constrained to believe that the contract in question is not ultra vires or illegal, and for that reason the complaint in each action should be dismissed, with costs.

Ordered accordingly.

(81 Misc. Rep. 293.)

PEOPLE ex rel. MITCHELL v. SOHMER, State Comptroller.

(Supreme Court, Special Term, Albany County. June, 1913.)

STATES (§ 51*)—COMMISSIONER OF LABOR—EXPIRATION OF TERM OF OFFICE—FILLING VACANCY.

Where the term of office of the state commissioner of labor expired December 31, 1912, but he discharged the duties of the office until his successor was qualified under Public Officers Law (Consol. Laws 1909, c. 47) § 5, a so-called resignation after adjournment of the Legislature did not affect the vacancy existing for the purpose of naming the successor, and was one which occurred during the session of the Senate, which could be filled by the Governor only with the advice and consent of the Senate, under Labor Law, c. 36 (Consol. Laws 1909, c. 31), and was not a vacancy existing otherwise than by expiration of term while the Senate was not in session.

[Ed. Note.—For other cases, see States, Cent. Dig. § 56; Dec. Dig. § 51.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Application by the People, on the relation of John Mitchell, for writ of mandamus to William Sohmer, State Comptroller. Application denied.

See, also, 142 N. Y. Supp. 1138.

Herrick & Herrick, of Albany (D. Cady Herrick, of Albany, of counsel), for relator.

Thomas Carmody, Atty. Gen. (J. A. Parsons, Deputy Atty. Gen.), for defendant.

CHESTER, J. John Williams held the office of commissioner of labor of the state under a term which expired on the 31st day of December, 1912. Thereafter during the recent session of the Legislature the nomination of John Mitchell, the relator, was twice sent by the Governor to the Senate for appointment as commissioner of labor as the successor of said John Williams and was twice rejected by the Senate, the last time on the 3d day of May, 1913, after which on the same day the Senate and Assembly adjourned without date. John Williams, the incumbent of the office, who had been holding over and continuing to discharge the duties of the office after the expiration of the term for which he had been appointed until his successor should be chosen and qualified, pursuant to the provision of section 5 of the Public Officers Law (Laws 1909, c. 51, being Consol. Laws, c. 47), on the 16th day of May, 1913, resigned the office of commissioner of labor and on that day the Governor appointed the relator in his stead, and the latter thereupon took the oath of office. The defendant, under the advice of the Attorney General, refused to issue a warrant for the payment of his salary for the portion of the month during which he has served, on the ground of the alleged illegality of the appointment; hence this proceeding.

Under section 40 of the Labor Law (Laws 1909, c. 36, being Consol. Laws, c. 31) the commissioner of labor is appointed by the Governor by and with the advice and consent of the Senate, and holds his office for a term of four years beginning on the 1st day of January of the year in which he is appointed. Section 7 of the Public Officers Law provides the method of nomination and appointment to an office by the Governor by and with the advice and consent of the Senate, and further provides that:

"If such nomination be of a successor to a predecessor in the same office, it may be made and acted upon by the Senate after the expiration of the term or occurrence of a vacancy in the office of such predecessor, or at any time during the legislative session of the calendar year in which the term of office of such predecessor shall expire or in which the office shall become vacant."

The Constitution provides in section 8 of article 10 that:

"The Legislature may declare the cases in which any office shall be deemed vacant when no provision is made for that purpose in this Constitution."

Section 5 of the Public Officers Law, in relation to an incumbent holding over after the expiration of the term for which he shall have been chosen, contains the following significant clause:

"But after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor."

Section 30 of the Public Officers Law defines what events will create a vacancy in office "before the expiration of the term thereof," and provides that vacancies shall be caused by the death of the incumbent, his resignation, his removal from office, his ceasing to be an inhabitant of the state, the judgment of a court declaring void his election or appointment, or that his office is forfeited or vacant, and his refusal or neglect to qualify.

Section 39 of the Public Officers Law provides that:

"A vacancy which shall occur during the session of the Senate, in the office of an officer appointed by the Governor by and with the advice and consent of the Senate, shall be filled in the same manner as an original appointment. Such a vacancy occurring or existing otherwise than by expiration of term, while the Senate is not in session, shall be filled by the Governor for a term which shall expire at the end of twenty days from the commencement of the next meeting of the Senate."

The foregoing are all the provisions of law which to my mind have an important bearing upon the questions involved. The claim of the petitioner here is that by reason of the resignation of John Williams, the commissioner who was holding over after the expiration of his term of office, a vacancy was created after the adjournment of the Senate, which may be filled by the Governor without the advice and consent of the Senate. The Attorney General insists, upon the other hand, that the vacancy was the one that existed by reason of the expiration of the term of office, and was the same vacancy which existed during the entire session of the Senate.

Counsel on both sides have presented the matter to me informally, with the request for an immediate determination, so that the question may be reviewed by the Appellate Division at an extraordinary term thereof called by the Governor for Monday next, in the hope that its determination may in turn be reviewed by the Court of Appeals before it adjourns for the summer on the 20th instant. Because of this haste, no arguments of the questions, other than the mere statement of the respective claims, were presented by counsel upon either side, and no briefs submitted. Neither would counsel upon either side consent that a pro forma order, in fact, if not in form, be made by me to facilitate such review. I must therefore reach my conclusion without the valuable aid which is ordinarily afforded by the arguments of counsel.

The statute above quoted clearly provides what events will create a vacancy in an office *before* the expiration of the term thereof, and it also provides as stated that *after* the expiration of such term the office shall be deemed vacant for the purpose of choosing a successor. The statute is silent so far as I am aware as to the effect of a resignation of an incumbent holding over on the question of the time when the vacancy happens. Does a vacancy arise by reason of such resignation in a case where the office is "deemed vacant" under the law for the purpose of appointing a successor? The question would seem to carry its own answer. Of course, there is no vacancy in the office in the sense that the office is unoccupied, because the incumbent is authorized to hold over after the expiration of his term until his successor shall be chosen and qualified; but for the purpose of choosing

a successor the term "vacancy" means quite another thing, and it has been so recognized in the statute. Mr. Williams was simply holding over; he was not filling a new term of office; his term had expired. A new term of office was to begin on the 1st of January following the expiration of his term on the 31st of December. No one was filling that term.

Did the fact that he resigned on the 16th of May, while he was holding over, create any other or different vacancy than that which arose by reason of the expiration of his term of office, or was the paper which is called his resignation simply his declaration that he would hold over no longer? I think it must be answered that his so-called resignation had no effect upon the "vacancy" which under the statute was deemed to exist for the purpose of naming a successor, and that the vacancy was therefore one which occurred during the session of the Senate, which could be filled by the Governor only with the advice and consent of that body, and was not a vacancy occurring or existing otherwise than by expiration of term while the Senate is not in session.

If this conclusion is not correct, the lawful power of the Senate to give its advice and consent upon executive appointments could be defeated in many, if not most, cases, and the executive would exercise the power of appointment independent of the Senate in many cases where the law provides that such appointments can be made only by the Governor by and with the advice and consent of that body.

If these views are correct, it follows that the application should be denied, as a matter of law, and not as a matter of discretion.

Application denied.

(81 Misc. Rep. 290.)

MESNIG v. MESNIG et al.

(Supreme Court, Special Term, Albany County. June, 1913.)

PARTITION (§ 53*)—RECEIVERS—APPLICATION FOR INSTRUCTIONS.

Where, in partition, on application of receiver of rents and income for instructions as to whether he should sue plaintiff for rent of one of the parcels involved, or to obtain possession on her refusal, the evidence did not show whether plaintiff, in possession when the receiver was appointed, was liable for the rent, and there was no proof as to the value of the use and occupation, and in a few days, under a stipulation, judgment in the action might be rendered, if an agreement as to the rent was not reached, the application will be denied.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 147; Dec. Dig. § 53.*]

Action by Catherine Mesnig against Frederick S. Mesnig and others On application for instructions to receiver. Application denied.

Holmes & Bryan, of Troy, for receiver.

F. E. McDuffee, for Catherine Mesnig.

CHESTER, J. The petitioner, James W. Smith, is the duly appointed receiver of the rents and income of the real property involved in this action, which is one for the partition of the same. The plain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tiff, as has been stipulated by the parties, is entitled to dower in the property, and besides is one of four tenants in common thereof, each owning an undivided one-fourth part subject to such dower. The property sought to be partitioned consists of several different pieces, and the plaintiff and her minor son, Joseph Mesnig, who lives with her, are residing in one of the pieces, namely, the residence of her late husband, situate at No. 172 First street, in Troy. Such son is also one of said tenants in common. The other tenants in common are George L. Mesnig and Frederick S. Mesnig, two sons of the plaintiff's deceased husband by a former marriage.

The receiver was appointed January 16, 1913, and thereafter he made a demand in writing upon the plaintiff that she pay him rent at the rate of $50 a month for the premises occupied by her, and if she did not desire to pay rent he demanded from her immediate possession of such premises. She has nevertheless neither paid him rent nor surrendered the possession of the premises to him. The receiver asks for instructions as to his duty in the premises, and as to whether he shall bring suit to collect rent or to obtain possession of the premises in case of her failure to pay.

It appears that there is a stipulation between the parties that unless they agree among themselves on or before the 1st day of July, 1913, in regard to a sale of the property either to third persons or to each other, judgment of sale and partition of the proceeds shall be entered and the sale be enforced in the usual way. At the time of the appointment of the receiver the plaintiff was in possession of the house she occupies as a tenant in common, and if there was no agreement or understanding that she should pay rent therefor her possession was of course, under the law, the possession of each of the other tenants in common, and she would not be accountable to pay rent therefor up to that time. Rich v. Rich, 50 Hun, 199, 2 N. Y. Supp. 770; McCabe v. McCabe, 18 Hun, 153; Le Barron v. Babcock, 122 N. Y. 153, 25 N. E. 253, 9 L. R. A. 625, 19 Am. St. Rep. 488; Valentine v. Healey, 178 N. Y. 391, 70 N. E. 913.

But the receiver alleges, on information and belief, in his petition for instructions, that the said Catherine Mesnig and George L. Mesnig and Frederick S. Mesnig, before his appointment, had some agreement or understanding between themselves concerning the payment of rent at the rate of $50 per month, which rent the books show was charged to her dower account, for the premises which she and her minor son, Joseph Mesnig, occupy. Her answer contains no denial of this allegation, yet the allegation is hardly sufficient, without proof of what, if any, agreement was had, upon which to base an order for instructions to the receiver or fixing the rights of the parties in this respect.

There is insufficient proof before me on this application to determine whether the plaintiff is liable for rent, or for the value of the use and occupation, since the appointment of the receiver. There is no proof as to the value of the use and occupation, and it is open to question as to what, if any, agreement there has been to pay rent. There remain but a few days before the arrival of the time when, under

the stipulation mentioned, judgment may be entered in the action if an agreement between the parties is not reached in the meantime, and, for that reason, I think it would be unwise to subject the parties or the estate to the expense of a suit against the plaintiff on the part of the receiver, either for rent, for the value of the use and occupation, or for the possession of the premises, because every question that could be determined in such a suit can be disposed of before the referee who will be named in the judgment, and the matter should be referred to such referee, when appointed, to take testimony and report to the court, with his opinion upon the question as to whether the plaintiff is liable for rent, or for the value of the use and occupation, of the house occupied by her, subsequent to the time when the receiver was appointed, to the end that any amount for which she may be found to be liable may be charged against her interest in the proceeds of the sale, providing the property is sold, or against any share which should be set off to her pursuant to an agreement between the parties.

For these reasons, no instructions should be given to the receiver to sue at this time.

Ordered accordingly.

(157 App. Div. 844)

MacFARLANE v. MOSIER & SUMMERS et al.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. MUNICIPAL CORPORATIONS (§ 354*)—CONTRACTS—CANCELLATION—VIOLATION OF LABOR LAW.

A contract for the construction of a public building by a city does not exist until a written contract has been executed as required by the city charter, and a violation of Labor Law (Consol. Laws 1909, c. 31) § 3, as amended by Laws 1909, c. 292, in working men on municipal work more than eight hours a day, after the contractor's bid had been accepted, but before the contract was executed, is not ground for the cancellation of the contract under section 4, as a violation in the manner of performance of a contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 886, 887; Dec. Dig. § 354.*]

2. MUNICIPAL CORPORATIONS (§ 335*)—CONTRACTS—REVOCATION AFTER ACCEPTANCE OF BID.

After a contractor's bid for public work has been accepted, and the council has authorized the commissioner of public works to enter into the contract, neither the council nor the commissioner can arbitrarily refuse to accept a satisfactory bond and execute a proper written contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 860, 861, 863; Dec. Dig. § 335.*]

3. MUNICIPAL CORPORATIONS (§ 354*)—CONTRACTS—CANCELLATION—VIOLATION OF LABOR LAW.

A contract for municipal work does not relate back to the date of the acceptance of the bid, so as to render a violation of Labor Law (Consol. Laws 1909, c. 31) § 3, as amended by Laws 1909, c. 292, in working men on municipal work more than eight hours a day before the execution of the contract, a ground for the cancellation of the contract under section 4, as a violation in the manner of performance of a contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 886, 887; Dec. Dig. § 354.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. MUNICIPAL CORPORATIONS (§ 354*)—CONTRACTS—CANCELLATION—VIOLATION OF LABOR LAW.

A violation of Labor Law (Consol. Laws 1909, c. 31) § 3, as amended by Laws 1909, c. 292, providing that men on municipal work shall not be required or permitted to work more than eight hours a day, is not ground for the cancellation of the contract under section 4, providing for the cancellation of contracts which in the manner of their performance violate the act, where the violation was by a subcontractor, and without the permission or knowledge, actual or constructive, of the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 886, 887; Dec. Dig. § 354.*]

Appeal from Special Term, Erie County.

Action by William B. MacFarlane against Mosier & Summers and others. From a judgment dismissing the complaint (79 Misc. Rep. 460, 141 N. Y. Supp. 143), plaintiff appeals. Affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Irving W. Cole, of Buffalo (Hamilton Ward, of Buffalo, of counsel), for appellant.

John W. Ryan, of Buffalo, for respondents Mosier & Summers.

Clark H. Hammond, Corp. Counsel, of Buffalo (George E. Pierce, of counsel), for other respondents.

ROBSON, J. This action is brought pursuant to the provisions of section 3 of the Labor Law (Consol. Laws, c. 31 [Laws of 1909, c. 36], as amended by Laws of 1909, c. 292) by a citizen of the city of Buffalo to obtain the cancellation of a contract made by the defendants Mosier & Summers with the defendant city of Buffalo for the erection by the former of the Technical High School, and as further relief that the defendant Justice, as the comptroller of the city of Buffalo, be enjoined and restrained from paying to the defendants Mosier & Summers any moneys to apply upon said contract, and that the moneys already paid to Mosier & Summers upon said contract be refunded to the city by Mosier & Summers and the officers of defendant city who are defendants in this action. The ground upon which plaintiff seeks to base his cause of action is an alleged violation of section 3 of the statute in the "manner of performance" of the contract.

[1] The complaint being, as has been said, based upon an alleged violation of section 3 of the Labor Law in the manner of performance of the contract which Mosier & Summers had with the city of Buffalo for the erection of this public building, it is important to determine whether at the time of the violations alleged there was in fact a contract between these parties. These violations all occurred between the 17th of April and the 1st day of May, 1910. The formal written contract was not in fact signed till May 22d following. Plaintiff, however, contends that the contract was in fact made as early as April 4th preceding.

There is no dispute that proper proceedings were had by the duly authorized city officials by which plans and specifications for the proposed building were duly adopted, a notice duly published calling for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proposals or bids for the work of construction, that bids were received, and that it was duly ascertained by the commissioner of public works, upon whom rested the power and responsibility of the determination, that Mosier & Summers' bid was that of the lowest responsible bidder. This bid was accompanied, as required by the terms of the advertisement, with a bond conditioned in effect that, if the bid was accepted, the bidder would make the contract with the city according to the terms proposed in the advertisement for bids. But the legal scheme governing the letting of contracts of the class to which the contract in question belongs provided for a report by the commissioner of his determination to the common council, without whose consent the contract could not be made. This was done in this instance, and the commissioner of public works was duly authorized about April 4th to enter into the contract with Mosier & Summers. Plaintiff claims that at this point a complete contract was made between the city and the contractors. But a further charter provision required that all contracts of this class must be in writing, and that a bond, to be duly approved by the mayor of the city, must also be furnished by the contractor, providing in effect for the faithful performance of the contract. The advertisement for bids and the bid itself contemplated and provided for this exact procedure.

[2] Doubtless the common council, after duly authorizing its superintendent of public works to enter into this written contract, could not, nor could that official of his own motion, arbitrarily refuse to complete the business of making the contract by accepting a satisfactory bond of the contractor and signing a written contract conforming to the advertisement, the bid, and its acceptance. Sufficient authority for this proposition may, I think, be found in the cases cited and reviewed in the prevailing opinion in Molloy v. City of New Rochelle, 198 N. Y. 402, but a contract in form to bind the city as a contract between the parties for the actual construction of the building had not then been completed. The bidder was still required to furnish a satisfactory bond, which was thereafter to be formally approved, and the written contract was to be prepared and signed, for no other contract than a written contract in such case could be a contract between the parties as the charter of defendant city provides. I think, therefore, the trial court was right in holding that at the time of the violations complained of defendants did not, in the manner of performance of a contract with the city, violate the provisions of section 3, for at the time of the violations alleged the contract had not yet come into existence. Hepburn v. City of Philadelphia, 149 Pa. 335, 24 Atl. 279; Water Com'rs of Jersey City v. Brown, 32 N. J. Law, 504; Edge-Moor Bridge Works v. County of Bristol, 170 Mass. 528, 49 N. E. 918; Dillon's Municipal Corporation (5th Ed.) § 810.

The violations alleged occurred while a subcontractor named Brown was engaged in excavating upon the site of the building. The particular violations alleged were that this subcontractor permitted or required laborers engaged in the performance of that work to work more than eight hours a day. This excavation was a part of the work included in the specifications, and also in the written contract there-

after made. Brown had agreed with Mosier & Summers to do this work, and began it soon after it was apparent that Mosier & Summers were to have the contract. Mosier & Summers paid him for this work, and the work was thereafter included with that for which they received pay on estimates of work performed by them under their contract with the city.

[3] Appellant claims that, even though it be held there existed no actual contract between the city and the contractor until the written contract was signed, yet when it was signed it related back to the time the commissioner of public works was authorized to enter into it for the city, and the statute having been violated in the performance of a part of the work contemplated by the contract in the interim between the authorization and the making of the contract, the contract itself at once became void because of the previous violations. It does not seem that can be held to result from these facts. It is conceded that after the written contract was in fact made no violations of the statute have been shown. The utmost that could justly be claimed as a result of the previous violations would be that the persons who "required or permitted" them could not recover for the work in doing which the violations occurred; the work having been done in anticipation of, and not under, the contract. But this is not the principal purpose of the present action. It attacks the validity of the whole contract.

No intimation is made that the execution of the written contract was unduly delayed for the purpose of permitting any part of the work contemplated to be done without the statutory restrictions as to the manner of performance. It is doubtless true that, if there were a basis for a suggestion that the execution of the contract was in fact delayed for the purpose, even incidentally, of avoiding the statutory prohibitions, it would be held, and properly enough, that the contractors had in fact violated the statute, and no contract, under those circumstances, should have been thereafter made with them, and, if made, it would have been void. But the good faith of defendants is not attacked.

[4] I think, also, that the trial court held properly that, even conceding that the work being done by Brown, the subcontractor, at the time of the violations alleged, was done under the contract between the city and the contractors, the evidence does not show that any of these violations were required, or permitted, by the contractors, or even that they occurred with their knowledge or consent. It would seem to be a manifest injustice to hold that violations of the statute for which the contractors were not responsible, as having themselves required or permitted them, or as having with actual knowledge, or under such circumstances as would properly charge them with constructive knowledge that violations of the statute were either required or permitted by others, who were engaged on the work, could properly be attributed to the contractors for the purpose of enforcing the drastic penalty of a forfeiture of the contract. The opinion of the trial court on this branch of the case leaves nothing of importance to be said.

The judgment should be affirmed, with costs. All concur.

(157 App. Div. 852)

FATTA v. EDGERTON.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. PRINCIPAL AND AGENT (§ 69*)—DUTIES OF AGENT—AGENT TO DISCHARGE MORTGAGE—TAKING ASSIGNMENT IN OWN NAME—EFFECT.
   Where plaintiff's agent, in paying off prior mortgages on property, so as to make the mortgage given by plaintiff to defendant a first lien as agreed, instead of having the mortgage discharged, took an assignment in blank, the assignment inures to the benefit of plaintiff, and both plaintiff and defendant are entitled to have it discharged of record.
   [Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 130–145; Dec. Dig. § 69.*]

2. PRINCIPAL AND AGENT (§ 105*)—PAYMENTS TO AGENT—MISAPPROPRIATION BY AGENT—EFFECT.
   Where money loaned on a mortgage was paid to the agent of the mortgagor for that purpose, who misappropriated it, the mortgagor must stand the loss, rather than the mortgagee, though the agent of the mortgagee in paying the money to the mortgagor's agent had failed in his duty to the mortgagee to see that the money was properly applied.
   [Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 298–310, 374; Dec. Dig. § 105.*]

3. PRINCIPAL AND AGENT (§ 23*)—EXISTENCE OF AGENCY—SUFFICIENCY OF EVIDENCE.
   Evidence in an action to cancel a bond and mortgage *held* to show that one to whom the mortgagee paid the money loaned on the mortgage, and who misappropriated it, was the agent of the mortgagor to receive the money.
   [Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

Foote, J., dissenting.

Appeal from Trial Term, Erie County.

Action by Maria A. Fatta against George B. Edgerton. From a judgment for defendant (137 N. Y. Supp. 226), plaintiff appeals. Affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Cleveland G. Babcock, of Buffalo, for appellant.

Thomas A. Sullivan, of Buffalo, for respondent.

KRUSE, P. J. The action is brought to cancel a bond and mortgage, executed by the plaintiff to the defendant to secure the payment of $2,800, covering certain premises situate in the city of Buffalo, upon the ground that the moneys, the payment of which the bond and mortgage were intended to secure, were not applied by the defendant as agreed between the parties. The action has been twice tried. Upon the first trial the plaintiff succeeded, but upon appeal to this court the judgment was reversed and a new trial ordered. 143 App. Div. 658, 128 N. Y. Supp. 181. Upon the second trial, plaintiff's complaint was dismissed, and she appeals.

The plaintiff contends that the evidence on the last trial differs from that on the first trial. I think there is not enough difference to require or warrant a conclusion different from that reached by this court on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the former appeal. The opinion on the former appeal was written by the late Justice Spring and concurred in by all of the other justices. It states very fully and in detail the various circumstances which led to the conclusion there reached, and need not be again stated here, beyond a bare outline.

[1] The plaintiff, or her husband, acting for her, applied to Moses T. Day, a lawyer, for a loan upon the property, agreeing to pay him 2½ per cent. commission. Day procured the loan from George B. Edgerton, the defendant, with the understanding that the mortgage would be a first lien. Edgerton paid the amount of loan to Day. After the bond and mortgage in question were executed, they were delivered to Phillip V. Fennelly, another lawyer, by plaintiff. Day paid over to Fennelly the amount of the loan, except such part as represented Day's commissions and other charges; the amount so paid over being $2,488.66, which was to be used in clearing the title and discharging the prior mortgages. Among other claims against the property, at the time the bond and mortgage in question were executed, were two mortgages, one known as the Utley mortgage, and another known as the Snyder mortgage. Fennelly used $400 to pay an unrecorded mortgage (not one of the two referred to), and the further sum of $850 to pay the Snyder mortgage. The balance of the money he kept, leaving the Utley mortgage, upon which there was unpaid about $1,900, unsatisfied. Fennelly did not have the Snyder mortgage discharged, but took an assignment in blank. The trial judge finds, however, that the assignment inured to the benefit of the plaintiff, and that both parties to this action are entitled to have the mortgage discharged of record.

[2] It is contended on behalf of the plaintiff that the testimony of the defendant himself, who was not sworn upon the first trial, but testified upon the second at the instance of the plaintiff, as well as Day's own testimony upon the second trial, shows that he (Day) was acting as the agent for the defendant. While Day was the agent of the defendant to the extent of seeing that the defendant's mortgage was a first lien upon the property, it does not follow that because Day violated his obligation to the defendant, and disobeyed his instructions, and paid over the money before the title was clear, defendant must bear the loss occasioned by the misappropriation of the money by Fennelly. Even if Day's agency for the plaintiff was limited to procuring the loan, and his agency for the defendant extended to the proper distribution of the money, if Fennelly was her agent for ultimately receiving and distributing the money, or she so held him out, or consented to the payment thereof by Day to Fennelly, as I think the evidence shows, she should bear the loss of Fennelly's misdoings, rather than the defendant.

The plaintiff, as well as the defendant, understood that the defendant's mortgage was to be a first lien upon the property. She also knew that the amount loaned was not sufficient to meet all the prior liens and incumbrances upon the property. She knew that the money had been paid to Fennelly, and with that knowledge caused a sufficient sum to be placed in his hands, in addition to what had been turned over to him, to procure the satisfaction and discharge of the Utley mortgage.

[3] While Day did testify upon the first trial, as plaintiff's counsel urges, that the plaintiff's husband told him to pay the money over to Fennelly, that Fennelly was acting for him and his wife, and testified finally on the second trial that he could not swear that the plaintiff's husband told him in so many words to pay over the money to Fennelly, he did insist that the husband told him that Fennelly had the matter of clearing up the title in his hands, and to go over and close up the matter with Fennelly. I think his testimony in that regard is corroborated by other circumstances, as will be seen by referring to the opinion on the former appeal. The decision of the case did not necessarily turn upon the question as to whether or not Day represented the plaintiff. It was there held that, if either Day or Fennelly was her agent in getting the money into the hands of Fennelly, the plaintiff cannot recover. To that ruling we adhere, and upon the evidence hold that in receiving and distributing the money Fennelly represented the plaintiff, and not the defendant.

Of course, the defendant expected, and it was a duty which Day owed to the defendant to see, that all prior liens against the premises were discharged, so that his mortgage would be a first lien; but his failure so to do cannot properly be urged as a reason for making the defendant also liable for the misconduct of Fennelly.

I think the judgment should be affirmed, with costs.

ROBSON, LAMBERT, and MERRELL, JJ., concur.

FOOTE, J. (dissenting). Day admits on this trial that he had no express authority from plaintiff or her husband to pay over the money to Fennelly, nor does it appear that Fennelly had authority from plaintiff to receive it. No such authority should be implied. Day's admission removes the essential basis of our former decision, and brings the case within the rule of Graves v. Mumford, 26 Barb. 94, Johnstone v. Horowitz, 139 App. Div. 800, 124 N. Y. Supp. 689, and Yeoman v. McClenahan, 190 N. Y. 121, 82 N. E. 1086.

(157 App. Div. 835.)

ACKERMAN v. STACEY.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. MUNICIPAL CORPORATIONS (§ 706*)—NEGLIGENT USE OF STREETS—EVIDENCE—RATE OF SPEED.

In an action for the death of a boy, who was killed by the defendant's automobile while crossing a street, evidence *held* to require submission to the jury of the question whether the automobile was exceeding the speed limit, although there was no direct testimony as to its speed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. NEGLIGENCE (§ 122*)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE OF CHILD—BURDEN OF PROOF.

Where a boy 10 years old was killed by an automobile while crossing a street, an instruction that the burden was upon the plaintiff to show that the boy was incapable of taking care of himself in the street, in order to find that he was not guilty of contributory negligence, was erroneous, as requiring the plaintiff to prove, without reference to age,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

intelligence, or circumstances, that the boy was actually incapable of taking care of himself.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221–223, 229–234; Dec. Dig. § 122.*]

3. TRIAL (§ 295*)—INSTRUCTIONS—CHARGE CONSIDERED AS A WHOLE.

Though, if a charge taken as a whole contains correct instructions upon the issues, error cannot be predicated, ordinarily, upon the fact that separate instructions contain inaccurate statements of the law, yet where one of the lost instructions given is an erroneous statement as to the law of contributory negligence as applied to an infant decedent, it constitutes reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. § 295.*]

Appeal from Trial Term, Herkimer County.

Action by Schuyler Ackerman, as administrator, against Irving E. Stacey. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Argued before KRUSE, P. J., and ROBSON, LAMBERT, and MERRELL, JJ.

A. M. Mills, of Little Falls (James A. Evans, of Little Falls, of counsel), for appellant.

Andrew J. Nellis, of Albany (Robert F. Livingston, of Little Falls, of counsel), for respondent.

ROBSON, J. Plaintiff's intestate, an infant nearly 10 years of age, a pedestrian crossing a public street in the city of Little Falls about 10 o'clock in the evening of June 15, 1910, was struck and fatally injured by an automobile in which defendant was then riding with three members of his family and two friends, besides a chauffeur, who was driving the car. Respondent does not seem to claim on this appeal that he, though not in fact the owner, was not the person responsible for the operation and management of the car. The evidence presented a fair question of fact both as to defendant's negligence and the contributory negligence of the deceased, and we should not be inclined to disturb the verdict of the jury in defendant's favor, except that, as it appears to us, the substantial rights of plaintiff were on the trial prejudiced by certain rulings of the trial court.

[1] The speed at which the car was running at the time of the accident was a material factor in the evidence upon the question of defendant's negligence. No witness testified directly as to an estimate of the speed of the car, and the court in the course of the trial held that there was no evidence warranting the jury in finding that the speed exceeded 4 miles an hour. This ruling was first made at defendant's request, when the court was considering the question whether there was evidence to go to the jury on the question of a violation by defendant of the statute as it then existed, which limited the speed at which it was lawful to run an automobile under the conditions which the evidence disclosed were then present. To this ruling plaintiff duly excepted. When plaintiff's counsel was making his closing address to the jury, the court held that he had no right to suggest to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

them that the car was going at a greater rate of speed than 4 miles an hour. Again, in the charge of the court the jury were fully instructed that, though they could not under the evidence find that the car was running at a greater speed than 4 miles an hour, yet, as the court said:

"If the condition there, in view of the park being located on the right-hand side, the conditions as to the street lights, and the conditions as to the probability of persons passing from the park out into the street, were such that the chauffeur ought to have reduced the speed more than he did, ought to have had his car under better control than he did, so as to stop it in less time and less space than he did, then those are circumstances which you have a right to take into consideration on the question whether he was or was not negligent in the operation of that car."

Exceptions to these rulings of the court were duly taken in behalf of plaintiff. We think the jury's consideration of the question of the speed of the car should not have been thus limited, and that there was some evidence of facts from which as an inference the jury might under proper instruction have determined that the car was running at a considerably greater speed than 4 miles an hour. It appeared that the car weighed 3,000 pounds and was equipped with a gasoline motor of 45 horse power. It was also equipped with both a foot and an emergency brake, which, as the chauffeur testified, "acted quickly and were very forcible and powerful." He also testified that as soon as he saw the intestate, who was then directly in front of the left headlight of the car and but about a foot distant, he "threw on the brakes and pulled the throttle, which slackens the speed of the machine and stops her." He further says:

"I applied the foot brake just as soon as I saw the boy. I put the other brake on after that."

And this brake was found to be on after the car had stopped. These is further testimony upon which the jury might have found that this car, notwithstanding these efforts of the chauffeur to stop it, ran, after the intestate was struck, more than 70 feet along a street having, as the exhibits indicate, a slight upgrade in the direction the car was moving. Under such circumstances it is apparent that the car had a considerable momentum when it struck the intestate; and, if it ran more than 70 feet after he was struck under the conditions shown by this part of the evidence of the chauffeur, it is not credible that its speed was not greater than 4 miles an hour. Though there was no evidence to show within what distance this or a similar car would be stopped under similar conditions when running at any designated speed per hour, yet it was for the jury to deduce as an inference from these facts the speed of the car, and not for the court to hold as matter of law that the evidence did not warrant a finding that it was running more than 4 miles an hour.

[2] We are also of the opinion that the court erred in charging the jury upon the question of the contributory negligence of plaintiff's intestate. In the body of the charge the jury were instructed correctly that:

"A boy of that age is not held to the same high degree of care that a person of mature years is held. He is held under the law to only that degree of care and caution for his own safety that a reasonably careful and cautious boy of that age is accustomed to exercise."

And the court further at some length explained and elaborated this principle in its proper application to this case. But, after the completion of the main charge, the court, at the request of defendant's attorney, charged:

"That the burden is upon plaintiff to show that his intestate, Frank Ackerman, was incapable of taking care of himself in the street, in order to warrant the jury in finding that plaintiff's intestate was not guilty of contributory negligence."

The effect of this statement by the court was an instruction to the jury that plaintiff was required to establish that intestate, without reference to his age, intelligence, or the circumstances in which the evidence shows he was placed at the time of the injury, was actually incapable of taking care of himself in the street. That the court did not at the time fully appreciate the comprehensive extent of this request to charge to which he acceded appears from the different statement of the law in the body of his charge, and also from some further requests which were charged at the suggestion of defendant's attorney.

[3] Recognizing, as we do, that error is not ordinarily to be predicated upon distinct parts of a charge, even though when, separately considered, they may be incomplete, or to some extent inaccurate, statements of the law, if the charge, taken as a whole, contains correct instructions to the jury upon these points, yet we cannot say that this statement, addressed as it was to the jury among the last instructions they received, and coming with the added force of a distinct statement of what plaintiff must prove as to the capacity of deceased to care for himself in the street, else a finding that he was guilty of contributory negligence must be made, was not so prejudicial to plaintiff as not to present error for which a reversal of the judgment should be directed.

The judgment and order should be reversed, and new trial granted, with costs to the appellant to abide event. All concurred, except FOOTE, J., not sitting.

(157 App. Div. 832)

COOK v. CONNERS.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. JUDGMENT (§ 713*)—CONCLUSIVENESS—EXTENT OF ESTOPPEL.
A judgment in an action for libel is conclusive, not only as to the issues actually determined, but as to every other question which the parties might or should have litigated.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234–1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

2. JUDGMENT (§ 585*)—CONCLUSIVENESS—EXTENT OF ESTOPPEL—LIBEL.
Where separate actions were brought for the publication of the same libel in two newspapers, which were owned by the same person, the issues involved in each action were the same, and the judgment in one was a bar to the other.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062–1064, 1067, 1073, 1084, 1085, 1092–1095, 1132; Dec. Dig. § 585.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. ACTION (§ 57*)—CONSOLIDATION—REPETITION OF LIBEL.
Separate actions against the same person for publication of the same libel in two papers owned by him may properly be consolidated.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 632–675; Dec. Dig. § 57.*]

4. LIBEL AND SLANDER (§ 100*)—EVIDENCE—ADMISSIBILITY—REPETITION.
In actions for libel, evidence of a repetition of the defamation before the commencement of the action may be received, although not alleged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246–256, 258–272, 291, 322, 323; Dec. Dig. § 100.*]

Appeal from Trial Term, Chautauqua County.

Action by Margaret E. Cook against William J. Conners. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Herman J. Westwood, of Fredonia (Westwood & Monroe, of Fredonia, of counsel), for appellant.

Edward J. Garono, of Buffalo (Robert F. Schelling, of Buffalo, of counsel), for respondent.

ROBSON, J. The action is for libel. The publication of it is charged to have been made by defendant in the Buffalo Courier, a morning newspaper owned and published by him, on the 28th day of August, 1910. The preceding day the defendant had published practically the same article in the Buffalo Enquirer, an afternoon newspaper also owned and published by him. Both papers are published in the city of Buffalo, using the same buildings, under the same business and circulation management, and using the same presses and machinery and the same telegraphic service.

Though the article as published in the Courier is not verbally the same as that published in the Enquirer, yet the incident exploited therein, the application of its statements to plaintiff, and the statements themselves, so far as the libelous matter is concerned, are practically identical. It was the same calumny. It was in effect the same libel.

Shortly after these publications occurred plaintiff brought at about the same time two separate actions against the defendant; the complaint in one charging the libel to have been published by the defendant in the Buffalo Enquirer, and that in the other charging its publication in the Buffalo Courier on the respective dates above recited.

The action for the libel published in the Enquirer was tried, and plaintiff had a verdict upon which judgment was entered, and payment and satisfaction thereof are alleged to have been made. Thereupon defendant moved for leave to serve an amended answer in the Courier action, setting up these facts as a bar to the action and also in mitigation of damages therein. This motion was granted, the order entered, and the amended answer served. Plaintiff appealed from the order, which was thereafter affirmed in this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] The judgment in the Enquirer action must necessarily be accepted as "final and conclusive upon the parties, not only as to the issues actually determined, but as to every other question which the parties might or ought to have litigated." Stokes v. Foote, 172 N. Y. 327, 344, 65 N. E. 176, 182, and cases there cited.

[2, 3] I think that the same issues were involved in each action. That the two actions might properly have been consolidated has been held. Cohalan v. Press Publishing Co., 123 App. Div. 487, 107 N. Y. Supp. 962. I think, also, that in the Enquirer action the publication of the libel alleged in the complaint in the Courier action might have been proved.

[4] It has been frequently held in slander actions that repetitions of the same slander made by defendant prior to the commencement of the action may be proved in an action for damages for uttering the slander, though not alleged in the complaint. The rule on this subject, which Church, C. J., states may be regarded as settled in this state, is as stated in the opinion in Distin v. Rose, 69 N. Y. 122, as follows:

"First. It is competent to prove the speaking of the same words charged in the complaint at a period so long prior that the statute of limitations would be a bar to an action. [Titus v. Sumner] 44 N. Y. 266.

"Second. A repetition of words, imputing the same charge, alleged in the complaint to have been made, may be proved to have been spoken at any time before the commencement of the action, but not words imputing a different charge. [Root v. Lowndes] 6 Hill, 518 [41 Am. Dec. 762]; [Howard v. Sexton] 4 N. Y. 161.

"Third. Nor can the same words be proved to have been uttered after the commencement of the action. [Frazier v. McCloskey] 60 N. Y. 337 [19 Am. Rep. 193]."

As stated by Rapallo, J., in Frazier v. McCloskey, 60 N. Y. 337, 19 Am. Rep. 193, cited in the foregoing quotation, the reason for admitting evidence of the class designated in the second subdivision of the foregoing quotation given by Bronson, J., in 6 Hill, 518, 41 Am. Dec. 762, supra, is that "the judgment will be a bar to another action"; and this is true, as further stated by Bronson, J., whether all the different occasions of speaking the slanderous words are proved or not. The case cited by Bronson, J., in support of this position is Defries v. Davis, 7 Carr. & Payne, 112. In that case there was but one count in the declaration. Testimony that defendant had repeated the slander subsequently to the speaking of the words which were the subject of the present action was offered. An objection to its reception was made on the ground that the repetitions might be the subject of another action, and therefore ought not to be given in evidence in the present action. The court (Tindal, C. J.) said:

"You may show anything that is evidence of malice, but you must not show anything that would be the subject of another action. * * * I will receive any evidence of a repetition of the same words; so, if you have any other words which show an animus, not by separate slander, but by a repetition of this slander, or by other words which show the same train of thought, I will admit the evidence."

The ground upon which such evidence is admissible seems to be that it could not be the subject of another action. Leonard v. Pope, 27

Mich. 145. The same rule should apply to actions for libel. Galligan v. Sun Publishing Co., 25 Misc. Rep. 355, 54 N. Y. Supp. 471.

The judgment and order should be affirmed, with costs. All concur

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(157 App. Div. 848)

PEOPLE ex rel. BOROWIAK v. HUNT, Superintendent of Erie County Penitentiary.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

1. CRIMINAL LAW (§ 84*)—JURISDICTION—INFERIOR COURTS—STATUTORY PROVISIONS.

Laws 1910, c. 228, amending Laws 1909, c. 570, § 70, giving to the City Court of Buffalo, sitting as a Court of Special Sessions, an inferior court created by Laws 1909, c. 570, jurisdiction of misdemeanors equal to the County Court, is not repugnant to Const. art. 6, § 18, providing that inferior local courts of civil and criminal jurisdiction may be established by the Legislature, but that they shall have no greater jurisdiction than is conferred upon County Courts under the same article.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115–124; Dec. Dig. § 84.*]

2. JURY (§ 11*)—RIGHT OF TRIAL BY JURY—CRIMINAL PROSECUTION—STATUTORY PROVISIONS.

Const. art. 1, § 2, which preserves the right of trial by jury, is limited by its terms to those cases "in which it has heretofore been used," and does not apply to cases heard in a Court of Special Sessions, because trial by a constitutional jury was not within the course of procedure in such courts at the adoption of the Constitution.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 19–24; Dec. Dig. § 11.*]

3. JURY (§ 11*)—INFERIOR COURTS—JURISDICTION.

The fact that the City Court of Buffalo, sitting as a Court of Special Sessions, can try and determine misdemeanor cases without a jury, does not for that reason make its jurisdiction greater than that of County Courts, which can only try such cases with a jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 19–24; Dec. Dig. § 11.*]

Appeal from Special Term, Erie County.

Habeas corpus proceedings by the People of the State of New York, on the relation of Leo Borowiak, against William Hunt, as Superintendent of the Erie County Penitentiary. From an order dismissing the writ, relator appeals. Affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Harlow C. Curtiss, of Buffalo, for appellant.

Wesley C. Dudley, Dist. Atty., of Buffalo (Clifford McLaughlin, of Buffalo, of counsel), for respondent.

ROBSON, J. The relator was convicted in the City Court of Buffalo, sitting as a Court of Special Sessions, of the crime of petit larceny. He was thereupon sentenced to be confined in the Erie County Penitentiary for a term of 240 days. It is claimed by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

relator that the sentence exceeded that which the City Court, sitting as a Court of Special Sessions, could within constitutional limitations be given the power to impose, and was for that reason void.

[1] The crime of which defendant was convicted was a misdemeanor (section 1299 of the Penal Law [Consol. Laws 1909, c. 40]), and in the first instance was within the exclusive jurisdiction of the court of Special Sessions of the City of Buffalo to hear and determine. Section 70 of Chapter 570 of the Laws of 1909, as amended by chapter 228, Laws of 1910. The court being a Court of Special Sessions, before the amendment above referred to, the judgment which might be imposed by the court upon conviction of a defendant was limited by the provisions of section 717 of the Code of Criminal Procedure, and could not exceed a fine of $50 and imprisonment for 6 months. That amendment in terms gave the court—

"power to impose sentence of fine or imprisonment, or both, in the discretion of the court in all cases within its jurisdiction, upon conviction, to the same extent as the County Court of the county of Erie could do in like cases."

The City Court of Buffalo is a local inferior court created by the Legislature (chapter 570 of the Laws of 1909). Section 18 of article 6 of the Constitution provides that inferior local courts of civil and criminal jurisdiction may be established by the Legislature; but it is also provided that a court so created shall not be a court of record, neither shall it have any equity jurisdiction, nor—

"any greater jurisdiction in other respects than is conferred upon County Courts by or under this article."

The criminal jurisdiction of the City Court of Buffalo, sitting as a Court of Special Sessions, as extended by the amendment of 1910 above referred to, is therefore clearly within the letter of the Constitution, for it assumes to give that court power to impose sentence only to the same extent as the "County Court of Erie county could do in like cases."

[2] But it is claimed that this amendment violates another constitutional provision, which is found in section 2 of article 1, which so far as pertinent here is that:

"The trial by jury in all cases in which it has heretofore been used shall remain inviolate forever."

It is conceded that this provision is to be read in connection with section 23 of article 6, which provides that:

"Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law."

It is further conceded, and the cases so hold, that the Legislature may give such courts exclusive jurisdiction to hear and determine all cases involving charges of offenses of that grade. People ex rel. Comaford v. Dutcher, 83 N. Y. 243; People v. Austin, 49 Hun, 396, 3 N. Y. Supp. 578. The provision of the Constitution which preserves the right of trial by jury is limited by its terms to those cases "in which it has heretofore been used." It does not apply to cases heard in a Court of Special Sessions, for the reason that trial by a constitutional jury—i. e., a jury of 12 men—was not within the course

of procedure in such courts, and had not been, when this provision first appeared in the Constitution. People ex rel. Murray v Justices, etc., in and for the City and County of N. Y., 74 N. Y. 406. It follows, therefore, that the statute giving the City Court, sitting as a Court of Special Sessions, exclusive jurisdiction to try and determine charges of misdemeanors, is not violative of that provision of the Constitution.

[3] It is, however, urged that, because no greater jurisdiction can be given that court than is given the County Court, and because, if relator had been prosecuted in the County Court, he would have been entitled to trial by a constitutional jury, the jurisdiction and power of the City Court as a Court of Special Sessions has been by the statute above quoted extended beyond that of the County Court, in that the Court of Special Sessions can try and determine such cases without a constitutional jury. It is difficult to appreciate the force of this contention. Except for the limitation by section 717 of the Code of Criminal Procedure, above referred to, of the power of Courts of Special Sessions to render judgment of fine and imprisonment in case of conviction, there could be little doubt that such courts would have the power to impose a fine or imprisonment, or both, within the limit prescribed by the statute as penalty for the particular misdemeanor of which defendant had been convicted. This limitation being statutory only, it may, of course, be extended, or entirely removed, by subsequent legislation. The limitation never applied to the power of the County Court. The amendment removes it from the City Court of Buffalo, sitting as a Court of Special Sessions. The same argument as to the unconstitutionality of this City Court statute as it now exists in the amended form would have been equally persuasive that the statute as it existed before the amendment was unconstitutional. Before the amendment it could try and determine without a constitutional jury all charges of misdemeanors, which, if on proper application they had been directed to be prosecuted by indictment, could only have been tried and determined in a court of record with the aid of such a jury.

The order should be affirmed. All concur.

McELRAEVY & HAUCK CO. v. ST. JOSEPH'S HOME FOR GIRLS
(two cases).

(Municipal Court of City of New York, Borough of Queens, Second District. July 30, 1913.)

1. CONTRACTS (§ 322*)—"PERFORMANCE" BY PLAINTIFF—BURDEN OF PROOF.
"Performance" of a contract consists in doing the things agreed to be done, and the burden is on plaintiff to show performance, not on defendant to show nonperformance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1768; Dec. Dig. § 322.*

For other definitions, see Words and Phrases, vol. 6, p. 5295.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CONTRACTS (§ 280*)—PERFORMANCE—SUFFICIENCY.
A heating company contracted to install in defendant's premises a boiler of the capacity of 5,000 square feet of radiation, the boiler to be insurable. The boiler installed fell short one-third in capacity, and was not insurable. *Held*, in an action by the heating company on the contract, that there was no sufficient performance of the contract.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1249–1280; Dec. Dig. § 280.*]

3. CONTRACTS (§ 346*)—ACTION—NONPERFORMANCE—NECESSITY OF PLEADING.
Defendant, in an action on a contract, may show plaintiff's failure to perform, without pleading it as a counterclaim.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718–1751; Dec. Dig. § 346.*]

4. CONTRACTS (§ 319*)—ACTION—SUBSTANTIAL PERFORMANCE.
For plaintiff to recover as for a substantial performance, it was incumbent on it to show the difference in value between the boiler installed and the boiler called for by the contract.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493–1507; Dec. Dig. § 319.*]

5. CONTRACTS (§ 295*)—SUBSTANTIAL PERFORMANCE—HEATING CONTRACT.
Where plaintiff contracted to install an insurable boiler of a specified capacity, and the boiler furnished was not insurable, and was of only two-thirds the agreed capacity, there could be no recovery on the ground of substantial performance; such recovery being permitted only where the omissions are unsubstantial and such as the parties are presumed not to have had in contemplation when making the contract.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1353–1356, 1362; Dec. Dig. § 295.*]

6. SALES (§ 428*)—BREACH OF WARRANTY—REMEDIES OF BUYER.
Where defendant refused to accept a boiler from a heating company because not in compliance with the contract, his remedy was not limited to an action for damages for breach of warranty.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214–1223; Dec. Dig. § 428.*]

7. CONTRACTS (§ 155*)—CONSTRUCTION—CORRESPONDENCE.
In construing correspondence evidencing a contract between plaintiff and defendant, it should be read together, and ambiguities and uncertainties should be construed most strongly against the writer.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 736; Dec. Dig. § 155.*]

8. CONTRACTS (§ 322*)—ACCEPTANCE OF PERFORMANCE—SUFFICIENCY OF EVIDENCE.
Evidence, in an action by a heating company to recover under a contract for a boiler installed in defendant's premises, *held* to show that defendant did not accept the boiler.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1465, 1534; Dec. Dig. § 322.*]

Two actions by the McElraevy & Hauck Company against the St. Joseph's Home For Girls. Judgments for defendant.

Maerkle, Darius & Maerkle, of New York City, for plaintiff.

Francis J. Hogan, of New York City (Anthony J. Ernest, of New York City, on the brief), for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CRAGEN, J. These two actions, which were tried together, were brought to recover the sums of $300 and $370, respectively, and arise out of the following circumstances:

For a number of years prior to the year 1911, the defendant institution had in its Home at Flushing, L. I., two horizontal tubular boilers, used for heating the premises. In August, 1911, the Allsop Heating Company, plaintiff's assignor, inspected the defendant's premises with a view of making repairs to said boilers, and after such inspection the said Heating Company wrote to the defendant, submitting a proposition as to the cost of such repairs, with an alternative proposition for the removal of the poorer one of said boilers and the installation of a new boiler, to be connected with the remaining old one, and advising the defendant that the alternative proposition was the most advisable one to accept. This proposition, as far as material to a disposition of this action, is as follows:

"We will disconnect and remove one of the old horizontal tubular boilers now on premises, furnish and erect one Allsop 'Economy' water tube safety steam boiler of 5,000 square feet capacity, cross-connecting same with the better of the two old boilers, so that either one or both boilers can be used together or separately, with all necessary pipe and fittings, valves, gauge, damper regulator, fire tools, etc., complete, making repairs to the better one of the two horizontal tubular boilers as advised by the boiler inspector, all for net sum of thirteen hundred ($1,300) dollars."

This proposition was accepted by the defendant, and the Heating Company in the fall of 1911 removed one of the old boilers, and caused a boiler of the name and make contained in its proposition to be duly installed, which was connected with the old remaining boiler. No mention is made in said proposition of securing insurance on the boiler, although the president of the Heating Company admitted on the stand that he had agreed to do so, and the fact that he did is borne out by his company's letter of March 9, 1912. Subsequently the boiler was inspected by an inspector of the Fidelity & Casualty Company, and insurance refused, on the ground that the boiler was structurally defective. Much controversy was then had, between the Heating Company and the defendant, regarding the boiler; the defendant contending that the boiler was not as represented, in that it failed to perform the work or the results expected of it, and was insufficient in capacity, which controversy resulted in the defendant refusing to accept the boiler.

In the discussion regarding the merits of the boiler, the Heating Company maintained that the difficulty, if any, was due to the defects in the main and return piping, and the fact that the boiler could not show good results by reason of its being connected with the old remaining boiler. The controversy mentioned continued down to June, 1912, when the Heating Company submitted a further proposition to the defendant, for the removal of the remaining old and the installation of a second new boiler, and the erection of new piping, in place of what it contended was defective, for the sum of $1,107. This proposition was also entertained by the defendant. The evidence is not clear when the defendant made a payment on account, but in any event there was due $1,000 on the first contract when the second proposition

was submitted. Upon the acceptance of the second proposition, the Heating Company contends that it proceeded with the work, in the meantime having received the further sum of $700, which it credited on the first contract, leaving a balance of $300, to recover which the first action was brought.

The Heating Company never installed the second boiler, although it removed the second old one, and had the new one on the premises, preparatory to installation, when it contends the second contract was modified to the effect that it agreed to take back the second new boiler and cancel the second contract, in consideration of the defendant agreeing to pay the sum of $370, which the Heating Company claimed represented its outlay for material and labor to the date of cancellation, which sum is the subject of the second cause of action.

[1, 2] Considerable evidence was given on the trial as to the capacity of the boiler installed, with the usual conflicting opinion of experts. Suffice to say, however, the evidence established that the boiler falls far short of producing the guaranteed 5,000 square feet of radiation. The testimony of Mr. Peterson and Mr. Murdock, two of the experts, which I consider the most reliable on the subject of capacity, and both of whom arrive at practically the same conclusion, is to the effect that, working the boiler under the most favorable circumstances, it nevertheless falls short approximately one-third of the guaranteed heating capacity. By reference to the pleadings, it will be seen that the theory upon which the first cause of action is predicated is that the Heating Company performed its contract; otherwise speaking, the plaintiff, as the assignor of the Heating Company, alleges full performance of the contract on the part of the Heating Company, and not substantial performance. Can it be said, under the circumstances, that the contract was performed? I think not. The defendant was entitled to have a complete boiler placed upon its premises of the guaranteed capacity and of insurance thereon, as agreed. Performance of a contract consists in doing the thing agreed to be done, and the burden is on the plaintiff, suing upon a contract, to show performance, and not upon the defendant to show that the plaintiff has not performed. Vernon v. Vulcanite Portland Cement Co., 119 App. Div. 39, 103 N. Y. Supp. 876. As was said by the Court of Appeals in a very recent case (Cameron-Hawn Realty Co. v. City of Albany, 207 N. Y. 377, at page 381, 101 N. E. 162, at page 163):

"The contract establishes and determines the rights and liabilities of the parties. Their agreements create the obligations they are bound to fulfill and the court to enforce and fix the scope and limits thereof. * * * It is a well-settled rule of law that a party must fulfill his contractual obligations. Fraud or mutual mistake, or the fraud of one party, and the mistake of the other, or an inadvertence induced by the one party and not negligence on the part of the other, may relieve from an expressed agreement, and an act of God or the law, or the interfering or preventive act of the other party, may free one from the performance of it; but if what is agreed to be done is possible and lawful, the obligation of performance must be met. Difficulty or improbability of accomplishing the stipulated undertaking will not avail the obligor. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance. The courts will not consider the hardship or the expense or the loss to the one party, or the meagerness or the uselessness of the result to the other. They will neither

make nor modify contracts, nor dispense with their performance. When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it, because he promised it, and did not shield himself by proper conditions or qualifications."

[3, 4] Nor is it necessary for the defendant to plead a counterclaim to establish the fact of nonperformance. Ryan v. Brown (Sup.) 104 N. Y. Supp. 871. It is conceded that the Heating Company never secured insurance on the boiler, and, assuming that the plaintiff might be entitled to recover as and for substantial performance, it was incumbent upon it to show the difference between an insurable and insured boiler and one not insurable. This is likewise true regarding the heating capacity, although the difference between the guaranteed heating capacity and the radiation the boiler could produce is such that I doubt if the plaintiff could even recover on the theory of substantial performance. Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; Carpenter v. Ellsworth, 151 App. Div. 532, 136 N. Y. Supp. 108.

[5] As will be seen by reference to the above cases, it is only where the things omitted are unsubstantial that a recovery is permitted; for instance, the Court of Appeals said in Van Clief v. Van Vechten, 130 N. Y. at 580, 29 N. E. at 1019:

"Substantial performance is not sufficient, except when it is understood as excluding only such unsubstantial differences as the parties are presumed not to have had in contemplation when they made the contract."

Applying this test to the failure to insure or procure insurance on the boiler, and the fact that the boiler fell short approximately of one-third of the guaranteed heating capacity, can it be said that the Heating Company even substantially performed its contract? These things the parties had in contemplation. They are things which the parties intended, and the plaintiff cannot recover for the failure of the Heating Company to furnish them.

[6] But the plaintiff contends that defendant's remedy is for damages on the breach of warranty. This would be true if the boiler was accepted, but the boiler was not accepted.

[7, 8] From an analysis of the correspondence, which should be read together (Eng. Company v. Herring-Hall-Marvin Safe Co., 76 Misc. Rep. 369, 134 N. Y. Supp. 810), and ambiguities and uncertainties in which should be construed most strongly against the writer (Staten I. Co. v. Spearin, 149 App. Div. 854, 134 N. Y. Supp. 98), it will be seen that the proposition of August 30, 1911, was to include repairs. Accompanying the proposition was a letter of even date, which should be construed as the defendant understood it (Stanton v. Erie R. Co., 131 App. Div. 879, 116 N. Y. Supp. 375), which is to the effect that the boiler would cost $1,000, and the $300 was for repairs. This is the $300 which the defendant paid to the Heating Company, and the only sum that had been paid to it, when the second proposition of June 21, 1912, was submitted. While it is true that the defendant was put to an election of either accepting or rejecting the boiler after reasonable examination, the fact that it had not been accepted or regarded as such by the Heating Company is borne out by

its correspondence of March 9, 1912, and June 21, 1912, which negatives any idea of acceptance.

This was the position of the parties in June, 1912, when the defendant advised the Heating Company of its intention to remove the boiler and substitute another of different make. Upon receipt of this information, the Heating Company wrote to the defendant, offering explanations respecting the defects complained of, and assuring the defendant that, after a second boiler of the same make and capacity was installed in place of the old remaining boiler, the difficulty would be obviated. This resulted in the acceptance of the second proposition above mentioned, after which the defendant paid the Heating Company $700, being the first two payments of $200 and $500, respectively, mentioned in the acceptance of July 31, 1912. These payments the Heating Company credited on the first boiler, which it *clearly had no right to do,* as the two accounts, as far as the method of payment was concerned, had then become merged (see letter of July 31, 1912), and it could only be credited accordingly; i. e., to the whole then contractual indebtedness of $2,170. In any event, such payment could not operate as an acceptance of the first boiler, as the defendant's letter of July 31, 1912, must be read in connection with the Heating Company's proposition of June 21, 1912, and the correspondence connected therewith, and as the defendant understood it (Stanton v. Erie R. Company, supra), viz., that the first boiler was to produce the guaranteed capacity when the second boiler was installed and connected with it, evidencing the intention of postponing the acceptance until then. See, also, letter of July 18, 1912, wherein it is expressly stated the contract price of the first and second boiler ($2,000) was not to become due until the completion of this contract. What contract? The contract of installing the second boiler.

The fact that the second contract was modified as claimed by plaintiff is denied by defendant, and is highly improbable to say the least. The effect would be to release the Heating Company of performance of its prior contract, while the defendant would be required to pay in full for what work the Heating Company claims it did in the performance of the second contract.

It follows from the above that judgment should be rendered for the defendant on the merits in both actions; and, as no affirmative judgment can be rendered against the plaintiff on the counterclaims interposed, the same are hereby dismissed without prejudice.

(82 Misc. Rep. 63)

WESTERN NEW YORK INSTITUTION FOR DEAF MUTES v. BROOME COUNTY.

(Supreme Court, Trial Term, Monroe County. August, 1913.)

1. STATUTES (§ 161*)—REPEAL—ACT RELATING TO SAME SUBJECT.
Since Education Law 1909, § 2000, reproduced without change in Education Law 1910 (Consol. Laws 1910, c. 16) § 1190, contains a schedule of all acts intended to be thereby repealed, the fact that an act is not mentioned therein evidences the intention of the Legislature to leave such act undisturbed, and, unless it is utterly inconsistent with the act, it will not be repealed thereby.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230–234; Dec. Dig. § 161.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 2*)—STATUTES—REPEAL—IMPLIED REPEAL.
Since, under General Construction Law (Consol. Laws 1909, c. 22) § 95, the provisions of a law repealing a prior law, which are substantially re-enactments of provisions of the prior laws, shall be construed as a continuation of such prior laws, the Education Laws of 1909 and 1910 (Consol. Laws 1910, c. 16) were simply a continuation of the statutes which it repealed, and, since Laws 1876, c. 331, granting a charter to the Western New York Institution for Deaf Mutes, was not inconsistent with such prior statutes, it is not inconsistent with the Education Law and, therefore, not impliedly repealed thereby.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. COUNTIES (§ 222*)—CLAIMS AGAINST COUNTY—PLEADING—"AUDIT."
An allegation that the board of supervisors "refused to audit" a claim is equivalent to an allegation that the supervisors refused to pass upon the claim or in any manner exercise their judicial functions in relation thereto, since "audit" means to examine and allow or disallow.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 355–359; Dec. Dig. § 222.*

For other definitions, see Words and Phrases, vol. 1, pp. 639–642.]

4. PLEADING (§ 214*)—ADMISSIONS ON DEMURRER.
A demurrer admits the truth of a statement in a pleading attacked, and words, in the absence of something clearly indicating the contrary, are to be given their exact and legal meaning.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525–534; Dec. Dig. § 214.*]

5. COUNTIES (§ 206*)—ACTION—LIQUIDATED CLAIM.
An action at law can be maintained to recover a liquidated claim against a county which has been repudiated and audit refused by the supervisors.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322, 323, 325–330; Dec. Dig. § 206.*]

6. COUNTIES (§ 197*)—CLAIMS AGAINST COUNTY—LIQUIDATED CLAIM.
Charter of Western New York Institution for Deaf Mutes (Laws 1876, c. 331, §§ 1 and 2) authorizes the sending to it of deaf and dumb persons between the ages of 6 and 12 in the same manner as such persons may be sent to the New York Institution for Deaf and Dumb Persons under Laws 1863, c. 325. Laws 1863, c. 325, as amended by Laws 1875, c. 213, § 4, provides that the expenses of such deaf mute children, not exceeding the amount of $300 per year, are to be paid by the county from which sent, and bills therefor, properly authenticated by the principal of the institution, shall be paid upon presentation to the county treasurer. *Held*, that a claim against a county, fixed by the principal as prescribed by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

statute, was a liquidated claim and did not require audit by the board of supervisors.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 309–311; Dec. Dig. § 197.*]

Action by the Western New York Institution for Deaf Mutes against the County of Broome. Demurrer overruled.

Isaac Adler, of Rochester, for plaintiff.
James K. Nichols, of Binghamton, for defendant.

SAWYER, J. This is an action to recover for the education and maintenance of one Ruth M. Lytle, a deaf mute under the age of 12 years, who was admitted to the plaintiff institution from the county of Broome pursuant to a designation made by one of the supervisors of that county. Defendant demurs to the complaint and urges that it does not state facts sufficient to constitute a cause of action in that it fails to allege the making and filing of a certificate by the State Board of Charities that plaintiff has been duly organized and is prepared for the reception and instruction of deaf mute pupils, and further that an action at law cannot lie against defendant to recover the moneys in controversy. While the rule of pleading invoked by plaintiff is well settled, it does not appear applicable in this case.

Plaintiff is incorporated under a special charter, known as chapter 331 of the Laws of 1876, which authorizes it to receive, and the various supervisors and overseers of the poor in this state to send to it, deaf and dumb children "in the same manner and upon the same conditions as such persons may be sent to the New York Institution for the Instruction of the Deaf and Dumb, under the provisions of chapter 325 of the Laws of 1863." The act of 1863, referred to, as amended and in force when plaintiff's charter was enacted, provided for the sending of such children by local overseers of the poor, or supervisors, to the New York Institution for the Deaf and Dumb, and certain other similar institutions therein specifically named, or to "any institution in the state for the education of deaf mutes as to which the Board of State Charities shall have made and filed with the superintendent of public instruction a certificate to the effect that said institution has been duly organized and is prepared for the reception and instruction of such pupils." This act of 1863 was repealed by and its provisions included in the Education Law of 1909 and was again, with some changes immaterial to this controversy, made a part of the Education Law as adopted in 1910 (Consol. Laws 1910, c. 16). Defendant contends that by such action the Legislature eliminated all provisions for the education of deaf mute children, except such as are included in the Education Law, and that all statutes in relation thereto theretofore existing are repealed. If this be true before a child can now be sent to plaintiff for care and education at the expense of the county of its residence, unquestionably the prescribed certificate must have been issued and filed, and in an action to recover therefor plaintiff must under the rules of pleading so state in its complaint.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This child was committed to plaintiff's custody prior to the enactment of the Education Law of 1909, and no necessity for the procuring of such certificate existed. Concededly its charter then authorized the sending to it by the supervisor of this unfortunate little one and fixed upon defendant full liability for its care and education. As to that portion of the claim accruing prior to February 17, 1909, the complaint is sufficient. Whether without such certificate it can recover for care and education furnished it subsequent to that date depends upon the determination of whether or not the Education Law directly or by its inconsistent provisions effected a repeal of this part of plaintiff's charter.

[1] The repealing section of the Education Law of 1909 (2000), which is reproduced almost without change by section 1190 of the Laws of 1910, contains a schedule of all the acts which are intended by the Legislature to be thereby repealed, and chapter 331 of the Laws of 1876 (plaintiff's charter) is not therein included. This omission evidences the legislative intention to leave that charter undisturbed and, unless it be utterly inconsistent with the general scheme for education erected by the consolidation, must be so construed.

[2] Section 95 of the General Construction Law (Consol. Laws 1909, c. 22) provides that:

"The provisions of a law repealing a prior law, which are substantially reenactments of provisions of the prior laws, shall be construed as a continuation of such provisions of such prior law, * * * modified or amended according to the language employed, and not as new enactments."

The effect of this is that the Education Law as it now stands is simply a continuation of the law as it existed prior to the act of 1909. No inconsistencies between these statutes was thought to exist formerly, and the recent endeavor of the Legislature to collate and consolidate our statutory law has in no wise operated to change their status. Plaintiff's rights and powers have not been disturbed thereby, and the certificate now provided for by subdivision 6 of section 978 of the Education Law is not a prerequisite to the authority of public officers to place deaf and dumb children in its keeping. A more serious question is presented by the argument that plaintiff's remedy is either by mandamus or certiorari, as the case may be, and that an action at law will not lie against defendant.

[3] The complaint sets forth that the claim was presented to the board of supervisors of the defendant county, "but that said board of supervisors refused and still refuses to audit the said bills or any part thereof," and further alleges that the claim properly authenticated by the principal of plaintiff "has been duly presented to the county treasurer of Broome county, but that said county treasurer has refused and still refuses to pay the same or any part thereof." Defendant seems to assume that by the allegation that the supervisors refused to audit is intended to be stated that the claim was examined and passed upon as incorrect or illegal. That it was "audited at nothing."

[4] It is the well-understood rule that a demurrer admits the truth of the statement in the pleading attacked, and that words, in the ab-

sence of something clearly indicating the contrary, are to be given their exact and legal meaning. "Audit" means to examine and allow or disallow (People v. Barnes, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; People v. Supervisors, 35 App. Div. 239–242, 54 N. Y. Supp. 782; 4 Cyc. 1056), and the allegation is that the supervisors refused to pass upon this claim or in any manner exercise their judicial functions in relation to it. That they rejected and repudiated the entire transaction.

[5] Prior to the passage of the County Law of 1892, it was uniformly held that the only remedy for the refusal of the board of supervisors to audit a claim against its county was by mandamus, and the only method in which its audit of such a claim could be reviewed was by certiorari, and that an action therefor could not be maintained. This is still the rule in the case of unliquidated claims. Foy v. County of Westchester, 168 N. Y. 180, 61 N. E. 172.

In Kennedy v. County of Queens, 47 App. Div. 250, 62 N. Y. Supp. 276, however, the court in a careful opinion, written by Mr. Justice Goodrich, held that, where the claim was liquidated by the existence of a county obligation for a specific sum, the plaintiff has his dual remedy, either by mandamus or by certiorari, according to circumstances, or by action directly against the county. The court adopted as the true construction of the various statutes, as they stood after 1892, the suggestion of Mr. Justice Cullen in Albrecht v. County of Queens, 84 Hun. 399, 32 N. Y. Supp. 473, that such a case constituted an exception to the general rule as to actions against a county. This exception seems to have been the theory of counsel in Freel v. County of Queens, 9 App. Div. 186, 41 N. Y. Supp. 68, affirmed 154 N. Y. 661, 49 N. E. 124, where an action was maintained against the county upon a liquidated contract, and the same is true in Western N. Y. v. Yates County, 94 App. Div. 1, 87 N. Y. Supp. 534. In neither of these cases, however, was the point brought to the notice of the court, and no attempt was made to pass upon the question. Counsel for defendant calls my attention to the fact that the Kennedy Case has never been elsewhere followed, and cites a number of decisions to sustain his assertion that its doctrine has on the contrary been steadily repudiated. It seems never specifically to have been overruled, and that it stands alone as a precedent seems to be true, for no other case involving the precise question is, so far as I can ascertain, reported. It has, however, been frequently cited both in briefs of counsel and opinions of the court, but none of the cases can be said to constitute a reversal or repudiation of its doctrine.

Foy v. County of Westchester, supra, involved an unliquidated claim and held that such cases must be presented to the board of supervisors for audit, and that their action thereon was only reviewable by certiorari.

In People v. Westchester County, 57 App. Div. 135, 67 N. Y. Supp. 981, the claim in controversy had been presented to the supervisors and audited for an amount less than claimed, and it was held that certiorari would lie to review the audit. In the opinion written by Mr. Justice Jenks, however, the dual remedy is clearly recognized, and the expression, "the two provisions can stand together as furnish-

ing a double remedy for the same default," used in Thomas v. Supervisors of Westchester County, 115 N. Y. 47–55, 21 N. E. 674, 4 L. R. A. 477, is quoted with approval. It is true that two of the justices, while concurring in the result, limited their concurrence, if it was to be regarded that the Kennedy Case was an authority for the proposition that *in all cases* a claimant may maintain an action at law against a county at its option. As has been seen, such was not the holding of the Kennedy Case, and this imports no disapproval of the doctrine which it really enunciates.

In People v. Coler, 48 App. Div. 492, 62 N. Y. Supp. 964, a mandamus requiring the defendant to audit relator's unliquidated claim was sought and granted. Here the Kennedy Case was considered and distinguished with the intimation that, if the claim had been rejected and repudiated, an action at law for its recovery could be maintained. This was explicitly explained in People v. Westchester County, 53 App. Div. 339, 343, 65 N. Y. Supp. 707, 709, by the statement that the Coler Case held that, "where the relator's claim had never been rejected by the board of supervisors, the Kennedy Case was not an authority" for an action at law. This seems to limit that court's previous decision to cases where audit has been refused, but otherwise the case has no bearing here.

Bank of Staten Island v. City of N. Y., 68 App. Div. 231, 74 N. Y. Supp. 284, involved only the question whether the audit of a board of supervisors could be attacked collaterally.

Without attempting to review in detail the many other cases submitted to me as controlling, it is sufficient to say that the force of the Kennedy Case as an authority for the proposition that an action at law can be maintained to recover a liquidated claim against a county which has been repudiated and audit refused by the supervisors seems nowhere to have been disturbed, and I am persuaded that such is the law.

[6] The question is therefore presented as to whether the claim in suit is liquidated "by the existence of a county obligation for a specific sum." There is no allegation in the complaint that the amount charged for the maintenance and education of the Lytle child was fixed by agreement with the defendant or its board of supervisors, nor that same were furnished pursuant to any such agreement. In this respect the situation differs from that presented in the Kennedy Case, where the contract had been expressly entered into and afterwards entirely repudiated by the board. Plaintiff's charter (sections 1 and 2) authorized the sending to and reception by it of "deaf and dumb persons between the ages of 6 and 12 years in the same manner and *upon the same conditions* as such persons may be sent to the New York Institution for the Instruction of the Deaf and Dumb, under provisions of chapter 325 of the Laws of 1863." That chapter, as amended in 1875 (Laws 1875, c. 213), provided (section 4) that:

The "expenses for the board, tuition, and clothes for such deaf mute children * * * not exceeding the amount of $300 per year * * * shall be raised and collected as are other expenses of the county from which such children shall be received; and the bills therefor, properly authenticated by the principal or one of the officers of the institution, shall be paid to said institution by the said county, and its county treasurer or chamberlain, as the

case may be, is hereby directed to pay same on presentation, so that the amount thereof may be borne by the proper county."

This general statute as to compensation is unquestionably applicable for the benefit of plaintiff under its special charter and directs the payment to it of its bills upon demand by the fiscal officer of the county in such amount as its principal shall certify, not exceeding $300 per year. This plan of payment contemplates neither presentation to nor an auditing by the board of supervisors of such bills. The amount which the county is to pay, within the statutory limitation, is fixed by the principal of the institution. The contract in its entirety is created by the statute which empowers an overseer of the poor or supervisor to send a child of the designated class to this institution at the county's expense; the cost to the county to be determined, not at the discretion of the board of supervisors, but, within limitations, by the plaintiff. That a claim under such a statute is so "liquidated" needs no argument. This act was evidently framed by the Legislature in consideration of our public policy toward defectives and with deliberate intent to deprive local boards of supervisors of the power to arbitrarily or otherwise reduce claims for compensation for services of great importance to the state; services highly technical in their nature and the true value of which such a board could ordinarily have no good means of determining. A similar statute relating to the care of the insane (chapter 446 of the Laws of 1874, tit. 1, art. 1, § 16) was under consideration by the court of appeals in Thomas v. Supervisors Westchester County, 115 N. Y. 47, 55, 21 N. E. 674, 676 (4 L. R. A. 477), where the court approves and states the object of the legislation that "it was clearly not intended to leave it (Willard Asylum) without remedy until the meeting of the supervisors and subject it (its bills) to their audit."

Judgment overruling the demurrer, with costs, with the usual leave to answer within 20 days, is directed. Findings and proposed judgment may be submitted for signature.

(157 App. Div. 828)

HILDEBRANT v. LEHIGH VALLEY R. CO.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

MASTER AND SERVANT (§ 188*)—INJURIES TO SERVANT—SUPERIOR AND INFERIOR SERVANTS.

Under Railroad Law (Consol. Laws 1910, c. 49) § 64, making railroad employés who have control of a locomotive engine or of a train vice principals and not fellow servants of an employé killed or injured by their negligence, the executrix of a conductor, killed by the negligence of an engineer, may recover for his death, even though both employés were vice principals and the conductor was of superior rank.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 436; Dec. Dig. § 188.*]

Appeal from Trial Term, Ontario County.

Action by Jennie A. Hildebrant, as executrix, against the Lehigh Valley Railroad Company. Judgment for plaintiff for $10,916.08 damages, and defendant appeals. Affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Howard Cobb, of Ithaca (Tompkins, Cobb & Cobb, of Ithaca, of counsel), for appellant.

Merwin W. Lay, of Syracuse (Higbee & Lay, of Syracuse, of counsel), for respondent.

ROBSON, J. Plaintiff's testator was, at the time of receiving the injuries which resulted in his death, a freight conductor in defendant's service. Shortly after midnight on the 17th day of February, 1910, he, together with an engineer, fireman, and two brakemen, forming a freight train crew, was directed to take from defendant's Manchester yards an east-bound freight train, which appears to have been then completely made up, with the exception that it still lacked the locomotive. The engineer then in charge of a locomotive, to the operation of which he was assigned on this occasion, backed it down upon the front end of the train of cars for the purpose of coupling it thereto. The coupling, however, did not "make" on this first attempt; and the engineer, having been advised of that fact by the deceased, at the latter's suggestion, moved the locomotive forward from 15 to 20 feet and stopped. After the locomotive moved forward, the two brakemen found, on examining the coupling device on the front end of the forward car, that it did not operate properly, due, as it appeared, not to any actual defect in the coupler itself, but to a temporary obstruction of the usual free movement of its mechanism, which apparently resulted from the severe weather conditions then obtaining. The two brakemen not at once succeeding in their attempts to remedy this temporary difficulty, the deceased, who had meanwhile joined them, tried to adjust the coupler.

While thus engaged, and being directly in front of the coupler on which he was working, one brakeman being on either side of him, and all facing towards the train and away from the locomotive, the en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gineer backed the locomotive over the intervening space to the train end, with the result that intestate was caught between the drawheads and fatally injured. The court instructed the jury in effect that, if they found that this movement of the locomotive by the engineer was not made in the exercise by him of reasonable care and prudence, then negligence on the part of defendant causing the injury had been proved.

It is urged by appellant that this statement of the law of the case, to which sufficient exception was taken on the trial, is erroneous. In support of this position it is claimed, as stated in the reply brief for appellant:

"That one who is a vice principal cannot recover from the employer for the negligence of another vice principal, where the other vice principal is of superior rank and in control of the other vice principal."

He admits that, in cases where the statute hereinafter referred to applies, a vice principal, injured solely by the negligence of another vice principal of the employer, of equal authority with and not subject to the control of the former, would have a cause of action against the employer. The authorities seem to so hold. Kent v. Jamestown Street Rwy. Co., 205 N. Y. 361, 98 N. E. 664; Simons v. Brooklyn Heights R. R. Co., 142 App. Div. 36, 126 N. Y. Supp. 792; Gorman v. Brooklyn, Queens County and S. R. R. Co., 147 App. Div. 21, 131 N. Y. Supp. 686. Why the negligent employé in the first class of cases, the particular act of negligence not resulting from nor connected with any superior authority or control exercised over him at the time by the injured employé, should not be considered under the statute as a vice principal of the employer, if the negligent employé in the second class is made by the statute a vice principal, is not clear. The statute (section 42a, which was added by chapter 657 of the Laws of 1906 to the Railroad Law [Laws of 1890, c. 565], and now being section 64 of the Railroad Law [Laws of 1910, c. 481; Consol. Laws 1910, c. 49]) does not in terms indicate any such distinction in the two classes of cases. One class of employés of railroad corporations, who are by the act separately designated as vice principals of the employer, are those "who have, as a part of their duty, for the time being physical control or direction of a * * * locomotive engine"; and, as the statute further provides, in all actions against such employer for personal injury to, or death resulting from personal injury of, any person while in its employment, due to the negligence of its employés of the designated class, such negligent employés "are not fellow servants of such injured or deceased employé." No suggestion is made in the terms of this part of the statute, at least, that the liability of the employer in such case is to be limited, or affected, by a determination of the relative authority intrusted by it to the negligent and to the injured employé.

This question was fully and satisfactorily discussed in the opinion of Thomas, J., in the case of Simons v. Brooklyn Heights R. R. Co., supra, and our conclusion that the engineer in this case was as to the deceased the vice principal of the defendant may well be based on that part of his opinion. It also receives incidental support in the case of

Eagen v. Buffalo Union Terminal R. R. Co., 200 N. Y. 478, 93 N. E. 1110. In that case a conductor employed by defendant was killed while attempting to couple to the train of which he had apparent charge one of the devices used by his employer in its business. The trial court in that case charged that both the engineer who was operating the engine and the conductor's helper, one Donahue, who stood at the side of the train to direct by signal the engineer as to the movement of the train, were each vice principals of the common employer, for whose acts the employer would be responsible, if the negligence of either was the sole cause of the conductor's injury. The judgment in favor of the plaintiff was reversed by the Court of Appeals, apparently on the sole ground that the court erred in charging the jury that the helper, Donahue, was a vice principal of the employer. By inference, therefore, it would appear that the charge of the court that the engineer was, under the statute, as to the conductor a vice principal of the employer, was approved.

The Supreme Court of Indiana has also held that a liability may arise under the somewhat similar statute of that state for an injury to a conductor through the negligence of an engineer in charge of the locomotive upon the same train, notwithstanding a rule of the company making the conductor in some respects the superior servant. Pittsburgh, C., C. & St. L. R. R. Co. v. Collins, 168 Ind. 467, 80 N. E. 415. Appellant's counsel cites no case in this state which, as it now appears to us, is in conflict with our conclusion. The cases from other jurisdictions, to which attention is called in the brief, in each instance involved a consideration of particular statutes materially differing both in phraseology and substantive provisions from that of this state.

None of the other exceptions seem to be of sufficient importance to call for a particular reference to them. The evidence warranted a finding by the jury that deceased came to his death by reason of injuries caused by the negligence of the engineer, and that no negligence of deceased contributed to that injury. We cannot say that the verdict was excessive under the circumstances.

The judgment and order should be affirmed, with costs. All concur.

(158 App. Div. 309)

RICE, BARTON & FALES MACHINE & IRON CO. v. HOFFMAN-YOUMANS PAPER MILLS.

(Supreme Court, Appellate Division, Fourth Department. July 8, 1913.)

SALES (§ 359*)—PERFORMANCE OF CONTRACT—SUFFICIENCY OF EVIDENCE—WAIVER OF DELAY.

In an action upon a promissory note given for the purchase price of a machine manufactured to order, where the defendant filed a counterclaim for damages caused by the delay in the delivery of the machine, evidence *held* sufficient to show that the buyer had waived all claim for damages caused by the delay in consideration of an extension of credit granted by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 511, 1056–1059; Dec. Dig. § 359.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. SALES (§ 176*)—DELIVERY—WAIVER OF DELAY—CONSIDERATION.
The extension of credit by the seller is ample consideration for a waiver and satisfaction by the buyer of all damages occasioned by delay in the delivery of a machine, whether the new agreement was made and performed before or after the breach of the contract of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436–444; Dec. Dig. § 176.*]

Foote, J., dissenting.

Appeal from Trial Term, Onondaga County.

Action by the Rice, Barton & Fales Machine & Iron Company against the Hoffman-Youmans Paper Mills. Judgment for the plaintiff on the referee's report, and defendant appeals. Referee's report modified, by inserting in lieu of the tenth finding thereof the following: "This court finds from the evidence contained in the record that the defendant waived the provisions of the contract requiring the plaintiff to deliver the machine at the time therein mentioned, and any claim for damages by reason of such failure to deliver the machine within the time provided by the contract, or the time provided by the contract." Judgment affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Steward F. Hancock, of Syracuse, for appellant.
William H. Harding, of Syracuse, for respondent.

LAMBERT, J. The action is upon a promissory note, as to the inception of which there is no dispute; nor is it disputed but that same has not been paid. The controversy arises with reference to a counterclaim, sought to be interposed and maintained by the defendant.

February 16, 1910, plaintiff and defendant entered into a contract whereby plaintiff agreed to sell to defendant a paper machine at the stipulated price of $12,750, and to have same ready for shipment within eight weeks. This contract provided for payment as follows: One thousand dollars upon the signing of the contract, and the balance by way of notes. The machinery was to be manufactured, and it was not ready for shipment within the time provided for in the contract, and in fact was not set up and in operation until November of that year. The counterclaim is for damages resulting from plaintiff's breach of such contract as to time of delivery. Prior to the agreed time of delivery it became apparent that the machine would not be completed in time to comply with the contract in that particular, and plaintiff notified defendant of such fact. A lengthy correspondence then followed between these parties, continuing until after the delivery of the machine. The failure to comply with the agreement at the contracted time seems to have resulted to some extent from labor difficulties, and there is slight intimation of some misunderstanding with reference to certain drawings furnished by the defendant. The letters from the defendant, following the notification of plaintiff's inability to deliver on time, are ample to establish a waiver of such time of delivery. Such letters are replete with re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quests to make delivery as soon as possible, and do not contain any intimation of a present or prospective claim of damages for the delay.

Following the delivery of the machine, the defendant executed and delivered to plaintiff the promissory notes in accordance with the terms of the original agreement. These notes were renewed from time to time for short intervals, until eventually plaintiff refused further renewals of the note in suit and commenced action thereon. Extensive correspondence was had between the parties relative to these renewals and the payment of this particular note, and such letters contained no intimation of a claim for damages for delay in delivery. It was only when this action was brought that this claim was first asserted by the defendant.

[1] The referee has disallowed such counterclaim, upon the theory that same was waived by defendant. Such conclusion seems well established by the evidence. In June, 1910, it appears that defendant was indebted to plaintiff upon other purchases than those involved in this contract, for the amount of which indebtedness plaintiff was asking payment. On June 15th, in response, apparently, to such a demand, defendant wrote the plaintiff as follows:

"In regard to the open account, we are always willing to accommodate and play fair; but on account of your delay in shipping our machine, which is now two months, we will have to ask that you wait a short time."

Also on June 11th defendant wrote plaintiff, in speaking of this open account, as follows:

"If you will kindly hurry along our shipment, we will be glad to reciprocate in the way of settlement."

From the above and similar letters found in this correspondence, it is to be observed that defendant was claiming an extension of credit upon this open account by reason of the delay in delivery of the machine contracted for. Evidently this exchange of courtesies was acquiesced in by the plaintiff, for on September 19th the plaintiff wrote the defendant as follows:

"We are very glad indeed to know that you will put the paper over the machine to-morrow. We trust that everything will be found satisfactory in every respect, and that we will receive a check from you, as you advised us that you would send one when the machine started making up paper."

From the above it will be noted that the parties mutually agreed to an extenson of the time of delivery because of the exigencies of the situation. This would not, however, necessarily defeat a claim for damages for the delay. The parties, however, further, by the asking and the granting of the extension of credit, adjusted all such claim for damages and fully satisfied same. Defendant made claim to a right of such extension of credit because of the delay in shipment. The plaintiff acquiesced in such claim and granted such extension.

[2] The extension of credit was a valuable concession, and affords ample consideration for the waiver and satisfaction of the damages occasioned through the delay in delivery. In effect, the parties made a new agreement, whereby the time for delivery was extended, and all claim for damages because of such delay extinguished. This new

agreement was founded upon a sufficient consideration and was fully performed. Such performance of the substituted agreement fully satisfies the original one. As was said in McCreery v. Day, 119 N. Y. page 9, 23 N. E. page 199, 64 L. R. A. 503, 16 Am. St. Rep. 793:

"The technical distinction between a satisfaction before or after breach seems to have been disregarded in this state, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant."

For the foregoing reasons, the judgment appealed from should be affirmed, with costs. The last part of the tenth finding of fact contained in the referee's report, to the effect that, when the defendant so accepted the machine and gave the renewal notes, it waived the damages is modified by inserting in lieu thereof the following:

"This court finds from the evidence contained in the record that the defendant waived the provisions of the contract requiring the plaintiff to deliver the machine at the time therein mentioned, and any claim for damages by reason of such failure to deliver the machine within the time provided by the contract, or the time provided by the contract."

All concur, except

FOOTE, J. (dissenting). The action is upon a promissory note for $3,000, dated June 1, 1911, made by defendant to plaintiff in renewal of a prior note for the same amount, given to provide for the payment in part of the purchase price of a cylinder paper machine manufactured by plaintiff at Worcester, Mass., and delivered to defendant at its place of business at Baldwinsville, N. Y., at the agreed price of $12,750.

The controversy in the case arises over the delay in the delivery of this machine, which was several months later than the contract date of delivery. There is also a further question arising upon defendant's claim that it was entitled to renew the notes, including the one in suit, an indefinite number of times, because of the clause on that subject contained in the written contract, and for other reasons. This latter question was, we think, correctly ruled upon against the defendant by the referee, and no further reference to that question seems necessary.

As to the other question, it arises upon the counterclaim pleaded by defendant, to the effect that plaintiff agreed in the contract to deliver the machine to defendant within eight weeks, and it did not deliver the same for about four months, and that defendant was damaged by said delay in certain specified particulars to the amount of $4,000. It appeared from the correspondence between the parties that some weeks before the contract date of delivery, plaintiff ascertained that it would not be able to complete the machine and deliver it at the contract date, and so notified defendant; that defendant then and many times thereafter urged plaintiff to hasten the work of building the machine and to deliver it as early as possible, and called attention to the inconvenience and injury it would suffer by the delay. Nevertheless, defendant accepted the machine when it was finally delivered, and gave its promissory notes for the purchase price in accordance with the terms of the contract, without at that time making any claim

for damages. These notes were made at four months, five in number, and were renewed at defendant's request two or three times, and when the note now in suit became due, and plaintiff refused defendant's request for further renewal, and brought this action, defendant, for the first time, by its answer asserted to plaintiff a claim for damages on account of delay in delivery of the machine.

The referee has found as a fact that defendant, by accepting the machine when delivered without making a claim for damages, and by giving the renewal notes after the delivery of the machine, "thereby waived any damages which it may have sustained by reason of the failure of the plaintiff to deliver said machine at the time mentioned in said contract"; and, as conclusion of law, the referee has held that defendant, on the facts found, waived any claim for damages. The referee has also found, by ruling upon one of defendant's requests to find, that defendant's acceptance of the machine when delivered did not, in and of itself, constitute a waiver of defendant's claim for damages for the delay. There is no finding of an express agreement on defendant's part at any time to waive its claim for damages, nor is it claimed that plaintiff was led to complete the machine and deliver it after the contract date in reliance upon any statement of defendant that it would not make a claim for damages for the delay.

It having appeared from the evidence previously given that defendant had accepted the machine when delivered without making claim for damages, and had thereafter renewed the several promissory notes given for the purchase price as they matured without making such a claim, the referee excluded the evidence offered by the defendant to establish the amount of its damages under its counterclaim, on the ground that defendant's right to claim damages had been waived. As there was no finding of any express agreement of waiver, and no evidence from which such an agreement could be found, the question presented for our determination is: Did the defendant, by accepting the machine under the circumstances already stated thereby, as matter of law, waive its right to damages for the delay or estop itself from claiming and recovering such damages as counterclaim in this action?

No doubt the acceptance of the machine precludes defendant from interposing the delay as a defense in bar of an action for the purchase price. By accepting the machine, it becomes liable for the contract price; but I think the weight of authority favors the position of defendant that such acceptance does not waive the right to claim damages for the delay, either in an independent action, or by way of counterclaim in an action for the purchase price. The learned referee based his conclusion that there was a waiver upon the authority of the cases of Roby v. Reynolds, 65 Hun, 486, 20 N. Y. Supp. 386, and Burrowes Co. v. Rapid Safety Filter Co., 49 Misc. Rep. 539, 97 N. Y. Supp. 1048.

The latter case was an action for the contract price for window screens made by plaintiff and put into the building of defendant. The delay in performance beyond the contract time was pleaded as a defense, and not as a counterclaim, and the authorities are agreed that

acceptance under such circumstances is waiver of the delay and of nonperformance of the contract as a complete defense.

The Roby Case was an action to recover the contract price for five sets of double harness ordered by the defendant in that case of the plaintiff. Plaintiff was not a manufacturer of harnesses, and defendant understood plaintiff was to have the harnesses made by a manufacturer at another place. Defendant's claim was that the harnesses were to be delivered in one week. There was a delay in the delivery of about seven days after the week. After the harnesses had been received at plaintiff's place of business, defendant was notified of their arrival and called there to examine them; but as he was about to leave town by train, and had not sufficient time to make the examination, he made an arrangement with plaintiff's salesman by which plaintiff was to ship the harnesses to defendant at a place in Pennsylvania where he wished to use them, and plaintiff agreed to warrant the quality of the harnesses to be A No. 1 oak-tanned leather, and to take them back if they proved not to be so. Thereupon the harnesses were shipped to defendant, and after receiving them he sent his check to plaintiff in payment, deducting 3 per cent. from the purchase price as a discount for cash payment. This discount plaintiff refused to allow, and returned the check and sued for the purchase price. Defendant pleaded breach of warranty as to the quality of the goods, and a counterclaim for damages by reason of the delay in delivery of the goods. The jury seem to have allowed the counterclaim in the County Court, where the action was tried. On appeal this was held to be error, in that defendant, by what took place at the plaintiff's store, had waived the delay in delivery of the harnesses, and was not entitled to damages on that account. No authorities are cited in the opinion, but many of its expressions support the position of the plaintiff here.

To that extent we think the case is not in harmony with the cases referred to below, which we regard as controlling authority. Nevertheless this case is distinguishable on its facts from the present case. Plaintiff Roby did not himself undertake to manufacture these harnesses. When they were received at plaintiff's store, and defendant called there to examine them, some seven days after the contract date of delivery, the parties then made a new contract, or at least a modification of the original contract, by which, to induce defendant to accept the harnesses, plaintiff made an express warranty of the quality of the leather and agreed to take the harnesses back, if the leather proved not to be as warranted, and also agreed to make a delivery of the harnesses at a place in Pennsylvania where defendant wished to use them. In these material particulars the original contract was modified, and they afforded a good consideration for a waiver by defendant of the delay in delivery. In substance, a new agreement was then made by defendant to purchase those particular harnesses in the condition they then were in. As is said in the opinion of Dwight, P. J.:

"It is not to be supposed that plaintiff would have parted with the property if he had had reason to suppose that the defendant was to make a claim thereafter for nearly the entire price of the goods for previous delay in their delivery."

In addition to these cases, plaintiff's counsel has cited upon his brief a large number which he insists tend to support the decision of the referee. Many of them, I think, have no application to the question under consideration. Those which appear to support plaintiff's position are distinguishable as follows:

In Bock v. Healy, 8 Daly, 156, the delay in delivery was not pleaded as a counterclaim, but as a defense.

In General Elec. Co. v. National Contracting Co., 178 N. Y. 369, 70 N. E. 928, there was a considerable extension of the contract time for making and delivering the machinery there in question, and when it was finally delivered defendant refused to and never did accept the machinery, and the action was for damages for refusal to accept.

In Ohl & Co. v. Lewin Co. (Sup.) 132 N. Y. Supp. 385, defendant was in the attitude of refusing to accept the press which was the subject of that action, although it was held that the delay in delivering it had been waived.

In Crane v. Barron, 115 App. Div. 196, 100 N. Y. Supp. 937, defendants refused to accept the lumber they had contracted for, and the action was for damages because of such refusal.

In Dunn v. Steubing, 120 N. Y. 232, 24 N. E. 315, defendant's acceptance of plaintiff's work performed after the contract date was held to have waived the delay as a defense, and defendant's counterclaim for his damages on account of such delay was allowed.

In Birkett v. Nichols, 184 N. Y. 315, 77 N. E. 374, defendant had refused to accept the flour shipped in December, which by the contract was to have been shipped in November, and plaintiff recovered on the ground that the time for delivery had been extended before it expired, and that there was an executed waiver of the delay.

The rule, as we understand it, applicable to this question, is thus stated in Wharton on Contracts, vol. 2, § 891:

"Unless, also, punctuality goes to the substance of an engagement, a failure to keep time is waived by an acceptance of the goods or services; and if the promisee has sustained any loss by the delay as to time, he must prove it as a matter of set-off, or use it to sustain a cross-action, as the local practice may require."

In support of the doctrine of this learned author, it will be sufficient to cite the cases which have been called to our attention, without reviewing them in detail. They are: Granniss & Hurd Lumber Co. v. Deeves, 72 Hun, 171, 25 N. Y. Supp. 375, affirmed 147 N. Y. 718, 42 N. E. 723; Beyer v. Henry Huber Co., 115 App. Div. 342, 100 N. Y. Supp. 1029; Mikolajewski v. Pugell, 62 Misc. Rep. 449, 114 N. Y. Supp. 1084; General Supply & Construction Co. v. Goelet, 149 App. Div. 80, 133 N. Y. Supp. 978; Ruff v. Rinaldo, 55 N. Y. 664; Deeves & Son v. Manhattan Life Ins. Co., 195 N. Y. 324, 88 N. E. 395; Crocker-Wheeler Co. v. Varick R. Co., 104 App. Div. 570, 88 N. Y. Supp. 412, 94 N. Y. Supp. 23; Industrial Works v. Mitchell, 114 Mich. 29, 72 N. W. 25; Phillips & Colby Construction Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Johnson v. North Baltimore Bottle Glass Co., 74 Kan. 762, 88 Pac. 52, 7 L. R. A. (N. S.) 1114, 11

Ann. Cas. 505; Redlands Orange Growers Ass'n v. Gorman, 161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718, and note, where the principal authorities are collected and reviewed.

I may add that the rule which seems to be established in these cases could not, with justice, have been otherwise. Where a party makes a contract with a manufacturer of machinery to build for him a special machine to install in his manufacturing plant, and he learns at or near the contract time of delivery that there is to be a failure of performance, in that the machine is not yet completed, it would be an unjust rule which would compel him to waive all claim for damages on account of delay as a penalty for accepting the machine when finally offered for delivery. Moreover, such a rule would, in many cases, work a more serious hardship to the delinquent manufacturer of the machine, for the purchaser could only retain his claim for damages by declining to accept the machine. Then, not only would it be thrown back upon the hands of the manufacturer to dispose of, but the purchaser's damages would be still further increased by the added delay incident to procuring another machine to be manufactured for him elsewhere. Whether this rule should be held to apply to the purchase and sale of goods already in existence, which are articles of commerce, we need not now consider.

Many of the cases cited are those arising out of building contracts where the owner was not in a position to decline to accept the building, although completed after the contract date, and it is urged that for this reason these cases should not be regarded as applicable to the present case. There is, of course, this difference: That in our case defendant might have refused to accept the machine after the delivery date had gone by, but it was not bound to do so. It was at its option whether it would accept the machine when offered at a later date and still claim its damages. Having elected to accept it, it was then in the same position as is the landowner, who accepts, because he cannot do otherwise, a building erected for him upon his land. The remedies of each against the delinquent contractor should, in principle, be the same.

I think the learned referee should have admitted the evidence offered by defendant to prove its damages for the delay in delivering the machine, and that he was in error in finding, from the facts proved, a waiver of its claim therefor by defendant.

The judgment appealed from should be reversed, and a new trial ordered before another referee, with costs to the appellant to abide the event.

SEAWARD v. TASKER.

(Supreme Court, Trial Term, Kings County. September, 1913.)

1. JUDGMENT (§ 957*)—EVIDENCE TO IMPEACH—SUFFICIENCY.
In an action wherein plaintiff's right to recover depended on the validity of the judgment in a former action against the estate of a deceased executrix, evidence *held* to show that the attorney for plaintiff in such former action and a justice of the Appellate Division by which such judgment was affirmed had both acted as attorney for such executrix with regard to the matters involved in that action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1826; Dec. Dig. § 957.*]

2. ATTORNEY AND CLIENT (§ 20*)—DISABILITIES—ACTING FOR ADVERSE PARTY.
A member of a firm of attorneys which acted for an executrix and legatee under a will, in probating the will, administering the estate, and accounting, violated his professional duty by acting as attorney for the plaintiff in an action against the executor of such deceased executrix and legatee to compel an accounting for property turned over to her for life with power of disposition.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 27, 29; Dec. Dig. § 20.*]

3. ATTORNEY AND CLIENT (§ 30*)—DISABILITIES—ACTING FOR ADVERSE PARTY.
A member of a firm of attorneys is included in the retainer of the firm and a party to the confidential relation so as to make it improper for him to subsequently act for an adverse party relative to the same matter, even though the first client's business is entirely conducted by another member of the firm.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 43; Dec. Dig. § 30.*]

4. JUDGES (§ 47*)—DISQUALIFICATION—ACTING AS COUNSEL.
Under Judiciary Law (Consol. Laws 1909, c. 30) § 15, providing that a judge shall not sit as such in, or take any part in the decision of, a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, it was unlawful for a justice of the Appellate Division, who had formerly acted as attorney for an executrix and legatee in probating a will, administering the estate, and accounting, to sit as a member and take part in the decision of that court on an appeal in an action against the executor of such executrix and legatee to compel an accounting for property received by her for life with power of disposition.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214–219, 222, 223; Dec. Dig. § 47.*]

5. JUDGMENT (§ 9*)—DISQUALIFICATION OF JUDGE—EFFECT.
Under Judiciary Law (Consol. Laws 1909, c. 30) § 15, prohibiting judges sitting in or taking part in the decision of causes or matters in which they have been attorney or counsel, a determination of the Appellate Division, participated in by a justice who had been attorney with regard to the matters involved, was void, although the majority of the court rendered a judgment contrary to the opinion of such disqualified justice.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 9;* Judges, Cent. Dig. §§ 237, 239.]

6. JUDGMENT (§ 957*)—EVIDENCE TO IMPEACH—SUFFICIENCY.
In an action wherein the judgment in a former action was relied on as showing plaintiff's right to recover, evidence *held* to show that, when such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

former action was in the Court of Appeals, plaintiff's attorney in his brief willfully suppressed the truth and falsely stated a material fact.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1826; Dec. Dig. § 957.*]

7. JUDGMENT (§ 9*)—DISQUALIFICATION OF JUDGE—EFFECT.

Under Judiciary Law (Consol. Laws 1909, c. 30) § 15, prohibiting judges sitting as such in, "or" taking any part in the decision of, causes or matters in which they have been attorney or counsel, a determination of the Appellate Division was void where a justice who sat as a member of the court had formerly been attorney with respect to the matters involved, although he did not vote on such determination, especially where the Appellate Division in effect adopted his dissenting opinion on a former appeal.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 9;* Judges, Cent. Dig. §§ 237, 239.]

8. POWERS (§ 4*)—"ABSOLUTE POWER OF DISPOSITION"—PERSONAL PROPERTY.

The definition of an "absolute power of disposition" as a power of disposition by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit, contained in Real Property Law (Consol. Laws 1909, c. 50) § 153, applies to personal as well as to real property.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 4; Dec. Dig. § 4.* For other definitions, see Words and Phrases, vol. 1, p. 42.]

9. MONEY RECEIVED (§ 1*)—NATURE AND FORM OF REMEDY.

In an action for money had and received, plaintiff's right to recover is to be determined on principles governing courts of equity.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.*]

10. JUDGES (§ 56*)—DISQUALIFICATION—EFFECT OF ACTS AND PROCEEDINGS.

Where a biased judge sits as a member of an appellate court, the court, on that fact being brought to its attention, must set aside its determination and allow a reargument.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 235–245; Dec. Dig. § 56.*]

11. JUDGMENT (§ 9*)—DISQUALIFICATION OF JUDGE—EFFECT.

A court of equity, in an action wherein the right to recover was based on the judgment in a former action, would disregard the determination of the Appellate Division in such former action, where it appeared that a disqualified judge sat as a member of that court.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 9;* Judges, Cent. Dig. §§ 237, 239.]

12. JUDGMENT (§ 509*)—INVALIDITY—PROCURING BY MISREPRESENTATION OR VIOLATION OF ATTORNEY'S DUTY.

A decision obtained through an attorney's violation of his confidential relation towards a former client, or by a misrepresentation to the court of a material fact, would not be enforced in behalf of the party guilty of the offense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 951, 952; Dec. Dig. § 509.*]

Action by George W. Seaward, as administrator with the will annexed of William Z. King, deceased, against Frederick H. Tasker. On motion by plaintiff to set aside the dismissal of the complaint on the merits after a trial by the court and jury and for a new trial. Motion for new trial denied, and complaint dismissed.

See, also, 80 Misc. Rep. 570, 141 N. Y. Supp. 618.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Robert H. Wilson, of New York City, for plaintiff.
Frederick H. Sanborn, of New York City, for defendant.

SCUDDER, J. On the settlement of the order setting aside the verdict directed in this case and dismissing the complaint on the merits in accordance with the court's opinion herein (80 Misc. Rep. 570, 141 N. Y. Supp. 618), plaintiff's counsel insists, on the purely technical ground that the decision of the motion to dismiss the complaint was not reserved at the trial, that plaintiff is entitled to a new trial, and that the court is now without power to dismiss the complaint. This technical contention of plaintiff's counsel is without substance or merit. In the order dismissing the complaint, which order I have prepared and signed, I have endeavored to recite fully and accurately what occurred on the trial when the motions to dismiss the complaint were made. It is unnecessary to repeat that recital; let it speak for itself. Upon the trial the court did express its intention to reserve its decision of the motion to dismiss the complaint. Even if the court had not done so, the reservation of the decision of the motion to dismiss is necessarily implied.

Plaintiff offered in evidence voluminous records covering seven years of litigation which could not be examined at the trial. There was no conflict of evidence. The controversy which the court was called upon to decide embraced questions of law only. The court could not determine as a matter of law whether or not the complaint should be dismissed until it had gone over these records. The principal ground for the dismissal of this complaint, overshadowing all grounds dependent on mere rules of practice, is the inherent power of a court of justice at any stage of an action to decline to be used as an instrument of oppression and wrong. To make clear my meaning as affecting this motion, certain facts set forth in my opinion herein (80 Misc. Rep. 570, 141 N. Y. Supp. 618) will be again discussed.

The action before me is for money had and received. Plaintiff, as administrator c. t. a. of the estate of William Z. King, seeks to recover from defendant, a lawyer, all moneys which were paid him both for fees and disbursements during the seven-year litigation of the case of Seaward v. Davis. Davis was made defendant in that action because he was the executor of the estate of Mary E. King. Plaintiff in the action before me claims that the money paid to the defendant, Tasker, by Davis was money belonging to the estate of William Z. King in that it had been finally adjudged in the action of Seaward v. Davis that all the property of Mary E. King at the time of her death, and which came into the hands of Davis as her executor, belonged to the estate of William Z. King, the husband of Mary E. King. In support of his claim, plaintiff put in evidence in the present action all the records in the case of Seaward v. Davis. The sole question before me is whether or not these records show that a valid judgment was recovered against Davis.

In my opinion I gave a detailed history of the litigation in the case of Seaward v. Davis. In doing this, I referred to certain actions and conduct of Mr. Justice Burr and Mr. Robert H. Wilson in connection with that case and their previous relation to Mary E. King as her

attorneys through their membership in the firm of Burr, Coombs & Wilson. Plaintiff's present application for a new trial makes it necessary to state more explicitly why reference was made to their actions and conduct in my opinion, and why their actions and conduct render the judgment in Seaward v. Davis wrongful, illegal, and inequitable so that it cannot be followed or recognized in the action before me. My conclusions in thus holding, in so far as they involve these gentlemen, are, in substance, that, although statute and principles of law disqualified Mr. Justice Burr from taking any part in the judicial hearing of the case of Seaward v. Davis, he nevertheless took part therein; and that Mr. Wilson deceived the court and also violated the confidential relation of attorney and client. I am well aware of the gravity of these conclusions. It is a crime for an attorney to deceive the court. Penal Law (Consol. Laws 1909, c. 40) § 273. A justice of the Supreme Court may be removed for misfeasance or malfeasance in office. Although my conclusions are reached in this, a civil action, the ordinary rules as to the sufficiency of evidence to support a finding in such an action do not and should not apply here. Facts on which such conclusions rest, even though reached in a civil action, must be supported by nothing less than conclusive and indisputable evidence.

The burden of verity sits heavily. I have again gone over most carefully the facts stated in my opinion and find no statement of fact therein requiring correction. General allegations of fraud, illegality, and wrong are not permissible and should not be made. The facts upon which such conclusions rest must be pointed out to give such allegations weight or substance. The basic fact on which my conclusion rests, that the judgment against Davis was illegally and wrongfully obtained, is the fact that the law firm of Burr, Coombs & Wilson acted as the attorneys of Mrs. King in the settlement of her husband's estate, of which she was the executrix, procuring a decree for her adjudging her to be the sole legatee under his will (see note A), and that Mr. Justice Burr and Mr. Wilson were members of that law firm.

[1] Exactly what Burr, Coombs & Wilson did, and what Mrs. King did, during the period of their relation as attorney and client is therefore a matter of prime importance. In the notes subjoined hereto are set forth the more important evidentiary facts showing the relationship between Mrs. King and Messrs. Burr, Coombs & Wilson.

On January 1, 1905, Mr. Burr became a justice of the Supreme Court and thereby ceased to be a member of the firm of Burr, Coombs & Wilson. His partners continued the law business under the name of Coombs & Wilson.

In June, 1905, Mrs. King died, leaving a will disposing of all her personal property. Buell G. Davis, her brother, was appointed and qualified as her executor. Coombs & Wilson were retained by the remaindermen named in the will of William Z. King. These attorneys secured the appointment of an administrator c. t. a. of Mr. King's estate and commenced an action for an accounting against Mrs. King's executor, Davis, upon the theory that Mrs. King was trustee for the remaindermen of all the personal property she received under the

will of her husband. This action was commenced on September 30, 1905.

Repetition here of the history of this litigation is unnecessary. My opinion fully sets it forth. 80 Misc. Rep. 570, 141 N. Y. Supp. 618. For the purpose of this memorandum, it is sufficient to refer to such portions only of that litigation as bear upon the actions and conduct of Mr. Justice Burr and Mr. Wilson and render invalid the judgment finally recovered against Davis.

[2] First. Mr. Wilson violated the professional duty which he owed to Mrs. King in bringing the action against Mrs. King's executor in behalf of parties claiming adversely to her in the same matter in which he had acted for her as attorney. The principles of the legal profession which Mr. Wilson violated are well established.

In the case of In re Boone (C. C.) 83 Fed. 944, at page 952, the court says:

"It is the general and well-settled rule that an attorney who has acted as such for one side cannot render service professionally in the same case to the other side, nor in any event, whether it be the same case or not, can he assume a position hostile to his client and one inimical to the very interests he was engaged to protect; and it makes no difference in this respect whether the relation itself has been terminated, for the obligation of fidelity and loyalty still continues. * * * Of course it is conceded that an attorney may represent his client's adversary with perfect propriety whenever their interests are not hostile to each other. The test of inconsistency is not whether the attorney has ever appeared for the party against whom he now proposes to appear but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection."

In support of the above proposition numerous cases are cited by the court.

In Weeks on Attorneys it is said in section 120:

"Attorneys in England have, in pursuance of the summary jurisdiction of the court, been committed to the Fleet and their names stricken from the rolls for accepting a retainer on both sides. In other cases the court has, on motion, set aside proceedings and imposed the costs upon the attorney."

In Cyclopedia of Law and Procedure, vol. 4, at page 920, it is said:

"As it is the duty of an attorney, growing out of the relations between himself and his client, to devote all his skill and diligence to the interests of his client, he cannot act for the adverse party in the same suit, even though his motives are honest; and even after the relation has ended he cannot assume a position antagonistic to his former client's interest."

In Hatch v. Fogerty, 40 How. Prac. 492, 501, it is held that the fidelity of an attorney to the interest of his client "forbids his trafficking in the smallest degree with such interests by collusion or otherwise with persons who, in respect to such interests, have occupied an attitude of hostility towards his client."

It is apparent from the foregoing authorities that ethics forbid an attorney who has advised a client as to the law in a certain matter to take the position in behalf of an adverse party that the actions of his former client in accordance with his advice to him are illegal. An at-

torney's professional obligation to his client does not cease with the payment of the fee but continues for all time as to the matter which the client confided to him. A layman who follows the legal guidance of his attorney should be assured that the attorney will not be permitted to make profit by misguiding him. To allow otherwise obviously would be contrary to good morals and public policy and would encourage a species of professional treachery which would destroy all confidence in the legal profession.

If Mr. Wilson's new clients, claiming adversely to Mrs. King, his former client, of their own accord sought out and retained Mr. Wilson to bring this action, may it not be inferred that they were prompted to so do by reason of their belief that Mr. Wilson's knowledge of Mrs. King's affairs, through his services to her as one of her attorneys, would be useful to them? On the other hand, if Mr. Wilson solicited these remaindermen for a retainer, would he not be chiefly recommended in their eyes because of their belief that his knowledge of the matter through his services as one of the attorneys of Mrs. King would benefit them? It makes no difference in such a case whether the buyer sought the seller or the seller sought the buyer; in the eyes of the law what was sold was knowledge obtained by means of the confidential relation of attorney and client. Equity will prevent such traffic.

There can be no question but that Mr. Wilson and Mrs. King occupied the relation of attorney and client in the procuring of the decree settling her account as executrix of her husband's estate. See note A. Mrs. King retained the firm of Burr, Coombs & Wilson as her attorneys in procuring this decree. The decree recites that it is made upon the motion of that firm; Mrs. King paid to that firm their charges for the legal services rendered to her. See notes B and C.

[3] Mr. Wilson was a member of that firm and as such was included in Mrs. King's retainer, even though her business was entirely conducted by another member of the firm. See 4 Cyc. 969. Although Mr. Wilson may not have personally acted for Mrs. King, nevertheless the confidential relation of attorney and client subsisted between them, which equity will compel him to observe. See Earl Cholmondeley v. Lord Clinton, 19 Ves. 260, 273; Griffiths v. Griffiths, 2 Hare, 587.

Coombs & Wilson continued the law office of Burr, Coombs & Wilson when Mr. Burr became a Supreme Court justice on January 1, 1905. A few months later, Mrs. King, the client of Burr, Coombs & Wilson, died. Mr. Wilson promptly thereafter accepted a retainer and took steps toward bringing an action against the executor of Mrs. King in behalf of the remaindermen named in the will of William Z. King, which remaindermen claimed adversely to Mr. Wilson's former client, Mrs. King.

The complaint which Mr. Wilson drew in behalf of his new clients alleges the probate of the will of William Z. King and annexes a copy of that will; Burr, Coombs & Wilson, as the attorneys of Mrs. King, secured the probate of the will. See note C. The complaint alleges that William Z. King died possessed of personal property of the value of $17,458.75. This is the valuation stated in the inventory of his es-

tate; Burr, Coombs & Wilson, as the attorneys of Mrs. King, caused this inventory to be made. The complaint alleges that Mary E. King paid and turned over to herself personal property amounting to the sum of $17,346.23. This amount was arrived at by deducting from $18,158.75, the amount with which Mrs. King charges herself in her account as executrix of her husband's estate, the sum of $812.52, the aggregate of the amounts with which she credits herself in Schedules C and D of her account. Burr, Coombs & Wilson, as the attorneys of Mrs. King, prepared her account and secured the decree of the Surrogate's Court allowing it. See notes A and C. Mr. Wilson in preparing this complaint for his new clients made use of and examined the papers which Burr, Coombs & Wilson, as attorneys of Mrs. King, had prepared for Mrs. King. It is of no consequence whether Mr. Wilson examined the original "King" papers in the surrogate's office or copies of them from the private files in his own office; in either event, on each of those papers appeared the name of his firm, "Burr, Coombs & Wilson," to remind him of his obligation to Mrs. King.

Courts of law compel one member of a business firm to respect the contracts entered into on behalf of that firm by another member. A member of a firm of lawyers must be held to the same legal standards. The name of Mr. Wilson's firm on these "King" papers as the attorneys of Mrs. King put Mr. Wilson under the same obligation of loyalty to Mrs. King as he would have been under had his name appeared on those papers as her sole attorney. His partnership obligations prohibited him from attacking the decree which his firm secured for her. When Mrs. King paid Burr, Coombs & Wilson for their services, she paid not only for the firm's guaranty but also for the guaranty of each of its members that as her lawyers they believed the decree which they had secured for her was legal and valid, and that they knew no defect therein.

In the controversy over the construction of Mr. King's will, Mr. Wilson, in representing the remaindermen mentioned in that will after he had represented Mrs. King, was accepting a retainer on both sides of the same controversy. In doing this Mr. Wilson violated the rules which govern professional honor and ethics. By rules of professional honor and ethics I mean those common rules or ordinary standards of decency and fair dealing which forbid any act by an attorney which may bring the legal profession into disrepute, regardless even of intent to do wrong. To the end that the confidence in the legal profession shall not be impaired, the rule is stringent the lawyer at no time and in no manner shall act as the attorney for another adversely to the interests of his present client or of his former client in the same matter. Equity will even enjoin the partner of such an attorney from thus acting. See Earl Cholmondeley v. Lord Clinton and Griffiths v. Griffiths, supra.

Mr. Wilson throughout the entire seven-year litigation against Davis seems studiously to have avoided mentioning any fact which would call the court's attention to the relation of attorney and client which had subsisted between Mrs. King and Burr, Coombs & Wilson, but he takes advantage of defendant Davis' inability, as executor of

Mrs. King's estate, to account for her acts with reference to the property she received from her husband's estate because of her failure to keep books, regardless of the fact that Mrs. King, relying on the decree which Burr, Coombs & Wilson had obtained for her, adjudging her to be the sole legatee of her husband's property, was under no obligation to keep books.

Upon the second trial of the Davis action, Mr. Wilson obtained an interlocutory judgment which directed Davis, as executor of Mrs. King, to file an account of her acts and to charge himself therein with $17,268.50, the amount she received from her husband's estate. Davis filed an account wherein he stated in substance that, so far as he had been able to ascertain with due diligence, Mrs. King kept no account of the funds and property which she received from her husband's estate, and therefore he did not charge himself in his account with the amount she had thus received as directed by the interlocutory decree. Thereupon Mr. Wilson obtained a final judgment against Davis for $17,268.50, the full amount of the husband's estate, without proofs of any kind and solely upon the ground that Davis had not obeyed the interlocutory judgment in not charging himself with that amount. An appeal was taken by Davis to the Appellate Division from this interlocutory judgment and also from the final judgment. On this appeal (133 App. Div. 191, 117 N. Y. Supp. 468) Mr. Justice Burr sat as a member of the court and took part in the decision of the appeal.

In the action before me, which is governed by equitable principles, the judgment against Davis should be disregarded, irrespective of the merits of the action in which it was obtained, because of the former relation to Mrs. King of Mr. Wilson and also of Mr. Justice Burr.

[4] Second. It was unlawful for Mr. Justice Burr to sit as a member of the court and to take part in the decision of the court on this appeal when he had previously acted as attorney for Mrs. King in the matter out of which the litigation before the court grew.

Let us consider the position taken by the courts of New York state on a judge's taking part, sitting in judgment, or even sitting on the bench in a cause involving a subject-matter in which he had formerly acted as attorney when that cause thereafter came before his court for determination.

Said Judge Hurlbut in Oakley v. Aspinwall, 3 N. Y. 547, at pages 549, 550:

"The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice."

The provisions of section 15 of the Judiciary Law (Consol. Laws 1909, c. 30) are to be construed with reference to this elementary principle of judicial administration enunciated by Judge Hurlbut. That section among other things provides:

"A judge shall not sit as such in, or take any part in the decision of, a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested. * * *"

The statutory disqualification of a judge from taking any part in a cause or matter in which he has been attorney or counsel "contemplates," as said by Mr. Justice Jenks in People v. Haas, 105 App. Div. at page 121, 93 N. Y. Supp. at page 792:

"Any service in that cause or matter rendered by a lawyer in his legal capacity as an officer of the court."

Proceeding, Mr. Justice Jenks adds:

"However upright the judge, and however free from the slightest inclination but to do justice, there is a peril of his unconscious bias or prejudice, or lest any former opinion formed ex parte may still linger to affect unconsciously his present judgment, or lest he may be moved or swayed unconsciously by his knowledge of the facts which may not be revealed or stated at the trial or cannot under the rules of evidence. No effort of the will can shut out memory; there is no art of forgetting. We cannot be certain that the human mind will deliberate and determine unaffected by that which it knows but which it should forget in that process. * * * And there is a further consideration beyond the security of parties, namely, the fair repute of justice for absolute impartiality. In People ex rel. Roe v. Suffolk Common Pleas, 18 Wend. 550, 552, Bronson, J., * * * says: 'Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.'"

In another of the cases cited the court remarked that, if a judge has acted as attorney, counsel, law advisor, or advocate in relation to the business in hand, that furnishes just cause of exception without reference to the time when such aid or counsel was given. Mr. Justice Jenks concludes:

"Our more recent policy is to hedge in our judges so that the most hypercritical will find no opening for their shafts. That we do 'suppose a possibility of bias or favor in a judge,' * * * or at least that we propose to put him beyond the danger of aberration or without the shadow of suspicion, is proved by our statutes of disqualification."

As affecting Mr. Justice Burr, we have these undisputable facts established by the record herein: Before Mr. Justice Burr became a justice of the Supreme Court in 1905, he was a member of the law firm of Burr, Coombs & Wilson. This firm in the years 1899, 1900, and 1901 acted as the attorneys of Mary E. King in matters affecting the administration of the estate of her husband, William Z. King, of which estate Mrs. King was the executrix. They rendered services to Mrs. King on the probate of her husband's will, in obtaining the order to advertise for claims, in making the inventory upon the application to fix the transfer tax, in the preparation of her account as executrix, and in obtaining the decree settling her account, and in addition rendered her general services incidental thereto. See note C.

To bring Mr. Justice Burr within the inhibition of the principles and statute above referred to, two facts must be clearly established: (A) That Mr. Burr was a member of the firm of Burr, Coombs & Wilson and acted personally for the firm, the attorneys of Mrs. King; and (B) that the matter in which he acted for her as attorney was the same matter in which he sat in judgment as one of the justices of the Appellate Division on this appeal. 133 App. Div. 191, 117 N. Y. Supp. 468.

That Mr. Burr acted finds support in the following facts: (A) The decree admitting William Z. King's will to probate recites a deposition of Joseph A. Burr. The affidavit of the bill of costs in the accounting proceeding of Mrs. King as executrix of her husband's estate is signed and sworn to by "Jos. A. Burr." See note D. A letter addressed to Mrs. Mary E. King, bearing date about a year subsequent to the date of the decree settling the accounts of Mrs. King and signed "Jos. A. Burr," refers to an inclosed will and instructs her as to its execution. See note E. (B) On the appeal (133 App. Div. 191, 117 N. Y. Supp. 468) Mr. Justice Burr sat in judgment on the same subject-matter in which he had acted as attorney. Of this there can be no doubt. The title of the case on the cover of the printed record on appeal shows it to be the same subject-matter. The names of both William Z. King and Mary E. King appear in that title, and they appear throughout the record. The title is as follows:

"Supreme Court, State of New York, Appellate Division, Second Department. George W. Seaward, as Administrator with the Will Annexed of the Goods, Chattels and Credits which were of William Z. King, Deceased, Plaintiff-Respondent, against Buell G. Davis, as Executor of the Last Will and Testament of Mary E. King, Deceased, Defendant-Appellant."

The complaint, among other things, sets forth a copy of the will of William Z. King and alleges that Mary E. King was the executrix of his will. The complaint demands judgment that the defendant executor of Mrs. King's estate account to the plaintiff, the administrator c. t. a. of the estate of William Z. King, for all property paid to and received by the said Mary E. King, deceased, from the estate of said William Z. King, deceased. The answer to this complaint sets forth a copy of the decree settling the account of Mary E. King as the executrix of her husband's estate, the decree reciting that it is made on the motion of Burr, Coombs & Wilson, and it allows her account, adjudges her to be the sole legatee under her husband's will, and authorizes her to pay over and dispose of the property of the estate to herself as such legatee. See note A. This decree construed the will of William Z. King and held that his wife was the sole legatee thereunder.

Mr. Wilson, on behalf of his new clients, the remaindermen, contended and contends now that such construction was erroneous. This was and is the fundamental issue between the parties and is the principle issue discussed on the appeal. Mr. Wilson argued that appeal before the Appellate Division. It is not credible that Mr. Justice Burr forgot that Mr. Wilson had been his partner, and this court cannot assume that with the appeal record before him, the names of the parties disclosed, and in the light of the nature of the matter under discussion, Mr. Justice Burr forgot that he had acted as attorney for Mrs. King in the matter. He may have forgotten the principles of law and the statute above referred to which disqualified him to sit, or he may have placed a construction on them different from mine. Be that as it may, with it this court, in the discharge of its duty as it conceives it, has nothing to do. The sufficient and satisfying explanation must be made elsewhere.

Although under the construction of Mr. King's will, for which Mr. Wilson contended in behalf of his new clients, Mrs. King was given

the power to use both principal and interest for her own support, nevertheless, as before stated, the final judgment rendered without any proof and which was sought to be reviewed on this appeal was for $17,268.50, the full amount she received from her husband's estate, and was rendered solely upon the ground that Davis had not obeyed the interlocutory judgment in that he had not charged himself with that amount. Mr. Justice Burr, sitting in the case as a justice, holds with his former partners in their new position and relationship. In his opinion Mr. Justice Burr makes no mention of his former relation to Mrs. King as her attorney in the same subject-matter which is before him as a justice, and notwithstanding the fact that the inability of the defendant Davis, as Mrs. King's executor, to account to the remaindermen for Mrs. King's actions with reference to her husband's estate was due to the fact that Mrs. King in her lifetime, acting under the decree procured by her counsel, Mr. Burr, had treated as her own the personal property left by her husband, Mr. Justice Burr says in his opinion (133 App. Div. at pages 197, 198, 117 N. Y. Supp. page 473):

"The defendant here (Davis) has shown a lack of candor and fairness in the entire proceeding and has apparently sought to obscure rather than to make clear the real situation. If, as the result of this, he has been held accountable for a larger sum than was justified by the real facts, he has only himself to blame."

[5] True, Mr. Justice Burr's opinion was not adopted as the opinion of the court on this appeal, but in the eyes of the law the Appellate Division's determination was nevertheless rendered void by reason of Mr. Justice Burr's participation therein. The object of the statute which inhibited him from writing this opinion "goes beyond the security of parties, namely, the fair repute of justice for absolute impartiality." Mr. Wilson does not scruple to use and extol the excellence of Mr. Justice Burr's opinion in subsequent proceedings in the case, and the construction of the will which Mr. Wilson advocated and which Mr. Justice Burr sought to place on Mr. King's will in his opinion is actually adopted by the Appellate Division on a subsequent and final appeal to it. Although the determination of the Appellate Division on this appeal was void because of Mr. Justice Burr's participation in it when disqualified by law, an appeal is taken from it by Mr. Wilson to the Court of Appeals as though it was valid.

[6] Third. The Court of Appeals was induced to entertain, hear, and decide this appeal by a species of fraud upon that court in that the facts which disqualified Mr. Justice Burr from sitting below were not called to the attention of the Court of Appeals either by Mr. Wilson in his brief or by Mr. Justice Burr in his opinion. The Court of Appeals was justified in relying and did rely on the strong presumption existing in every case coming before it that a justice of the Appellate Division would not sit in judgment in a cause in which he was disqualified from sitting, and that, if disqualifying facts existed, the justice affected thereby would voluntarily and of his own accord withdraw from the case.

Mr. Wilson, in the brief which he submitted to the Court of Appeals, relies chiefly on Mr. Justice Burr's opinion to support his contentions. Whenever it is necessary for him to refer to the decree which Burr, Coombs & Wilson procured for Mrs. King and which adjudged her to be the sole legatee under her husband's will, he avoids mentioning the name of Burr, Coombs & Wilson in connection therewith and states the facts so that it does not appear that Mrs. King had acted and relied upon that decree. This amounts to a willful suppression of the truth. He ventures to go one step further. He not only suppresses the truth but he also states as a fact a very material matter which is false and which he knew to be false, which statement seemingly misled the Court of Appeals and affected its decision. This will be the subject next considered.

Fourth. The falsehood in Mr. Wilson's brief, which was submitted to the Court of Appeals. On the appeal to the Court of Appeals, the question at issue was the construction to be placed on Mr. King's will, and whether there was a duty on the part of the defendant Davis, as executor of Mrs. King's estate, to account to the remaindermen named in Mr. King's will for the property she had received from her husband's estate. Had that property become her own to be disposed of as she saw fit, or had it remained a trust estate in her hands for which her executor would have to account, provided any part of it had come to him? These were vital questions. If Mrs. King had the absolute power of disposition of the property during her lifetime and had exercised it, then there was no need of an accounting by her executor.

Mr. Wilson was in a very delicate and awkward position before the Court of Appeals. Success in that court demanded that he should attack the decree of the Surrogate's Court, which adjudged Mrs. King to be the sole legatee under her husband's will, and at the same time suppress the fact that Burr, Coombs & Wilson had obtained the decree for her and what she had done under that decree. Mr. Wilson had the means to obtain the knowledge that Mrs. King had disposed of the greater part of her husband's government bonds by transferring them to herself under this decree. The bonds were United States 4 per cent. registered bonds due in 1907. Mr. Wilson knew the character of the bonds, when they became due, and that they did not become due in Mrs. King's lifetime. They are described in the inventory of Mr. King's estate. See note F. He may be fairly charged with the common legal knowledge that, although Mrs. King, as executrix, might sell and assign these registered bonds to a third person, the treasury department would hardly permit Mrs. King, as executrix, to transfer them to herself without an order or decree of the court authorizing her so to do. He knew that the decree procured by Burr, Coombs & Wilson permitted Mrs. King, as executrix, "to pay out and dispose of" the bonds as part of the balance of her husband's estate remaining in her hands by having "the title of such bonds transferred to her," and he knew, as a lawyer, that the purpose of this provision was to enable her to do so. It is also common knowledge that whether or not registered bonds have been transferred can readily be ascertained by inquiry

of the register of the treasury. He knew the truth, yet could not succeed if he told the truth. He meets the situation in his brief (pages 2 and 3) by suppressing the truth and falsely stating the facts as follows:

"Upon the death of William Z. King, his widow, Mary E. King, took possession of all the personal property of the deceased, amounting to $17,458.75.

"The widow, Mary E. King, claimed this personal property absolutely and conducted a proceeding in the Surrogate's Court for an accounting *upon which nobody was cited*, and obtained a decree adjudging that she was sole legatee and entitled to all his personal property.

"She thereupon turned over to herself individually all the personal property of the estate amounting to $17,268.50.

"All these proceedings in the Surrogate's Court were without any notice to the remaindermen mentioned in the decedent's will.

"The personal property received by the widow from her husband's estate was simple assets easily identified and easily accounted for."

After stating what these assets were, Mr. Wilson continues:

"After the death of her husband and after receiving this personal property, the widow, Mary E. King, lived five years in the little village of Greenport, Long Island, in the home of her adopted daughter, Lilly Corwin.

"During these five years the government bonds which she received from her husband's estate matured.

"Less than two months prior to her death, the widow, Mary E. King, made her will by which she bequeathed in cash $14,000."

The court proceedings referred to in the beginning of the above quotation are there stated to have been taken by Mrs. King. As a matter of fact, they were all conducted by her attorneys, Burr, Coombs & Wilson, but Mr. Wilson avoids mentioning his firm's name in connection with them. He does, however, say at page 27 of his brief that "the present attorney for the defendant was also her attorney during her lifetime," referring to the defendant Tasker herein.

The paragraphs in the above quotation italicized by me contain the false statements of fact which I particularly emphasize as affecting the decision of the Court of Appeals. It was not the fact that the bonds matured in Mrs. King's lifetime. That Mr. Wilson knew it not to be the fact when he wrote this brief is established by his own sworn statement. See note G. That it was a material matter and that the Court of Appeals acted upon it is established by the fact that Chief Judge Cullen states in his opinion that "the bonds matured and were paid." 198 N. Y. at page 421, 91 N. E. 1109. To establish Mr. Wilson's intent to deceive, a motive for deceiving must be shown. It can be assumed that Mr. Wilson would not have stated in his brief that which he knew to be untrue if he had not believed that the falsehood was more advantageous to him than the truth. So far as the deceit is concerned, it makes no difference whether or not the Court of Appeals was deceived in the precise manner Mr. Wilson intended. There is much in the records, however, to indicate that the Court of Appeals was so deceived. These false statements are misleading in that they imply that Mrs. King did not dispose of the bonds in her lifetime but rather that they had matured automatically; that their face value had been paid to her by the government; that she had in no wise exercised her absolute power of disposition over the bonds or

over the cash she received for them upon their maturity; that this cash remained a trust fund in her hands; and that this cash, not made her own by the exercise by her of her absolute power of disposition, she had endeavored to bequeath by will. Mr. Wilson's false statement in his brief that the bonds had matured dealt with a highly material fact at a period in the case critical to him and to his new clients.

On two prior appeals the Appellate Division had held in effect that Mrs. King under her husband's will had an absolute power of disposition of her husband's property during her lifetime. The Court of Appeals held that she had such absolute power. If it had been known to any of these courts that Mrs. King had disposed of all the property in the execution of her absolute power, judgment would have at once been rendered against Mr. Wilson and his new clients. By means of his falsehood, Mr. Wilson obtained the judgment against Davis. Acting on its belief in the truth of the false statement of Mr. Wilson that the bonds had matured in the widow's lifetime, the Court of Appeals directed the accounting to proceed, and an opportunity was thereby afforded to mislead the lower court as to what the Court of Appeals had held to be the proper construction of Mr. King's will. Whether it was because the lower court was misled by Mr. Wilson or because of its own mistake, the lower court did disregard the construction placed upon Mr. King's will by the Court of Appeals and rendered judgment against Mr. Davis. To collect this judgment so obtained, Mr. Wilson caused the arrest and imprisonment of Davis. He is an old man, presumably of good reputation, whose honesty and good faith is evidenced by the fact that he kept intact the money and property which was the subject of the litigation, save only a comparatively small and most reasonable amount which he expended in his defense. The harshness of Mr. Wilson in taking the extreme measures of arresting and imprisoning this old man to collect costs and interest at a higher rate than Davis received, and his cupidity in this action in attempting to take away from his adversary, a reputable attorney, all the moneys paid him for services, including disbursements in a seven-year litigation, in the light of the history of the case, is not to be commended. After Davis' imprisonment, the third appeal in the case of Seaward v. Davis is argued and determined. 148 App. Div. 805, 133 N. Y. Supp. 384. This appeal is the final appeal in the case of Seaward v. Davis, and it is the final matter which now requires consideration.

[7] Fifth. The determination of the Appellate Division on the final appeal to it in the case of Seaward v. Davis is rendered nugatory by the fact that Mr. Justice Burr again sat as a member of the court, although he did not vote upon such determination. The Appellate Division on this appeal is practically the court of last resort for Davis. He has been completely stripped of money and property and is without means to appeal to the Court of Appeals should justice not be done him. Counsel could not have been assigned him even as a poor person to enable him to appeal to the Court of Appeals from the determination of the Appellate Division. Code Civ. Proc. § 466. The law for the preservation of the impartiality of courts and to protect

their reputation for impartiality was especially applicable to the Appellate Division on this last appeal of Davis.

In Oakley v. Aspinwall, 3 N. Y. 547, at page 551, above referred to, Hurlbut, J., says:

"The law applies as well to the members of this court [the Court of Appeals] as to any other; or if there be any difference it is rather in favor of its more stringent application to the judges of a court of last resort as well, because of its greater dignity and importance as a tribunal of justice, as that there is no mode of redress appointed for the injuries which its biased decisions may occasion."

On this last appeal to the Appellate Division, Mr. Justice Burr again sat as a member of the court, but the report of the case states that he did not vote. It is not stated that he took no part in the court's deliberation or its decision therein. Even if it be the fact that Mr. Justice Burr actually took no part in the decision, it was unlawful for him to sit in the case. Section 15 of the Judiciary Law is in the alternative. It provides that "a judge shall not sit as such in, *or* take any part in the decision of, a cause or matter * * * in which he has been attorney or counsel." The Appellate Division in deciding this last appeal seems to have fallen into error. The Court of Appeals in its opinion explicitly and in so many words says that Mr. King's will gave his widow "a life estate with the absolute power of disposition during her lifetime." It is my duty to take the decision of the Court of Appeals at its face value.

[8] An absolute power of disposition is defined by statute. Real Property Law (Consol. Laws 1909, c. 50) § 153. See, also, section 149. See note H. This statutory definition applies to personal property as well as to real property. Cutting v. Cutting, 86 N. Y. 522, 546. Notwithstanding the fact that this language of the Court of Appeals has a statutory definition and is not open to construction, nevertheless the Appellate Division in substance holds that the will of Mr. King gave his widow, not "the absolute power of disposition," but the power of disposition which was limited to her own use and support. This is the construction which is placed on the will by the opinion of Mr. Justice Burr on the previous appeal to the Appellate Division. The presence of Mr. Justice Burr as a member of the Appellate Division on this last appeal lays that court open to the criticism that because of his presence it did not follow the opinion of the Court of Appeals as to the meaning of Mr. King's will but did follow the opinion of Mr. Justice Burr, who, in the eyes of the law, is a biased member of the court. The court's reputation for impartiality is thereby impugned. Mr. Justice Burr may not have been actually biased, but his bias is presumed as a matter of law by reason of his statutory disqualification.

[9] Plaintiff's right to recover in the action now before me is to be determined on principles which govern courts of equity.

[10] If a biased judge sits as a member of an appellate court, such court, on that fact being brought to its attention, must set aside its determination and allow a reargument. Oakley v. Aspinwall, supra. The presence of such a biased member affects the substantial right of the litigant. People v. Haas, supra.

[11] A court of equity presumes as done what ought to be done. This court, in view of the equitable nature of the action before it, may and should disregard a determination of the Appellate Division which has been illegally rendered and which that court itself must set aside on proper application.

[12] Nor should a decision obtained through a violation of the confidential relation of attorney and client, nor one obtained on a misrepresentation to the court of a material fact, be allowed to avail the party guilty of the offense. The wrong which Davis suffered cannot be righted in this action, but further injustice towards him through the present proceeding against his attorney can and should be prevented.

All the facts being before this court for the first time only after the conclusion of the trial herein, the court now for the first time is in a position to render judgment on the merits, which it hereby does by denying the motion for a new trial and by dismissing the complaint.

Order dismissing complaint on the merits signed.

NOTE A.

Decree settling the accounts of Mrs. King, as executrix of her husband's estate, rendered by the Surrogate's Court of Kings county on May 18, 1900. This decree recites that it is made on the motion of "Burr, Coombs & Wilson," and, after adjudging that Mrs. King's account be settled and allowed and setting forth the summary statement of the account, the decree continues as follows:

"It is further ordered, adjudged, and decreed that the said executrix do, and she is hereby ordered and directed to, pay out and dispose of the balance so remaining in her hands as follows: That she be permitted and allowed to sell the government bonds referred to in Schedule A of her account remaining unsold and of the face value of $12,000 and inventoried at $13,560 and turn over the proceeds of such sale to herself as sole legatee under the said will or, if she so elect, to have the title of such bonds transferred to her. That she do retain the sum of $78, which sum is hereby allowed to her as and for reasonable costs, counsel fees, and other expenses in this proceeding. That she turn over the balance, the sum of $1,239.75, remaining in her hands to herself as sole legatee under the will of William Z. King, deceased.

"It is further ordered that the said executrix, upon making the payments and turning over the property hereinbefore directed, be discharged from all liability on account of her acts as such executrix as to the items embraced in this accounting."

NOTE B.

The account of Mary E. King, as executrix of husband, which was prepared by Burr, Coombs & Wilson, is dated May 11, 1900. Schedule C thereof contains the following:

Paid Burr, Coombs & Wilson for services rendered to estate as follows:

For publication of citation and services on probate of will	$ 35 00
Obtaining order to advertise for claims	10 00
Services rendered in making inventory	10 00
Services rendered on application to fix transfer tax	25 00
Services rendered in obtaining exemption of estate from federal legacy tax	25 00
General services rendered estate	200 00
Transfer tax paid to treasurer of the county of Kings	163 27

NOTE C.

Two vouchers were filed with Mrs. King's account; the following are copies of the same:

"Telephone Number '92 Williamsburgh.'

"84 Broadway, Brooklyn, January 10, 1900.

"$391.00.

"Received from Mary E. King, as executrix of the last will and testament of William Z. King, deceased, three hundred and ninety-one dollars for services and disbursements to date in the matter of the estate of William Z. King, deceased. Burr, Coombs & Wilson."

"Telephone Number '92 Williamsburgh.'

"84 Broadway, Brooklyn, May 11, 1900.

"$2280.00.

"Received from Mary E. King, as executrix of the last will and testament of William Z. King, deceased, two thousand two hundred and eighty dollars, being the proceeds of two U. S. government bonds of the face value of $1,000.00 each, together with the premium thereon. Mary E. King."

NOTE D.

The following is a copy of the affidavit to the bill of costs, which was allowed by the decree settling Mrs. King's account as executrix:

"State of New York, County of Kings—ss.:

"Joseph A. Burr being duly sworn doth depose and say that he is one of the attorneys and counsel for Mary E. King, the accounting party in the above-entitled proceedings; that the foregoing disbursements have been actually made or will be necessarily incurred therein, and that such disbursements are correctly stated, and are for reasonable and necessary expenses in this proceeding. Deponent further says that the days stated in the foregoing bill of costs to have been occupied as therein specified, were actually, substantially and necessarily so occupied and employed in this proceeding by deponents' employés and assistants. That no compensation has been paid or given out of the funds of the estate of the said deceased, for or on account of any services in the foregoing bill of costs specified. Jos. A. Burr.

"Subscribed and sworn this 11th day of May, 1900.

"Herman Joerg,

"Commissioner of Deeds, City of New York,

"Residing in the Borough of Brooklyn, Kings County.

"Notary Public."

NOTE E.

The following are copies of a letter and an inclosure and a bill said to have been found among Mrs. King's papers after her death. This letter and bill are referred to in record on appeal, Seaward v. Davis, 148 App. Div. 805, at page 121, folio 363. The will referred to in the letter has not been produced.

"Telephone Number '92 Williamsburgh.'

"Burr, Coombs & Wilson, Counsellors at Law, No. 84 Broadway.
"Joseph A. Burr,
"Samuel H. Coombs,
"Robert H. Wilson,
"Theo. F. Jackson, Counsel.

"Brooklyn, N. Y., May 8th, 1901.

"Mrs. Mary E. King, 147 Penn St., Brooklyn, N. Y.—Dear Mrs. King: I inclose herewith your will ready for execution. I also inclose a slip of paper showing how it should be signed both by yourself and the witnesses. The witnesses should add to their names, their places of residence. When you are ready to execute the will, call two witnesses, sign the will in their presence, then state, 'This is my last will and testament and I wish you to act as witnesses.' Then read in their presence the clause beginning, 'Signed, sealed, published and declared,' etc., and have the witnesses each sign in your presence and in the presence of each other. You can then take the will and

seal it up and put it in some safe place. I trust it may be very many years before there will be any occasion to use it. As requested by you, I inclose my bill.

"Yours, etc., Jos. A. Burr."

"P. S. When you have executed this will you had better destroy the one made in June of last year."

Paper said to have been inclosed in foregoing letter:

"In witness whereof, I have hereunto set my hand and seal this ——— day of May, nineteen hundred and one. Mary E. King.

"Signed, sealed, published and declared by the above-named testatrix as and for her last will and testament in our presence and we at her request and in her presence and in the presence of each other have hereunto subscribed our names as witnesses. John Jones,
"100 Bedford Avenue, Brooklyn, N. Y.
"Richard Smith,
"Greenport, Long Island."

Bill said to have been inclosed in foregoing letter:

"Telephone Number 1547 'Williamsburgh.'

"Brooklyn, N. Y., May 8, 1901.

"Ledger
"Folio
"Mrs. Mary E. King to Burr, Coombs & Wilson, Dr. Attorneys and Counsellors at Law, 84 Broadway, Brooklyn, N. Y.
"To services drawing will..... $10 00

"Paid
"F. G. Neauche, Cashier."

NOTE F.

Inventory of Mr. King's estate was filed June 2, 1899. Omitting household and personal articles of an aggregate value of $318.75, this inventory sets forth the following:

Cash in hand	$ 300 00	$ 300 00
Cash in Seamen's Bank for Savings, N. Y., Book No. 212,537, balance	1,000 00	1,000 00
And interest from Jan. 1, 1897.		
10 bonds $1,000 ea., due 1907	10,000 00	
6 bonds $500 ea., due 1907	3,000 00	
10 bonds $100 ea., due 1907	1,000 00	
U. S. 4 per cent. registered bonds	$14,000 00	
Appraised value 113 per cent		$15,820 00

NOTE G.

Sworn statement of Mr. Wilson discrediting his brief. Mr. Wilson's brief was submitted to the Court of Appeals on April 26, 1910, the date of the argument of the appeal in that court. Seaward v. Davis, 198 N. Y. 415. In a certain petition to the Appellate Division verified by Mr. Wilson on June 9, 1913, he states that he ascertained in 1908 that Mrs. King had transferred the government bonds to herself. This statement is contained in the following paragraph thereof:

"XXX. That it was not until after the decision by the Court of Appeals, in May, 1910, holding that the burden of proof was on the plaintiff to prove what property Mary E. King had not disposed of, that your petitioner ascertained the dealings of said Mary E. King with the said property so received by her from her husband's estate, except that it had been ascertained in 1908 by inquiry at the Treasury Department in Washington that she had transferred the government bonds to herself and had subsequently resold them."

NOTE H.

Section 153 of the Real Property Law reads as follows: "Sec. 153. When power of disposition absolute.—Every power of disposition by means of

which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute."

Section 149 of the Real Property Law authorizes a remainder dependent on the bare chance of the nonexercise of the absolute power of disposition by the donee. This section reads as follows: "Sec. 149. When estate for life or years is changed into a fee.—Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts."

The courts of this state have held that the term "absolute power of disposition" applies and is confined to cases where the donee and no other person is interested in the proceeds which arise from the execution of the power. Stafford v. Washburn, 145 App. Div. at page 797, 130 N. Y. Supp. 571 (opinion of Laughlin, J.). Judge Laughlin's opinion was adopted as the opinion of the Court of Appeals on the subsequent appeal of the case to that court. 208 N. Y. 536, 101 N. E. 1122.

In Cutting v. Cutting, 86 N. Y. 522, at page 539, it is said that "by an absolute power of disposition they [the revisers of the statutes] meant a power of disposition in the lifetime of the donee, or, in other words, a power by which he 'may sell when he chooses, and dispose of the proceeds at his pleasure.'"

Compare the statute and cases above referred to with what Chief Judge Cullen says of the power given Mrs. King by her husband's will: In Seaward v. Davis, 198 N. Y. 415, at page 420, 91 N. E. 1107, at page 1108, Chief Judge Cullen first states that Mr. King's will gave the widow "the absolute power of disposition during her lifetime, with remainder over of such part as she might not dispose of to the persons named in the will," and shortly after using this language says that "the widow had the right to dispose of the property in her lifetime and as to such property as she did dispose of neither she nor her executor was bound to account to the remaindermen because they had no interest in it."

(158 App. Div. 900)

LOWN v. SPOON et al.

(Supreme Court, Appellate Division, Second Department. July 25, 1913.)

1. INFANTS (§ 58*)—CONTRACTS—AVOIDANCE.

An infant, on the attainment of his majority, cannot avoid a contract, of which he has enjoyed the benefit, and recover back the consideration paid.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 149–160; Dec. Dig. § 58.*]

2. INJUNCTION (§ 26*)—ENJOINING ACTION AT LAW—ADEQUACY OF LEGAL REMEDY.

Equity will enjoin an action at law by an infant, seeking to rescind a contract and recover back money paid for the purchase of stock of a corporation, where a full and complete investigation of the rights of the parties could not be had in the action at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24–49, 54–61; Dec. Dig. § 26.*]

Appeal from Special Term, Dutchess County.

Suit by Frank B. Lown against John J. Spoon and others. From an order granting a temporary injunction restraining defendant from prosecuting an action at law, defendant Spoon appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The opinion of Morschauser, J., at Special Term, was as follows:

The preliminary objections raised by the defendant must be overruled. Section 416, Code of Civil Procedure; Daly v. Amberg, 126 N. Y. 490, 27 N. E. 1038.

The plaintiff claims that the defendant Spoon made a contract with him, and that the plaintiff duly performed such contract upon his part, and that the defendant Spoon only partially performed, and later violated the contract upon his part. Plaintiff alleges that defendant was of full age, and defendant Spoon, while not denying the fact of entering into a contract with the plaintiff, merely says that he was a minor at the time of making the contract, and therefore he should receive back from the corporation the amount he paid for the stock of the corporation.

The purchase of the stock of the corporation was only a part performance on the part of the defendant Spoon of the contract which the plaintiff alleged he entered into with the defendant. The purchase of the stock was not the result of a dealing between the corporation and the defendant Spoon, but was an act on the part of the defendant Spoon, which he had agreed with the plaintiff to perform as part and parcel of an agreement with the plaintiff. The validity of the purchase of this stock must be judged by the agreement made between the defendant Spoon and the plaintiff and their respective acts thereunder.

Under all the circumstances, justice requires a full and complete investigation of the rights of the parties concerned, and in order that such full and complete investigation may be had it is necessary that a court of equity should intervene, and that is all that plaintiff asks in this case. The cases cited by the learned counsel for the defendant do not apply to the question.

[1] No rule of law has ever permitted an infant to avoid a contract, of which he has enjoyed the benefit, and recover back the consideration paid, on the attainment of his majority. Crummey v. Mills, 40 Hun, 370; Medbury v. Watrous, 7 Hill, 110. It has become the settled law in this state that the privilege of infancy may be used as a shield to protect the infant, and not as a sword to inflict injuries upon another. If an infant has had the benefit of a contract sought to be rescinded by him, he must account for the benefit, or return its equivalent. Rice v. Butler, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703; Mutual Milk & Cream Company v. Prigge, 112 App. Div. 652, 98 N. Y. Supp. 458. Kent, in his Commentaries (volume 2, p. 240) says: "If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, not as a sword. He cannot have the benefit of the contract on one side, without returning the equivalent on the other."

[2] Equity prohibits the undue advantage which would accrue to an infant, and the great wrong which might be done to one, innocently dealing with such infant, if such infant, especially if of sufficient age to appreciate the value of a contract, were permitted to recover back all that he had parted with and obtain all the advantages gained. "The jurisdiction of a court of equity by action to restrain proceedings in actions pending in a court of law should be sparingly exercised, and only when the other remedies are inadequate and the equities invoking its jurisdiction are apparent and strong. There is no hard and fast rule about it, and every case must depend largely upon its own circumstances." N. & N. B. H. Co. v. Arnold, 143 N. Y. 268, 269, 38 N. E. 272.

It appears from the affidavit of the defendant Spoon that the contract which he seeks to rescind was actually made with the plaintiff herein. It also appears that the defendant has instituted an action in New York county against the Sunnyfield Nursery Company, a corporation, which he alleges is in fact the plaintiff. In this action he seeks to rescind a contract made for the purchase of the stock of the corporation, and to recover back the sum of $1,000 paid for the purchase thereof. The sole ground upon which he seeks a rescission of this contract is that at the time of making the contract he was

an infant. The real party in interest, so far as relates to pecuniary loss by reason of any recovery by the defendant Spoon in this action against the corporation, is the plaintiff in this action; and this appears from the affidavit of the defendant, who insists that the corporation is in fact the plaintiff, and it is not disputed. This action is for injunctive relief, and there does not appear to be any adequate remedy at law enabling the plaintiff to present his side of the question to the court, except in an action in equity, wherein all the parties interested in the controversy may be heard, and substantial and complete justice be done. In order to thus proceed it is important that the defendant be enjoined, during the pendency of this equitable action, from prosecuting the action which he has commenced in New York county, and which does not include all the parties interested, so as to enable the court in that action to give consideration to all the matters which in justice should be considered. The motion is not for a stay, but for a temporary injunction, so that all the matters can be disposed of.

In justice and in equity, I believe that the injunction should be continued. Ordered accordingly.

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

John G. Snyder, of New York City, for appellant.

William L. Gellert, of Poughkeepsie, for respondent.

PER CURIAM. Order affirmed, with $10 costs and disbursements, upon the opinion of Mr. Justice Morschauser at Special Term.

PEOPLE ex rel. HAMMOND v. BECKER, Sheriff.

(Supreme Court, Special Term, Erie County. August, 1913.)

ARREST (§ 10*)—ARREST IN CIVIL ACTIONS—STATUTORY PROCEEDINGS—"WRONGFUL DETENTION."

Where a woman purchased diamond earrings on the installment plan, the contract providing that the title was to remain in the vendor until the purchase price was fully paid, that the vendor was entitled to possession upon default in any of the payments, her refusal to surrender after default was a wrongful detention under Code Civ. Proc. § 549, providing for the arrest of a defendant in civil actions for damages for personal injury and injury to property, including the wrongful taking, detention, or conversion of personal property.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 34–47; Dec. Dig. § 10.*]

Certiorari proceedings by the People, on the relation of Helen Hammond, against Frederick Becker, sheriff of Erie county, to secure relator's discharge from imprisonment. Proceeding dismissed.

Charles Newton, of Buffalo, for relator.

Riordan & Batt, of Buffalo (Paul J. Batt, of Buffalo, of counsel), for persons interested in continuing the imprisonment of the relator.

BISSELL, J. This is an application by writ of certiorari to secure the discharge of the relator from imprisonment pursuant to a body execution issued upon a judgment obtained in the Erie county court (A. R. Henry Schneider and Ernest W. Schneider against Helen Hammond).

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The facts, briefly stated, are as follows: The defendant in the action below entered into a contract with the plaintiffs for the purchase of a pair of diamond earrings. By the terms of the contract she was to make payments in installments at stated intervals, and it was provided that, until the full amount of the purchase price was paid, the title was to remain in the vendors and right to possession would arise upon default in the payment of any of the installments. It appears that the defendant was in default as to several installments and that the plaintiffs demanded the return of the earrings. Upon the defendant's refusal to return them, the vendors brought an action in replevin against the defendant, the relator in this proceeding, and a requisition was issued and demand made by the sheriff upon the relator, who again refused to surrender the earrings. Thereupon, on an application, an order of arrest was issued by the Erie county judge, and the relator in pursuance of that order was lodged in jail by the sheriff. On July 31, 1913, she made application to the Erie county court for an order to vacate this order of arrest, which application was denied, and no appeal was taken from the order made thereupon. The action was brought to trial August 5, 1913, and decided in favor of the plaintiffs. The court found:

That "the defendant failed to return the earrings to the plaintiffs, and that the failure of the defendant to surrender possession of the said chattel to the plaintiffs was willful, and that the defendant ever since has wrongfully and willfully detained the said one pair of diamond earrings."

The court also found:

"That, upon demand by said sheriff for the possession of said one pair of diamond earrings described in the complaint pursuant to said requisition, the defendant willfully refused to surrender or deliver the possession thereof to the said sheriff."

The judgment of the court entered for the plaintiffs upon default, the answer having been withdrawn, recites:

"It is adjudged and decreed that the plaintiffs * * * recover from the defendant * * * possession of the one pair of diamond earrings being the property described in the complaint herein, or, in case the possession of the said property is not delivered to the plaintiffs, that the plaintiffs recover from the defendant the sum of $942, the value thereof. * * *"

An execution was thereupon issued against the person of the relator pursuant to section 1489 of the Code of Civil Procedure.

The relator bases her claim to right to relief by the institution of proceedings in this court on the ground of gross misapplication of law in the issuing of the execution against the person of the relator. Leaving out of consideration any question as to the propriety of seeking by a writ of certiorari to set aside the action of the court below, we do not think that the relator can succeed in this proceeding. Section 549 of the Code provides:

"A defendant may be arrested in an action, as prescribed in this title, where the action is brought for either of the following causes: Subdivision 2. To recover damages for personal injury; and injury to property, including the wrongful taking, detention or conversion of personal property. * * *"

This section is modified by section 553 of the Code, which provides that:

"A woman cannot be arrested, as prescribed in this title, except in a case * * * where it appears, that the action is to recover damages for a willful injury to person, character, or property."

Section 3343, subd. 10, of the Code, defines an "injury to property" as an "actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract."

The relator's contention is that her acts, as found by the Erie county court, do not constitute an "injury to property." We cannot concur in this view. We think the refusal of the relator to surrender the earrings is a "wrongful detention," within the meaning of section 549 of the Code, and consequently an "injury to property." The fact that such injury was "willful" was found by the court below, and that finding is conclusive here. We do not think it is necessary to discuss the question further. It has been disposed of on very similar facts in a decision by Mr. Justice Wheeler in Boasberg et al. v. Bond, unanimously affirmed 151 App. Div. 897, 135 N. Y. Supp. 1101.

The proceeding is therefore dismissed. Let an order be entered accordingly.

(82 Misc. Rep. 94)

THE TAXICAB CASES.

YELLOW TAXICAB CO. v. GAYNOR.

(Supreme Court, Special Term, New York County. August 21, 1913.)

1. MUNICIPAL CORPORATIONS (§ 111*)—ORDINANCES—PARTIAL INVALIDITY—EFFECT.

In a city ordinance abolishing all public hack stands theretofore designated and all special hack stands, and authorizing the mayor to locate and designate public hack stands in the public streets, and regulating the business of public hackmen, provisions relating to the disposition to be made of lost property found in cabs, and conferring upon certain police officials power to hear and determine as to violations of the ordinance, were severable from the main provisions and, if invalid, did not render the whole ordinance void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 245–256; Dec. Dig. § 111.*]

2. CONSTITUTIONAL LAW (§ 278*)—MUNICIPAL CORPORATIONS (§ 690*)—STREETS—PERMITS TO MAINTAIN HACK STANDS—REVOCATION.

Licenses granted by a city to maintain hack stands in the public streets, which provided that they were revocable, and which were issued pursuant to an ordinance providing that the mayor should have power to revoke any such license, gave to the licensees no property rights in the street; and hence an ordinance abolishing all hack stands previously designated was not invalid as taking property without due process of law contrary to Const. N. Y. art. 1, § 6, and Const. U. S. Amends. 5 and 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 763, 765, 767–770, 772–777, 779–806, 808–810, 816–824, 907–924, 942; Dec. Dig. § 278;* Municipal Corporations, Cent. Dig. §§ 1490, 1491; Dec. Dig. § 690.*]

3. MUNICIPAL CORPORATIONS (§ 690*)—STREETS—PERMITS TO MAINTAIN HACK STANDS—REVOCATION.

Licenses to maintain public hack stands in the streets, which, by their terms and by the terms of the ordinance under which they were issued, were revocable, were revoked by the repeal of the ordinance pursuant to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which they were granted, since they might be revoked indirectly as well as directly.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1490, 1491; Dec. Dig. § 690.*]

4. CONSTITUTIONAL LAW (§ 278*)—MUNICIPAL CORPORATIONS (§ 690*)—DUE PROCESS OF LAW—STREETS—USE BY ABUTTER'S LICENSEE.

Parties maintaining hack stands in the streets under contracts with the owners or licensees of abutting property had no property rights in the streets within Const. N. Y. art. 1, § 6, and Const. U. S. Amends. 5 and 14, providing that no person shall be deprived of his property without due process of law, and hence an ordinance abolishing such hack stands was not invalid, since abutting owners could not, by their private contracts, confer any right upon the hackmen inconsistent with the right of the local authorities to regulate the business of hackmen and prescribe reasonable regulations as to the use of the streets.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 763, 765, 767–770, 772–777, 779–806, 808–810, 816–824, 907–924, 942; Dec. Dig. § 278;* Municipal Corporations, Cent. Dig. §§ 1490, 1491; Dec. Dig. § 690.*]

5. CARRIERS (§ 5*)—REGULATION—HACKMEN.

The business of public hackmen is affected with a public interest and is subject to public regulation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 3, 4, 7; Dec. Dig. § 5.*]

6. CARRIERS (§ 11*)—HACKMEN—POWER TO REGULATE.

Under Greater New York Charter (Laws 1901, c. 466) § 51, as amended by Laws 1910, c. 262, providing that subject to the Constitution and laws of the state the board of aldermen may provide for licensing and otherwise regulating the business of hackmen, cabmen, etc., and may regulate the rates of fare to be taken by the drivers or owners of hackney coaches, carriages, etc., and compel the owner thereof to pay annual license fees, and section 44, providing that the board may exercise all the powers vested in the city by proper ordinances, rules, etc., not inconsistent with the provisions of that act or the state or federal Constitution or laws, may make all such ordinances, rules, etc., as to the board may seem meet for the general good and government of the city, and may provide for the enforcement thereof by fines, penalties, etc., the board of aldermen had the power to enact an ordinance abolishing all public hack stands theretofore designated and all special hack stands, authorizing the mayor to locate and designate public hack stands in the streets and the number of hacks which should be allowed at the places designated, prescribing the maximum rates of fare for public hacks, requiring public hacks to be equipped with taximeters, prescribing the qualifications of drivers, making provision for their examination, providing for the inspection of vehicles, and providing penalties for violations thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

7. MUNICIPAL CORPORATIONS (§ 591*)—LEGISLATIVE POWERS—DELEGATION.

In an ordinance regulating the business of public hackmen and providing for licensing and inspecting vehicles and examining applicants for drivers' licenses, a provision that the enforcement of the provisions thereof should be under the control of the bureau of licenses did not delegate to such bureau the question whether the ordinance should be enforced, but merely delegated to it purely administrative duties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1310; Dec. Dig. § 591.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. MUNICIPAL CORPORATIONS (§ 591*)—ORDINANCES—VALIDITY—EFFECT OF ILLEGAL ACTS UNDER ORDINANCES.

Where a municipal ordinance regulating the business of public hackmen conferred upon the bureau of licenses only purely administrative duties and did not delegate to it the question of whether the ordinance should be enforced, the fact that such bureau had suspended the operation of some of its provisions did not render the ordinance void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1310; Dec. Dig. § 591.*]

9. CARRIERS (§ 2*)—HACKMEN—POWER TO REGULATE.

Greater New York Charter (Laws 1901, c. 466) § 51, authorizing the board of aldermen to provide for licensing or otherwise regulating the business of hackmen and to regulate the rates of fare to be taken by owners or drivers of hackney coaches, carriages, etc., was not impliedly repealed by Laws 1910, c. 480, § 2, subd. 9, as amended by Laws 1913, c. 344, defining the term "common carrier" as used in that act as including all railroad corporations, etc., and every corporation, etc., owning, operating, or managing any such agency for public use in the conveyance of persons or property, or section 5, providing that the jurisdiction, supervision, powers, and duties of the public service commission in the first district shall extend under that chapter to any common carrier other than a railroad or street railroad corporation operating or doing business within that district, so far as concerns operations exclusively within that district, especially as the charter provisions are declaratory of powers which the city has enjoyed during its entire corporate existence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

10. CARRIERS (§ 2*)—HACKMEN—POWER TO REGULATE.

Greater New York Charter (Laws 1901, c. 466) § 51, authorizing the board of aldermen to provide for licensing or otherwise regulating the business of hackmen and to regulate the rates of fare to be taken by owners or drivers of hackney coaches, etc., was not repealed by Laws 1910, c. 374, amending Highway Law (Consol. Laws 1909, c. 25) § 288, relative to the use of highways by motor vehicles, so as to provide that except as otherwise provided local authorities shall have no power to pass or enforce any ordinance requiring from any owner or chauffeur to whom that article is applicable any tax, fee, license, or permit for the use of the public highways or excluding them from the free use thereof, and that no ordinance contrary thereto shall have any effect, "provided, however, that the power given to local authorities to regulate vehicles offered to the public for hire * * * and all ordinances, rules, and regulations which may have been or which may be enacted in pursuance of such powers shall remain in full force and effect," since not only is there no express repeal of section 51, but the powers granted by that section are governed by the exception contained in chapter 374.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

11. CARRIERS (§ 12*)—HACKMEN—POWER TO REGULATE.

Greater New York Charter (Laws 1901, c. 466) § 51, providing that the board of aldermen shall have power to regulate the rate of fare to be taken by owners or drivers of hackney coaches, carriages, motors, automobiles, or other vehicles, grants power to regulate rates of fare to be charged by public hackmen expressly and not merely by inference.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7–11, 15–20; Dec. Dig. § 12.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

12. COMMERCE (§ 47*)—INTERSTATE COMMERCE—HACKMEN—POWER TO REGULATE.

Where a city ordinance regulating the rates of fare to be charged by public hackmen operated only within the limits of the city and did not assume to regulate the rates for interstate commerce, it was not invalid as regulating interstate commerce because a hackman might contract to carry a passenger into another state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 47.*]

13. MUNICIPAL CORPORATIONS (§ 671*)—STREETS—GRANTS OF RIGHT TO USE.

A city had power to designate public hack stands upon the public streets without the consent of abutting owners, where the abutter's right of ingress and egress to and from his property was not impaired.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447–1450; Dec. Dig. § 671.*]

14. MUNICIPAL CORPORATIONS (§ 671*)—STREETS—GRANTS OF RIGHT TO USE.

Under an ordinance authorizing the mayor to designate public hack stands in the streets adjacent to property used as public parks, public buildings, hotels, etc., but further providing that no public hack should stand at any hack stand so designated within 15 feet of the entrance to any building erected on the adjacent property, the establishment of such hack stands was not per se a nuisance as impeding the abutting owner's right of ingress and egress, since the amount of space necessary to secure to the abutting owner such right rests within reasonable limits within the discretion of the municipal authorities, and unless an abuse of such discretion is clearly shown there is no excuse for judicial interference.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447–1450; Dec. Dig. § 671.*]

15. CONSTITUTIONAL LAW (§ 235*)—CARRIERS (§ 11*)—ORDINANCES—VALIDITY.

A municipal ordinance regulating the business of public hackmen was not discriminatory within Const. U. S. Amend. 14, § 1, prohibiting any state from denying to any person within its jurisdiction the equal protection of the laws, because it applied, not to all persons engaged in transporting passengers for hire, but only to those so engaged who solicited business upon the streets.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 683; Dec. Dig. § 235;* Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

16. CONSTITUTIONAL LAW (§ 240*)—CARRIERS (§ 11*)—ORDINANCES—VALIDITY. NANCES—VALIDITY.

A city ordinance regulating the business of public hackmen was not discriminatory under Const. U. S. Amend. 14, § 1, prohibiting states from denying the equal protection of the laws to any person within their jurisdiction because it required taximeters on motor-driven vehicles, and made no such requirement as to horse-drawn vehicles; it being a matter of common knowledge that the distance traveled is more easily ascertained by the occupant of a horse-drawn vehicle than of a motor-driven vehicle.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697–699; Dec. Dig. § 240;* Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

17. CONSTITUTIONAL LAW (§ 240*)—CARRIERS (§ 11*)—ORDINANCES—VALIDITY. NANCES—VALIDITY.

An ordinance regulating the business of public hackmen was not discriminatory within Const. U. S. Amend. 14, § 1, prohibiting states denyings the equal protection of the laws to any person within their jurisdiction because it required taximeters on motor-driven vehicles designed to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

carry not more than four persons and made no such requirement with regard to those of a greater capacity, since the smaller cabs are more generally engaged in transient business, while vehicles designed to carry a larger number of persons are more generally employed to travel a route between known points or are employed for a definite time at an agreed rate.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697–699; Dec. Dig. § 240;* Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

18. MUNICIPAL CORPORATIONS (§ 626*)—ORDINANCES—VALIDITY.

Municipal ordinances should not be condemned as discriminatory, where they are designed to promote public convenience and whether or not they are adapted to this end rests largely within the discretion of the governing body of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1380; Dec. Dig. § 626.*]

19. CONSTITUTIONAL LAW (§ 242*)—CARRIERS (§ 12*)—DISCRIMINATION—ORDINANCES—VALIDITY.

A municipal ordinance regulating the business of public hackmen was not discriminatory within Const. U. S. Amend. 14, § 1, prohibiting states from denying the equal protection of the laws to persons within their jurisdiction, because it fixed lower rates of fare for motor-driven vehicles than for horse-drawn vehicles, where it was not shown that the lower rate for horse-drawn vehicles would not result in their ceasing to exist, since there was a difference in the character of service in which the two classes of vehicles were engaged justifying their inclusion in different classes.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 691; Dec. Dig. § 242;* Carriers, Cent. Dig. §§ 7–11, 15–20; Dec. Dig. § 12.*]

20. CONSTITUTIONAL LAW (§ 230*)—ORDINANCES—VALIDITY.

A municipal ordinance regulating the business of public hackmen was not discriminatory within Const. U. S. Amend. 14, § 1, prohibiting the states from denying the equal protection of the law to persons within their jurisdiction, because it required the payment of a license fee of $5 for a cab, and $10 for coaches and for sight-seeing cars or those carrying more than seven persons; this being merely a classification of vehicles of different character and not discriminating against any person.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230.*]

21. CARRIERS (§ 11*)—ORDINANCES—VALIDITY.

A provision of a city ordinance regulating the business of public hackmen, requiring the use of taximeters on motor-driven vehicles, was not unreasonable or void, but was necessary to prevent frauds.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

22. MUNICIPAL CORPORATIONS (§ 624*)—HACKMEN—POWER TO REGULATE.

A city, under its powers to regulate the business of public hackmen conferred by its charter, had power to impose penalties for failure to comply with an ordinance requiring the use of taximeters by hackmen.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1375–1377; Dec. Dig. § 624.*]

23. CARRIERS (§ 11*)—ORDINANCES—VALIDITY.

Provisions of an ordinance regulating the business of public hackmen, requiring an applicant for a driver's license to present a sworn testimonial as to his character by two reputable citizens and a further testimonial from his last employer, unless a sufficient reason was given for its omission, and authorizing the mayor to suspend or revoke a driver's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

license, were not unreasonable, being designed to afford protection to those using hacks.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

24. CARRIERS (§ 11*)—ORDINANCES—VALIDITY.

A provision of an ordinance regulating the business of public hackmen, that no person shall solicit passengers for a public hack upon the streets except the driver while sitting upon the box of his vehicle, is not unreasonable, being designed to prevent the annoyance of those near hack stands and to prevent drivers from congregating upon the sidewalk in front of hotels and other public buildings.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

25. CARRIERS (§ 11*)—ORDINANCES—VALIDITY.

A provision of an ordinance regulating the business of public hackmen, prohibiting any one riding on the seat with the driver, was a reasonable police regulation, especially where it appeared that it was not adopted arbitrarily, but to prevent robberies and assaults by hackmen with the assistance of companions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

26. CARRIERS (§ 18*)—CHARGES—ENFORCEMENT OF REGULATION—PRELIMINARY INJUNCTION.

Where, on a motion for an injunction pendente lite to restrain the enforcement of a city ordinance prescribing rates of fare to be charged by hackmen, the affidavits presented a sharp conflict of fact as to whether hacks could be operated at a profit at such rates, this fact would not be determined upon affidavits upon a preliminary hearing in advance of the trial.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. § 18.*]

27. CARRIERS (§ 12*)—REGULATION—RATES OF FARE.

Rates of fare to be charged by hackmen, prescribed by a city ordinance, which would permit a fair profit for the service rendered, were not confiscatory and unreasonable because they would not also yield a fair return upon all the property employed by the corporation rendering the service.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7–11, 15–20; Dec. Dig. § 12.*]

Actions by Yellow Taxicab Company, Hotel Astor, Universal Taximeter Cab Company, Hilliard Hotel Company, and Motor Taximeter Cab Company, respectively, against William J. Gaynor, as Mayor of the City of New York, and others, and by Hotel Woodward Company, Garden Taxicab Company, Waldorf-Astoria Hotel Company, Hawk & Wetherbee, Mason-Seaman Transportation Company, Haverty's Taxicabs, Incorporated, Jennie K. Stafford, doing business under the firm name and style of Robert Stafford, Greeley Square Hotel Company, the New Taxicab & Auto Company, Forty-Seventh Street Taxicab Company, and Riverside Taxi Service Company, respectively, against the City of New York and others. On motion by the plaintiff in each case for an injunction pendente lite. Motions denied, and temporary injunctions vacated.

Leary & Goodbody, of New York City, Edgar T. Brackett, of Saratoga Springs, and Edward W. Hatch, Samuel F. Moran, Arthur K.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wing, and Henry Bennet Leary, all of New York City (William U. Goodbody, of New York City, of counsel), for plaintiff Yellow Taxicab Co.

Dixon & Holmes, of New York City, for plaintiff Hotel Astor.

Wing & Wing, of New York City, for plaintiff Universal Taximeter Cab Co.

Baldwin & Hutchins, of New York City, for plaintiff Hilliard Hotel Co.

Harvey T. Andrews, of New York City, for plaintiffs Motor Taximeter Cab Co. and Forty-Seventh Street Taxicab Co.

Campbell & Boland, of New York City, for plaintiff Hotel Woodward Co.

Green & Barry, for plaintiff Garden Taxicab Co.

Baldwin & Hutchins, of New York City, for plaintiff Waldorf-Astoria Hotel Co.

Corbitt & Stern, of New York City, for plaintiffs Hawk & Wetherbee and Mason-Seaman Transp. Co.

John W. Browne, of New York City, for plaintiff Haverty's Taxicabs, Inc.

Stephen Barker, of New York City, for plaintiff Jennie K. Stafford.

Hatch & Sheehan, of New York City, for plaintiff Greeley Square Hotel Co.

George C. Norton, of New York City, for plaintiff New Taxicab & Auto Co.

Atkins B. Cunningham, of New York City, for Riverside Taxi Service Co.

Archibald R. Watson, Corp. Counsel, of New York City (Terence Farley and George P. Nicholson, both of New York City, of counsel), for defendants.

SEABURY, J. Sixteen motions in as many cases were argued and submitted to the court for decision at the same time. The object of the plaintiffs in all of these motions is to secure an injunction pendente lite in actions brought to restrain the defendants from attempting to enforce a certain ordinance passed by the board of aldermen of the city of New York, known as the "Public Hack Ordinance." The ordinance was approved by the mayor of the city on June 2, 1913, and by its terms was to become operative on August 1, 1913. The motion in each case is based upon the contention that the ordinance is unconstitutional, beyond the power of the board of aldermen, discriminatory, unjust, and unreasonable, and therefore void.

The plaintiffs in these cases are of two classes: First, certain taxicab owners engaged in transporting persons for hire; and, second, certain persons engaged in the operation of hotels in front of which the defendants, acting pursuant to the ordinance referred to, have assumed to establish public hack stands. While these two classes of persons claim to be affected in a different manner by the enforcement of the ordinance, all of the plaintiffs assert the invalidity of the ordinance upon the same grounds. The court will determine all of the

motions and discuss the grounds urged in support of each in a single opinion.

The plaintiffs engaged in the operation of taxicabs have paid to the city a license fee of $10 for each cab employed in its business, and for each stand an amount equal to as many times $25 as cabs are allowed on such stand. Some of the licenses issued to these plaintiffs expire by their terms on August 1, 1913, and others according to their terms continue beyond this date. Each license states that in consideration of $25 the person named "is hereby licensed to keep and use a special hack stand in the city of New York at" a designated place, and provides that:

"This license is subject to the strict observance of all laws, ordinances and regulations enacted for the protection of the city so far as they may apply, is to continue in force for a period of one year, beginning * * * and ending, * * * unless sooner suspended or revoked, and is not transferable."

Section 307 of the ordinances in effect up to and including July 31, 1913, provides as follows:

"All licenses shall be granted by authority of the mayor and issued by the bureau of licenses for a term of one year from the date thereof, unless sooner suspended or revoked by the mayor, and no person shall be licensed except a citizen of the United States or one who has regularly declared intention to become a citizen. *The mayor shall have power to suspend or revoke any license or permit issued under the provisions of this ordinance.*"

Those of the plaintiffs who are proprietors or lessees of hotels and are engaged in the business of operating the same assert that they have under contracts with cab companies been enabled to afford to their patrons and guests a taxicab service which has been satisfactory and responsible; and that the mayor, pursuant to the ordinance, has located a public hack stand alongside of the curb of the street upon which their hotels front; and that the new ordinance which is now under review does not provide as a condition precedent to the designation of a public hack stand in front of such hotels that the consent of the occupant, owner, or lessee must be obtained. These plaintiffs have not given their consent to the designation of public hack stands in front of their respective premises.

The ordinance the validity of which is assailed in these actions purports to abolish all public hack stands heretofore designated and all special hack stands. It authorizes the mayor to locate and designate as public hack stands the space alongside the curb adjacent to property used as public parks, public buildings, railroad stations, steamship and ferry landings, hotels, restaurants, theaters, and the center of any street or avenue where the roadway exclusive of the sidewalk is 30 feet in width or more (article 5, subds. 1, 2, and 3). The ordinance gives to the mayor the power to designate the number of public hacks which shall be allowed at the places designated (article 5, subd. 4), and prescribes the maximum rates of fare for public hacks (article 6). The maximum rates of fare for motor vehicles is made to depend on the number of passengers carried and the distance traveled (article 6). The ordinance provides that every public hack propelled by mechanical power and seating four persons or less must have a taximeter (article 3, subd. 2). The ordinance also prescribes

the qualifications of drivers of public hacks, and makes provision for the examination of applicants for a driver's license (article 4). It also provides for the inspection of the vehicles to ascertain whether their character and condition conform to the requirements of the ordinance (article 3). The ordinance provides penalties for the violation of any of its provisions.

On the same day that the ordinance was adopted the board of aldermen passed a separate act repealing sections of a former code of ordinances under which all previous hack licenses had been granted. This repealing ordinance was approved by the mayor on the same day that he approved the public hack ordinance, and both ordinances by their terms were to become operative at the same time.

[1] In determining the questions presented the court must keep in mind the well-settled principle of law that the fact that there may be void provisions of a statute or ordinance furnishes no reason for declaring the whole statute or ordinance void. Some of the provisions of the ordinance attacked upon these motions may be open to question. Thus, those provisions of the ordinance which provide for the disposition to be made of lost property found in cabs and the powers conferred upon certain police officials to hear and determine as to violations of the ordinance contain provisions which are easily severable from the main provisions of the ordinance. The validity of these provisions is in no way involved in these actions, and the court should not go out of its way to anticipate controversies which may not arise. If any such controversies do arise in the administration of the ordinance, the persons who claim that their rights have been invaded will have access to adequate legal remedies. Upon these motions, therefore, the court is to consider only those objections to the ordinance which the plaintiffs claim threaten them with injuries against which they would be remediless if injunctive relief is denied. The claims of the plaintiffs which it is necessary for the court to pass upon are those which rest upon the contention that the ordinance is violative of the Constitution of the state and of the provisions of the fifth and fourteenth amendments to the Constitution of the United States; that the board of aldermen was without legal power to enact it; that it violates the rights of owners or lessees whose property abuts the curb in front of which public hack stands are attempted to be established without the consent of such owners or lessees; and that it is discriminatory and unjust and unreasonable. These objections we shall consider in the order named.

[2] The claim that the ordinance violates the provisions of the state Constitution (article 1, § 6) and the provisions of the Constitution of the United States expressed in the fifth and fourteenth amendments is necessarily based upon the assumption that those of the plaintiffs who are engaged in the transportation of passengers for hire have already by contract with the city of New York acquired certain property rights which cannot be impaired by the repeal of the ordinances under which permits were granted to them to occupy special hack stands heretofore designated. It becomes necessary, therefore, at the outset to ascertain what rights, if any, this class of plaintiffs have to occupy such private or special hack stands. The permits to them

were granted under the provisions of an ordinance which prohibited other licensed hackmen from going upon or using a special or private hack stand. Sections 317 and 318 of the Code of Ordinances. The effect of those provisions of the old ordinance and the licenses granted pursuant thereto gave to hotels and other owners of buildings abutting on the public streets the right to maintain private hack stands. These special privileges in the streets of the city enabled those in front of whose property special hack stands were established to sell for their private profit the right to use a part of the public streets. Licenses issued pursuant to such ordinances discriminated against the right of other public hackmen than those who made contracts with the abutting owners to enjoy equal rights in the public streets. It is in evidence before the court that an investigation made by a commissioner of accounts of the city of New York shows that over $360,000 is paid annually to the hotels and other abutting owners for the sale of these privileges, and the report of a commission appointed by the mayor to investigate the whole subject of cab service estimated the amount paid annually for such purposes as not less than $500,000.

Because of the discrimination which licenses issued under the old ordinance permitted against other hackmen than those who sustained contractual relations with the abutting owners its validity is not free from doubt. Penn. Co. v. City of Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223; Odell v. Bretney, 38 Misc. Rep. 603, 78 N. Y. Supp. 67; Id., 62 App. Div. 595, 71 N. Y. Supp. 449; Id., 93 App. Div. 607, 87 N. Y. Supp. 655; Montana Union Ry. v. Langois, 9 Mont. 419, 24 Pac. 209, 8 L. R. A. 753, 18 Am. St. Rep. 745, and authorities therein cited. Notwithstanding the reasons suggested by these decisions against the validity of the ordinance in question, it has been upheld in the case of City of N. Y. v. Reesing, 38 Misc. Rep. 129, 77 N. Y. Supp. 82, affirmed 77 App. Div. 417, 79 N. Y. Supp. 331. This latter case is binding as an authority upon this court and compels it to indulge the assumption that the ordinance under which the licenses were granted to those of the plaintiffs engaged in business of the transportation of passengers for hire was a valid ordinance while it remained unrepealed. This assumption necessitates an inquiry into the nature of the rights conferred under the licenses granted pursuant to those provisions of the old Code of Ordinances referred to. It has been pointed out above that the ordinance under which licenses were formerly issued and the licenses in terms provided that such licenses should be revocable by the mayor. The licenses were not contracts with the city of New York. They conferred no right of property in the street. They were mere permits granting privileges to render public service. The right to revoke such a license is the correlative of the right to grant it. 25 Cyc. 625.

The authorities are uniform that such licenses are not contracts and create no property right and are always revocable. Calder v. Kurby, 71 Mass. (5 Gray) 597; People v. Roper, 35 N. Y. 629, 635; Laing v. Mayor and Council of Americus, 86 Ga. 756, 13 S. E. 107; Sullivan v. Borden, 163 Mass. 470, 40 N. E. 859; St. Charles v. Hackman, 133 Mo. 634, 34 S. W. 878; Newson v. City of Galveston, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; Chief of Police of City of

Providence v. Bemus, 17 R. I. 230, 231, 21 Atl. 539, 12 L. R. A. 57; Sights v. Yarnalls, 53 Va. 292; Hutchins v. Town of Durham, 118 N. C. 457, 469, 24 S. E. 723, 32 L. R. A. 706; Wiggins v. City of Chicago, 68 Ill. 372; Schwuchow v. City of Chicago, 68 Ill. 444.

[3] A license by its terms revocable, granted pursuant to an ordinance which is repealed, falls with the ordinance which furnished the only authority for granting it. Such revocable municipal licenses may be revoked indirectly as well as directly. Laing v. Mayor and Council of Americus, 86 Ga. 756, 13 S. E. 107; People v. Meyer (Sup.) 5 N. Y. Supp. 69. From these authorities it is clear that the licenses heretofore granted were revoked by the repeal of the ordinance pursuant to which they were granted. The argument of the plaintiffs that the ordinance violates its property rights contrary to the constitutional provisions referred to is based entirely upon a fallacy. These permits, instead of being contracts, as claimed by the plaintiffs, are mere licenses revocable by the power which granted them, and, in fact, by the repeal of the ordinance pursuant to which they were issued, have been revoked. These plaintiffs, therefore, have no greater rights than if no permits had ever been issued to them. They have no property rights in the city's streets which have been impaired by the ordinance, and no property which the ordinance confiscates or attempts to take away.

[4] There is no merit in the claim that they have rights by virtue of contracts which they have made with the owners or lessees of property abutting pon the curb in front of which special hack stands were formerly established. Whatever the rights of such abutting owners may be, it is clear that they cannot by their private contracts with hackmen confer any right upon them which is inconsistent with the right of local authorities to regulate the business of hackmen and prescribe reasonable regulations as to the use of the streets. Moreover, it follows from the conclusion announced that the claim of the plaintiffs that the rates of fare prescribed by the ordinance are confiscatory is without merit and not to be considered, except in so far as the reasonableness of the rates prescribed is to be taken into account in determining the general question as to whether the ordinance is itself unreasonable and unjust.

[5] This aspect of the plaintiffs' contention we shall subsequently consider. The assumption of the plaintiffs that public hackmen are in the same class as those engaged in private business is without foundation and is contrary to fundamental principles embodied in the common law and in our present constitutional provisions. From time immemorial it has been held that the business of a public hackman is affected with a public interest and falls within the principle of the common law which was long ago asserted by Lord Chief Justice Hale in his treatise De Portibus Maris (Harg. Law Tracts, 78). The underlying principle there asserted was that businesses of certain kinds sustain such a peculiar relation to the public interests that there is superinduced upon them the right of public regulation. This principle is firmly fixed in our modern constitutional law. People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460, af-

firmed Budd v. N. Y., 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; Munn v. Ill., 94 U. S. 113, 24 L. Ed. 77. As was well said by Chief Justice Waite in Munn v. Ill., supra, in the exercise by government of the power of regulation—

"it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, *hackmen*, bakers, millers, wharfingers, innkeepers, and so forth, and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

It has repeatedly been asserted that such persons stood "in the very gateway of commerce and took a toll from all who passed," and that their business tended "to a common charge" and had become a thing of public interest and use, and for that reason ought to be subjected to governmental regulation so that they shall be enabled to "take but reasonable toll." The question as to what is a "reasonable toll" is a legislative rather than a judicial question. These views are so abundantly fortified by the opinion of the court in Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247, and the cases therein cited, that amplification is unnecessary.

[6] The plaintiffs contend that the board of aldermen were without power to enact the public hack ordinance and that the ordinance is void for that reason. This contention is without merit. The statutory authority of the board of aldermen to enact the ordinance is clearly set forth in the Greater New York Charter (Laws 1901, c. 466). Section 51 of that charter, as amended by chapter 262 of the Laws of 1910, provides as follows:

"Subject to the Constitution and laws of the state, the board of aldermen shall have power to provide for the licensing and otherwise regulating the business of * * * hackmen, cabmen. * * * The board of aldermen shall also have power to regulate the rates of fare to be taken by owners or drivers of hackney coaches, carriages, motors, automobiles or other vehicles, and to compel the owners thereof to pay annual license fees. All ordinances in relation to any of the matters mentioned in this section shall be general, shall provide for the enforcement thereof in the manner specified in section 44 of this act as amended, and shall fix the license fee to be paid, if any. All licenses shall be according to an established form, and shall be regularly numbered and duly registered as provided by the board of aldermen."

Section 44 of the charter provides that:

"No enumeration of powers in this act shall be held to limit the legislative power of the board of aldermen," except as to this act specifically provided, and the board of aldermen, "in addition to all enumerated powers, may exercise all of the powers vested in the city of New York by this act, or otherwise, by proper ordinances, rules, regulations and by-laws not inconsistent with the provisions of this act, or with the Constitution or laws of the United States or of this state; and, subject to such limitations, may from time to time ordain and pass all such ordinances, rules, regulations and by-laws, applicable throughout the whole of said city or applicable only to specified portions thereof, as to the said board of aldermen may seem meet for the good rule and government of the city, and to carry out the purposes and provisions of this act or of other laws relating to the said city, and may provide for the enforcement of the same by such fines, penalties, forfeitures and imprisonment as may by ordinance or by-law be prescribed."

The right of a municipality to establish public hack stands has been recognized and acted upon by the city of New York from early times,

and is but an incident of the right to license and regulate those who ply the trade of hackmen for hire. The defendants have submitted upon these motions a record of municipal ordinances from 1817 to date, which demonstrate that the corporate authorities of the city have from such time exercised such power as a part of its police functions.

[7] The fact that the ordinance provides that "the enforcement of the provisions of this ordinance shall be under the control of the bureau of licenses" does not justify the contention urged by the plaintiffs that the board of aldermen have delegated to such bureau "the question of whether the ordinance shall be enforced at all or not." There is nothing in the ordinance which justifies such an interpretation being placed upon its provisions. Manifestly the board of aldermen cannot itself attend to the work of licensing and inspecting vehicles and conduct the examination of applicants for drivers' licenses. The duties which the ordinance confers upon the bureau of licenses are purely administrative in character and not legislative. The board of aldermen exercised its legislative function in enacting the ordinance. No discretion is delegated to the bureau of licenses to determine whether or not the ordinance should become operative. That it should become operative followed as a matter of course from the fact that it was enacted by the board of aldermen and approved by the mayor, unless the ordinance is itself illegal.

[8] The claim that the chief of the mayor's bureau of licenses has in effect suspended the operation of some of the provisions of the ordinance is not a proper subject of consideration upon these motions. If the fact be as alleged, there are remedies open to the plaintiffs, but that fact would furnish no ground for declaring the ordinance itself void.

[9] The claim that those of the plaintiffs engaged in the transportation of passengers for hire are subject to the exclusive jurisdiction of the Public Service Commission in the First District by virtue of subdivision 9 of section 2 of chapter 480 of the Laws of 1910 (Consol. Laws 1910, c. 48), as amended by chapter 344 of the Laws of 1913, and that therefore the board of aldermen is without power to enact the ordinance, is unsound and can only be sustained by a process of reasoning which assumes that the Legislature in enacting chapter 344 of the Laws of 1913 intended to repeal those provisions of the charter which conferred upon the board of aldermen the right to regulate hackmen and the rates of fare to be charged by them. Such an interpretation not only does violence to that canon of statutory construction, which holds that repeal by implication is not favored, but finds no support in anything contained in the act of 1913 referred to above. The provisions of that act, which provide that the jurisdiction of the Public Service Commission in the First District "shall extend under this chapter * * * (D) to any common carrier other than a railroad corporation or street railroad corporation operating or doing business within the district, so far as concerns operation exclusively within that district," does not justify the inference that the Legislature intended to repeal sections 51 and 44 of the Greater New York Charter, which confer in unequivocal terms the authority upon the city to

enact ordinances regulating the business of hackmen. These charter provisions are but declaratory of powers which the city of New York has enjoyed during its corporate existence, and in the absence of a clear legislative intent it is not to be assumed that the Legislature intended to repeal them.

[10] The contention that section 51 of the charter has been repealed by chapter 374 of the Laws of 1910, amending section 288 of the Highway Law (Consol. Laws 1909, c. 25), is fallacious.

The amendment made to section 288, upon which the plaintiffs base their claim, so far as applicable to the question under consideration, provides as follows:

"Except as herein otherwise provided, local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring from any owner or chauffeur to whom this article is applicable any tax, fee, license or permit for the use of the public highways, or excluding any such owner or chauffeur from the free use of such public highways, excepting such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages or in any other way respecting motor vehicles or their speed upon or use of the public highways; and no ordinance, rule or regulation contrary to or in anywise inconsistent with the provisions of this article, now in force or hereafter enacted, shall have any effect; provided, however, that the power given to local authorities to regulate vehicles offered to the public for hire, and processions, assemblages or parades in the streets or public places, and all ordinances, rules and regulations which may have been or which may be enacted in pursuance of such powers shall remain in full force and effect."

That this law does not contemplate taking away from the local authorities the right to regulate the business of hackmen and cabmen appears not only from the language used and the absence of any express repeal of section 51 of the charter, but also from the exception contained in the law itself. The present ordinance falls within the terms of the exception, which provides:

"That the power given to local authorities to regulate vehicles offered to the public for hire, * * * and all ordinances, rules and regulations which may have been or which may be enacted in pursuance of such powers shall remain in full force and effect."

To imply a repeal of section 51 of the charter from this language would be to act in defiance of the expressed intent of the Legislature to the contrary. The amendment made to section 288 of the Highway Law was not intended as a substitute for those charter provisions which equip the city with authority to exercise its police power in reference to those trades and callings which have for many generations been deemed proper subjects for the exercise of such power. The fact that the provisions contained in section 288 of the Highway Law reserves the right "to regulate vehicles offered to the public for hire" and is there expressed in different phraseology from that employed in section 51 of the charter is a circumstance wholly insignificant. The phraseology employed is immaterial when the intent is clearly expressed, and an intention not to repeal section 51 of the charter affirmatively appears in the amendment to section 288 of the Highway Law.

[11] The contention that the power to fix rates must be expressly given and cannot be inferred is inapt in view of the provision of section 51 of the charter that:

"The board of aldermen shall also have power to regulate the rates of fare to be taken by owners or drivers of hackney coaches, carriages, motors, automobiles or other vehicles."

It is difficult to see how the Legislature could have expressed more clearly a direct grant of power.

[12] The objection that the board of aldermen is without power to regulate rates because a hackman might contract to carry a passenger from New York to Jersey City, and thus engage in interstate commerce, the power to regulate which rests solely in the Congress of the United States, is without merit. The objection seems to me to be frivolous in view of the fact that the ordinance does not assume at all to regulate the rates for interstate commerce. The ordinance in question operates only within the limits of the city, and therefore cannot be held obnoxious as a regulation of interstate commerce. Budd v. New York, 143 U. S. 517, 545, 12 Sup. Ct. 468, 36 L. Ed. 247. The attempt to show that the ordinance is in excess of the power of the board of aldermen cannot survive an examination of the statutes and the application to them of any reasonable interpretation.

[13] All of the plaintiffs in these actions urge that the provisions of the ordinance permitting the establishment of a public hack stand in front of hotels without the consent of owners or lessees of such property is in violation of the right of such owners or lessees and renders the ordinance void. Those of the plaintiffs who are engaged in the business of transportation of passengers for hire claim the right to assert this objection because at the present time, by leave of the owners, they are enjoying the privileges of a private hack stand in front of such hotels. The other plaintiffs are the owners or lessees of hotels or other property abutting upon the streets in front of which the mayor has designated a place for a public hack stand. There is no doubt of the right of the city of New York to designate public hack stands upon the public streets. Such stands are not per se a nuisance. They do not interfere with the street for street purposes, but, on the contrary, facilitate the use of the street for such purposes. The right to establish such public hack stands existed under the ancient charters of the city of New York and has been confirmed by subsequent legislation. The opinion of Judge Jones in Masterson v. Short, 30 N. Y. Super. Ct. 241, and the opinion of Judge Barbour in the same case (Id., 30 N. Y. Super. Ct. 299), although differing as to whether such stands may under the circumstances disclosed in that case create a nuisance, are agreed in asserting the right of the corporate authorities to license hackney coaches and to designate portions of the public streets as the standing places thereof. The object and reason for such regulation was well stated by Judge Jones in his opinion, where he said:

"The system of hackney coaches standing at designated places in the streets of the city grew out of the necessity of meeting the public demands. A de-

mand arose in cities for means of transit, from point to point, other than by walking. As the city increased in extent of territory, and became more populous, the demand increased. This gave rise to a class of men, who procured one or more vehicles, according to their means, and plied the streets for hire. It was soon found necessary to place these men under special police regulations, and, as one of those regulations, to assign certain places in the streets where they might stand waiting for customers. Such regulation was necessary for the control of the hackmen, and for the convenience of the public. Its object was to prevent the hackmen from traveling, with their empty vehicles, in search of custom in the streets, otherwise sufficiently crowded, and also to prevent their stopping and remaining, for any considerable time, at inconvenient places; but the great object was to have hacks standing at various points where the public would be most likely to want them, and where they would cause the least inconvenience to other vehicles or injury to the surrounding property."

If the municipal authorities have the right to establish public hack stands, as they undoubtedly have, it follows that they have the right to establish such stands at such places as the public welfare and convenience shall require. The designations pursuant to the ordinance (article 5, § 3) of spaces alongside the curb adjacent to property used as public parks, public buildings, railroad stations, steamships and ferry landings, hotels, restaurants, and theaters, are obviously conducive to the public convenience. Such a designation is not therefor in itself either invalid or unreasonable. That such a designation must be made with due regard to the rights of abutting owners is clear, but if such designation does not impair the rights of such owners there can be no legal objection urged against it. It is settled law that a court of equity will withhold injunctive relief where there is no substantial injury to the easements of light, air, and access to the premises of an abutting owner. Adler v. M. E. R. Co., 138 N. Y. 173, 180, 33 N. E. 935.

The statement of the plaintiffs that the designation of such public hack stands in front of the property of an abutting owner or occupier without the latter's consent is a nuisance and illegal is too broad a statement of the rule of law applicable to this subject to be accurate. The rights of an abutting owner are not paramount to the rights of others of the general public to use the streets for legitimate street purposes. Donovan v. Pennsylvania Company, 199 U. S. 279, 303, 26 Sup. Ct. 91, 50 L. Ed. 192. The abutting owner has rights special and peculiar to himself which arise out of the relation of his property to the public street. His right of way and his right to the free and unimpeded ingress and egress to and from his property and to the easements appurtenant thereto are clearly recognized by controlling legal authorities. 2 Dillon, Municipal Corporations (5th Ed.) §§ 1016, 1125, and cases cited; 28 Cyc. 856. A legislative act or municipal ordinance which substantially interferes with this right violates the property right of the abutting owner, whether the fee of the street is owned by the abutting owner or the public. Donovan v. Pennsylvania Co., supra, 199 U. S. 279, 302, 26 Sup. Ct. 91, 50 L. Ed. 192; Story v. Elevated R., 90 N. Y. 122, 43 Am. Rep. 146. The rights of the abutting owner are of course subject to such valid regulations as the local authorities may prescribe for the public convenience, but such regulations in order to be valid must recognize the rights of the

abutting owner of ingress to and egress from his property. In Donovan v. Pennsylvania Co., supra, Mr. Justice Harlan said:

"Generally speaking, public sidewalks and streets are for use by all, upon equal terms, for any purpose consistent with the object for which such sidewalks and streets are established; subject of course to such valid regulations as may be prescribed by the constituted authorities for the public convenience; this to the end that, as far as possible, the rights of all may be conserved without undue discrimination."

If the ordinance now under review, in authorizing the establishment of public hack stands alongside of the curb in front of the plaintiffs' hotels does not impair the free and unimpeded right of ingress and egress to and from the property of the plaintiffs, the regulation is valid and violates no right of any abutting owner.

[14] The framers of the ordinance seem to have had these principles well in mind and to have endeavored to make the establishment of a public hack stand consistent with a recognition of the special and peculiar rights of abutting owners. Thus in secton 7, art. 5, of the ordinances, it is provided that:

"No public hack shall stand at any hack stand located and designated by the mayor in accordance with section 3 of this article, adjacent to the curb of the sidewalk, within fifteen feet of the entrance to any building erected on the property adjacent to the said hack stand. The said fifteen feet shall be determined by measuring fifteen feet on each side of a point on the curb opposite the middle of the entrance to the adjacent building. No hack shall stand within five feet of any crosswalk."

The ordinance under review therefore specifically sets aside thirty feet in front of the property of the abutting owner for the special uses of such owners and permits no public hack stand to be designated within this space. It is not claimed that the municipal authorities have designated any stand in violation of this provision. The amount of space necessary to secure to the abutting owner the free and unimpeded right of ingress and egress to and from his property must always rest within reasonable limits within the discretion of the municipal authorities. Unless the ordinance and the acts of the defendants done or threatened pursuant thereto clearly show such an abuse of discretion as leaves no doubt that the rights of the abutting owner have been violated, there is neither reason nor excuse for judicial interference. It is not claimed that the agents of the defendants will not observe the requirements of the ordinance in this respect, and, if they should disregard the limitations imposed by the ordinance, it is to be presumed that the local authorities will restrain them. The amount of space necessary to be kept free of the presence of public hacks in order to conserve the rights of the abutting owners or occupants is primarily to be determined by the board of aldermen and not by the courts. Bearing in mind the provisions of the ordinance which set aside 30 feet in front of the property of those of the plaintiffs who own or lease the hotels in front of which public hack stands have been designated, it is impossible for the court to determine that the establishment of such stands is per se a nuisance, or that the right of these plaintiffs to the free and unimpeded ingress and egress to and from their property is in any way impaired. Nor is there anything

in the affidavits submitted upon these motions which tends to a contrary conclusion.

That the rule here applied is in harmony with the weight of legal and judicial authority conclusively appears from an examination of the writings of learned commentators and judges. In Dillon on Municipal Corporations (5th Ed. vol. 3, § 1167), the rule is thus stated:

"Generally speaking, public sidewalks and streets are for use by all, upon equal terms, for any purpose consistent with the object for which such sidewalks and streets are established, subject, of course, to such general regulations as may be prescribed by the constituted authorities for the public convenience, to the end that as far as possible the rights of all may be conserved without undue discrimination. Licensed hackmen and cabmen, unless forbidden by valid local regulations, may within reasonable limits use a public sidewalk in prosecuting their calling, provided such use is not materially obstructive in its nature; that is, of such exclusive character as in a substantial sense to prevent others from also using it upon equal terms for legitimate purposes. By virtue of its power to regulate the use of streets and sidewalks and to regulate hackmen and so forth the city council may provide for public hack stands in the city streets and may prescribe the length of time that hackmen may stand thereat. But it is not within the power of the municipality to authorize the creation or maintenance of a hack stand of such a nature as to interfere with the ingress to and egress from abutting property, nor can the establishment of a hack stand by municipal ordinance be used as a justification for the acts of hackmen in congregating upon the sidewalk in front of and adjacent to or about the abutting premises so as to interfere with the ingress or egress of persons desiring to visit the same. Similarly hotel keepers and other property owners may make such reasonable use of the street adjoining the hotel or property as is reasonably necessary for the purpose that enabled them to keep carriages for the use of their guests on call."

In 2 Elliott on Roads & Streets (3d Ed.) § 883, it is said:

"Municipal corporations often enact ordinances setting apart certain places for coaches, hacks or express wagons to stand, and the validity of such ordinances does not seem often to have been questioned. If the easement of access is not interfered with it may be that the abutter could not ordinarily enjoin such a use of the street."

In City Council of Montgomery v. Parker, 114 Ala. 118, 21 South. 452, 62 Am. St. Rep. 95, it was held that a municipal ordinance providing that a portion of a street in front of a designated hotel shall be "established as a stand for two hacks" was within the power of the municipality, not unreasonable, and that the penalties prescribed for a violation thereof were enforceable. The opinion of the court makes it clear that provided such stand does not obstruct the property and guests of a hotel which abuts such street in their reasonable ingress to and egress from the hotel and in the transportation of baggage no ground for injunctive relief is presented.

In Veneman v. Jones, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100, the court said:

"There can be no question but that the ordinance authorizing the depot marshal to prescribe the places where omnibuses, hacks, and other vehicles should stand at the railroad depot, and requiring drivers to obey the directions of police officers in regard to the places which their respective vehicles should occupy, was a proper regulation, and one which the municipal authorities had the power to pass. City of St. Paul v. Smith, 27 Minn. 364 [7 N. W. 734, 38 Am. Rep. 296]; Commonwealth v. Robertson, 5 Cush. [Mass.]

438; Commonwealth v. Stodder, 2 Cush. [Mass.] 562 [48 Am. Dec. 679]. Such regulations tend to the convenience of the general public by protecting persons from the annoying solicitations of hackmen and others, who, when acting without restraint, often confuse travelers, besides engendering strife and contention among themselves."

In Pennsylvania Co. v. City of Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223, it was held that railroad depots in cities are in the nature of public buildings, and the city council may establish hack stands in front of them so long as access to and egress from the building is not prejudicially interfered with.

In Donovan v. Pennsylvania Co., 199 U. S. 279, 303, 26 Sup. Ct. 91, 98 (50 L. Ed. 192), Mr. Justice Harlan says:

"By the Illinois statutes it is provided that the city council in cities may regulate the use of streets and sidewalks, and license, tax, and regulate hackmen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation. Hurd's Ill. Stat. 1901, pp. 285, 287. And by ordinance of the city council of Chicago it is provided that 'any licensed hackney, coach, cab or other vehicles for the conveyance of passengers may stand, while waiting for employment, at the following places, and for the period of time hereinafter provided: * * * Stand No. 4. The east side of Canal street, occupying 110 feet between Adams and Madison streets, as the superintendent of police shall direct. * * * Stand No. 6. At all railroad depots ten minutes previous to the arrival of all passenger trains.' Rev. Code of Chicago, § 498. The validity of this ordinance has been sustained by the Supreme Court of Illinois. Pennsylvania Co. v. Chicago, 181 Ill. 289 [54 N. E. 825, 53 L. R. A. 223]."

After making this statement Mr. Justice Harlan adds the following significant sentence:

"Perceiving nothing in the above provisions inconsistent with any right secured by the Constitution of the United States, we accept the decision of the state court as authoritative upon this point."

These authorities and the others referred to in them leave no doubt in the mind of the court that the ordinance in question in so far as it permits the establishment of public hack stands in front of the hotels of some of these plaintiffs is a police regulation which offends against no constitutional provision and does not impair the rights of easement which the owners abutting on the street possess.

The decision in McCaffrey v. Smith, 41 Hun, 117, upon which these plaintiffs place great reliance, does not seem to me to be contrary to the authorities cited, because in that case the stand in front of the plaintiff's premises "interferes somewhat with access to the hotel and premises of the plaintiff." Upon the facts before the court the actual decision in McCaffrey v. Smith, supra, may be sustained, although I think that the authorities cited above demonstrate that the rule declared in the opinion in that case is too broadly stated to be an accurate statement of the law governing this subject.

It is further contended by the plaintiffs in these actions that the ordinance is unreasonably discriminatory in its provisions, and that therefore it violates the provisions of section 1 of the fourteenth amendment of the Constitution of the United States, which prohibits any state from denying to any person within its jurisdiction the equal protection of the laws. The respects in which it is claimed that the

ordinance is unreasonably discriminatory are: (1) That it singles out and attempts to reach and affect only those engaged in transportation of individuals for hire who solicit business upon the streets and not at all other persons so engaged in transporting individuals for hire; (2) that it requires taximeters on motor-driven vehicles designed to carry not more than four persons, and makes no such requirements as to horse-drawn vehicles or motor-driven vehicles of a greater carrying capacity than four persons; (3) that it fixes lower rates of fare for motor-driven vehicles than for horse-drawn vehicles for the same distance; (4) that it requires a fixed payment—$5 license fee for a cab and $10 license fee for coaches and a $10 license fee for sight-seeing cars or those that carry more than seven persons.

[15] In so far as the first objection is concerned, it is a natural and just classification between those who solicit business upon the public streets and other persons who are engaged in the transportation of passengers for hire. The hackmen who ply the streets for hire are because of that fact engaged in a public employment which naturally and necessarily differentiates their position from that of private livery men. In Prof. Wyman's work on Public Service Corporations (volume 1, § 107), it is said:

"The hackmen who ply for hire have always been regarded as in the employment of the public. Theirs is really one of the most striking cases of temporary monopoly. In the case of any hackman his rival may be around the corner prepared to make a fair price; and yet, as the traveler cannot bide his time he will often submit to an extortionate price rather than let a moment pass. For the time being the monopoly is effective, and therefore the necessity of regulating the business of hackmen upon the principles of public service law has long been apparent."

[16] The classification which the ordinance makes between those operating motor-driven vehicles and horse-drawn vehicles which is objected to in the second objection, set forth above, is one which has repeatedly had the sanction of the courts. People v. MacWilliams, 91 App. Div. 176, 86 N. Y. Supp. 357; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L. R. A. (N. S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725. The purpose of a taximeter is to enable the occupant of the cab to determine the distance traveled and the rates of fare therefor. It is a matter of common knowledge that the distance traveled is more easily ascertainable in the case of horse-drawn than in the case of motor-driven vehicles.

[17] The fact that motor-driven vehicles designed to carry not more than four persons are required to have taximeters, while the same requirement is not made as to motor-driven vehicles of greater carrying capacity, cannot be said to be unreasonably discriminatory. The smaller cabs designed to carry a few persons are more generally engaged in transient business, while touring cars and sight-seeing vehicles designed to carry a larger number of persons are more generally employed to travel a fixed route between known points or are employed for a definite time at an agreed rate.

[18] In determining whether or not a provision of an ordinance is discriminatory, it is always to be borne in mind that regulations which are designed to promote public convenience are not to be condemned, and whether or not such regulations are adapted to this end rests largely within the discretion of the governing body of the city. City of Buffalo v. N. Y., L. E. & W. R. R., 152 N. Y. 276, 281, 46 N. E. 496.

[19] The objection that the ordinance fixes lower rates of fare for motor-driven vehicles than for horse-drawn vehicles the court cannot determine from the proof presented to be unreasonably discriminatory. It may be that there are those among the public who prefer the horse-drawn to the motor-driven vehicle and that if a lower rate than that prescribed for motor-driven vehicles were adopted the horse-drawn vehicle would cease to exist. If this be so, then the difference in rate would be justified, not on the ground that it gives the owner of the horse-drawn vehicles an advantage over his better equipped competitor, but on the ground that it was essential in order to have horse-drawn hacks operated at all, and thus make it possible to satisfy the demand of those who may prefer horse-drawn to motor-driven vehicles. Those engaged in operating horse-drawn vehicles are engaged in a different kind of public service from those engaged in operating motor-driven vehicles. The character of service being different, the provisions of the ordinance which place them in a different class are not on that account unreasonably discriminatory.

[20] The fourth objection urged relates to what is obviously a mere classification between vehicles of different character and in no way discriminates against any person.

There is not therefore anything in the provisions objected to that denies to any person or class of persons the equal protection of the laws. The distinctions made in the ordinance are not made arbitrarily, but are generally speaking a classification made with due regard to the acts sought to be regulated and bear a natural and reasonable relation to the objects classified. Such being the case it follows that the ordinance is not unreasonably discriminatory.

Finally, it remains only to consider the contentions of the plaintiffs that the ordinance is unreasonable and unjust and therefore void. The plaintiffs claim that it is unjust and unreasonable in the following respects:

First, it requires expensive meters; second, it imposes unreasonable penalties for incorrect meters; third, the requirements exacted of an applicant for a driver's license are unreasonable; fourth, that the provisions for the suspension and revocation of a driver's license are unreasonable; fifth, that the requirement that no person shall solicit passengers for a public hack or hacks upon the streets or highways of the city, except the driver of a public hack when sitting upon the box of his vehicle, is unreasonable; sixth, the prohibition against any one riding on the seat with the driver is unreasonable; seventh, that the rates, prescribed are so low as to make it impossible to operate motor vehicles at a profit, and that therefore the ordinance is unreasonable.

[21] 1. The requirement that meters shall be used has been shown by experience to be essential in order to check the frauds which might easily be perpetrated upon passengers. The commissioner of accounts of the city of New York and the commission appointed by the mayor of the city to investigate this whole subject of taxicab regulation have both reported that such frauds have been commonly committed. The requirement that meters shall be used is not only necessary if the frauds heretofore practiced are to be prevented, but is obviously so just and reasonable a regulation as not to justify further discussion.

[22] 2. If the requirement that meters shall be used is reasonable it follows as a corollary that the ordinance may impose penalties for the failure to comply with this requirement. The requirement of the ordinance is that correct meters shall be used. Meters of any other character would only serve to facilitate the perpetration of fraud. The penalties prescribed for a violation of the ordinance are reasonable and are such as have been commonly prescribed in similar cases by other municipalities.

[23] 3. The requirement that an applicant for a driver's license shall present a sworn testimonial as to his character by two reputable citizens and a further testimonial from his last employer, unless a sufficient reason is given for its omission, is a reasonable and wise requirement designed to afford protection to those who in using such vehicles are obliged to commit the safety of their persons and property to the care of such persons. In the opinion of the board of aldermen this requirement was deemed essential to securing competent and reliable men to operate such vehicles. The plaintiffs object to the ordinance on the ground that the abolition of private hack stands deprives them of the opportunity to protect their patrons, because they will no longer have any control or authority over those operating motor vehicles. This objection would not be without force if it were not for the requirement that the bureau of licenses should exercise care in the selection of such drivers and retain a measure of control over them after their appointment. Notwithstanding the fact that this provision is well calculated to protect the patrons and the guests of the plaintiffs and others, it is objected to by the plaintiffs on the ground that it will prohibit "many thoroughly competent and reliable men from pursuing this calling." In a careful report submitted to the mayor by the commission appointed to investigate the subject of the regulation and control of public hacks and hack stands, the commission in suggesting a proposed ordinance which has since been enacted into law, and which is the ordinance now under review, say:

"Proprietors of some of the large hotels object to the elimination of private stands, insisting that if this be done they cannot insure to their guests the safe and efficient service they have now. They fear that unaccompanied women using public hacks will not be so well protected and that the lost articles will not be so well handled. Their objections would be well founded if it were proposed merely to abolish the private stands without providing for much more thorough regulation than we have at present. We fully appreciate the fact that if the private stands be abolished the city must assume a much heavier burden of regulation, inspection and oversight of the general hack service than is imposed upon it at present. In other words, it will be necessary that the city administration shall so control and regulate

public hackmen that the proposed public hack service shall be at least equal in efficiency to the present private service. Such control is essential to the success of the change we recommend. It is therefore necessary, in considering the proposed ordinance which we submit, to read it at all times in connection with our views herein set forth."

4. The provisions of the ordinance giving to the mayor the power to suspend or revoke a driver's license is only a reasonable method of securing such continued control over such drivers as is essential to the protection of those using such vehicles.

[24] 5. The requirement that no person shall solicit passengers for a public hack upon the streets except the driver when sitting upon the box of his vehicle is obviously designed to prevent the annoyance of those near such hack stands and to prevent the drivers of such hacks from congregating upon the sidewalk in front of hotels and other public buildings, and by their solicitations obstructing traffic and making a nuisance of themselves to the patrons and guests of such hotels and to others going to and from such public buildings.

This requirement is in all respects reasonable and just, and is well adapted to secure the accomplishment of the purpose which the framers of the ordinance had in mind.

[25] 6. The prohibition against allowing any one to ride on the seat with the driver is a reasonable police regulation and will tend to promote the safety of those using such hacks. The argument that this provision confiscates physically a fractional part of the usable value of the cab loses sight of the reason which impelled the adoption of the provision. The reasons leading to the adoption of this prohibition are well set forth in the report made to the mayor by the commissioner of accounts in January, 1912, which has already been referred to. In that report it is said:

"Finally we would suggest that no license be granted by the bureau of licences to any cab or taxicab which is constructed with a seat beside the driver. The reason for this provision is obvious. Police records in all cities give evidence of robberies and assaults committed by hackmen with the assistance of companions. Section 324 of the ordinances provides that 'no licensed hackman shall carry any other person than the person first employing the hack without the consent of such passenger.' This section, however, is inadequate. There would appear to be no violation of the provision unless the passenger actually protests. At any rate, the passenger's acquiescence is quite sufficient. Most travelers in New York would, if requested by the driver, readily consent to his carrying an additional passenger so long as the latter was not to occupy a seat inside the vehicle. In a lonely spot the passenger inside would be quite helpless against two men. This practice, which is not uncommon, may be reduced to a minimum, we believe, by eliminating the possibility of any person sitting beside the driver of a cab or taxicab."

I have thus set forth at length the reasons which impelled the adoption of this provision because a mere statement of them shows that the requirement was adopted not arbitrarily, but as a necessary police regulation to secure the safety of passengers.

[26] 7. The contention that the rates prescribed are so low as to make it impossible to operate motor vehicles at a profit and are therefore unjust and unreasonable is urged in the briefs of the coun-

sel for the plaintiffs, under the contention that the rates prescribed are confiscatory. It has already been pointed out that this contention is founded upon a false assumption that those operating hacks under the former ordinances did so under a contract with the city and without regard to the fundamental distinction asserted at common law and recognized in our constitutional provisions between those engaged in conducting a private business and those the nature of whose business subjects their occupation to public regulation. This contention fell with the false assumption upon which it was founded when it appeared that the permits issued were not contracts conferring property rights, but revocable licenses, and that the rates of fare which the city attempted to prescribe related only to the business of hackmen who from time immemorial have been the subject of public regulation. If, however, the rates prescribed were in fact so low as to make it impossible to operate motor vehicles under them at a profit, that fact would tend to establish that the ordinance itself was unjust and unreasonable. The ordinance prescribes the following rates: For not more than two passengers for the first half mile or any portion thereof, 30 cents, and for each succeeding one-quarter mile or any portion thereof, 10 cents. For three or more passengers for the first half mile or any portion thereof, 40 cents, and for each succeeding one-sixth mile or any portion thereof, 10 cents. The affidavits submitted upon these motions fall far short of satisfying the court that the rates of fare prescribed are unjust and unreasonable. On behalf of the defendants evidence is adduced to show that such motor-driven vehicles can be operated at a profit upon the rates prescribed. Upon this question the motions present a sharp conflict of fact which should not be determined upon affidavits upon a preliminary hearing in advance of trial. When it is realized that the rates heretofore prevailing were necessarily so high as not only to pay a fair profit to those rendering service, but also to defray the large sums which these persons were accustomed to pay to those operating hotels in front of whose premises private hack stands were established, it is easy to understand that the rates heretofore prevailing represented a profit upon something other than the cost of rendering the service.

[27] Indeed, the plaintiffs contend that the rates of fare prescribed are confiscatory and unreasonable, not because they will not permit those rendering such services to receive a fair profit for the service rendered, but because they would fail to yield a fair return upon all the property employed by the corporation rendering the service. In short, the contention is that the rule declared by the United States Supreme Court for determining the reasonableness of rates in cases of a railroad corporation operating under a franchise are applicable to hackmen operating under a revocable license. The claim is too unreasonable, too clearly contrary to the fundamental principles which have been discussed above, to be entitled to further comment.

The contention advanced by the plaintiffs that the ordinance requires the driver to have been a resident of the city for at least a year and that it therefore violates article 4, § 2, of the federal Constitution, which provides that "the citizens of each state shall be entitled to all

privileges and immunities of citizens in the several states," is completely answered by pointing out that the ordinance does not contain such a requirement or prescribe conditions from which it can reasonably be inferred that such a requirement exists. The examination made of the objections urged to the ordinance shows that these objections are without merit and that the ordinance itself, in so far as its provisions are involved upon these motions, in no way offends against any constitutional or statutory provision or against any canon by which the validity of a municipal ordinance may justly be tested.

The ordinance was not hastily adopted. Careful and thorough examination and investigation of the whole subject-matter involved preceded the framing and adoption of the ordinance. Upon the whole the ordinance must be pronounced a serious and well-considered attempt to remedy abuses which have grown to such an extent as to make the application of a remedy imperative.

The motions are denied, with costs, and the temporary injunctions heretofore granted are vacated and set aside.

(81 Misc. Rep. 287.)

PEOPLE ex rel. KEENAN v. SCHULTZE, City Engineer.

(Supreme Court, Trial Term, Rensselaer County. June, 1913.)

MUNICIPAL CORPORATIONS (§ 218*) — VETERAN FIREMAN — APPOINTMENT TO POSITION—REMOVAL.

Where a veteran fireman was appointed by a city engineer to a position not provided for by the charter, and the board of estimate and apportionment took no action looking towards its creation or the salary thereof, the appointment is illegal, and relator is not protected from removal by the Civil Service Law (Consol. Laws 1909, c. 7).

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 589–598; Dec. Dig. § 218.*]

Petition by the People, on the relation of John Keenan, for writ of peremptory mandamus to Paul Schultze, City Engineer of the City of Troy. Petition denied.

Frederick C. Filley, of Troy, for relator.

Charles I. Webster, Corp. Counsel, John P. Judge, and Owen D. Connelly, all of Troy, for respondent.

RUDD, J. The relator seeks reinstatement as inspector of masonry and concrete upon the construction of the new Central School building. He contends that he was appointed to that position with salary of $4.80 per day, by the city engineer, and without cause removed therefrom; Joseph Brennan, not a party to this proceeding, having been appointed in his place, to perform the same work at the same salary. The relator asks that a writ issue to compel the city engineer to reinstate him, for the reason that at the time of his removal he was protected by the Civil Service Law (Consol. Laws 1909, c. 7), as a veteran fireman.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Much latitude was allowed relator in the taking of testimony under the issue. He showed notification by the city engineer that he, the city engineer, had appointed relator as an inspector, also a notice of the secretary of the municipal civil service commission that he had passed the civil service examination, and he presented evidence that the city of Troy, through its comptroller's office, had paid to him the compensation agreed upon as his salary. He was superseded in effect January 22, 1912, and Joseph Brennan assumed the duties as inspector on the same work at the same salary, which has been paid by the city.

It is claimed by the city that the employment of Brennan is by contract, and not by appointment; that the appointment of the relator was in violation of law, there being no power or authority vested in the city engineer to make such an appointment, and also that the relator was not protected by the Civil Service Law as a veteran fireman, for the reason that it does not appear that he had served five consecutive years as a fireman in a company duly incorporated and under the control of the state. There is no doubt but what the relator, so far as third persons were concerned, was in fact holding the position of inspector, and that he was recognized as such by the city.

In the question to be here determined, which involves in effect the title to the office, if it was an office, and particularly the consideration as to whether relator had legally been appointed, we must go further than simply to ascertain whether he was in fact acting as an inspector. It is not alleged in the petition that the city engineer had the power of appointment, although the proof shows that the city engineer assumed to make the appointment. It is alleged that the position of inspector was created, but it is not shown by whom it was created, unless it is for us to assume that the appointment by the city engineer was the creation of the position of inspector.

Such assumption would not be justified in fact or law. All subordinate positions, not named or provided for in the charter of second class cities, are created by the board of estimate and apportionment. That board creates the position and fixes the compensation. It is not for any official of the city to create positions and make appointments as in his official opinion it seems necessary. The very object of the law is to clothe one board, and that alone, with the power to provide the necessary servants as the demand arises.

There is no evidence that the board of estimate and apportionment took any action looking to the creation of this position which the relator filled, or took any action with reference to fixing or determining the salary of the position. The relator's appointment was illegal, and while he was in fact an inspector of masonry on a school building, he had no such title to the office as will give him the protection under the Civil Service Law which he here seeks.

In the opinion of the court, the solution of this question disposes of the case. The petition for a writ of mandamus is denied, with costs.

Petition denied, with costs.

In re FARLEY, State Com'r of Excise.

(Supreme Court, Special Term, Steuben County. September 13, 1913.)

1. INTOXICATING LIQUORS (§ 106*)—LIQUOR TAX CERTIFICATE—CANCELLATION—STATUTES.

Liquor Tax Law (Consol. Laws 1909, c. 34) § 36, providing for the cancellation of a licensee's liquor tax certificate on his conviction of designated offenses, must be strictly construed.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 113, 115; Dec. Dig. § 106.*]

2. INTOXICATING LIQUORS (§ 106*)—LICENSE—LIQUOR TAX CERTIFICATE—CANCELLATION—GROUNDS—"DISORDERLY HOUSE."

Laws 1910, c. 619, provides that whoever maintains a house of ill fame, or a place for the practice of prostitution or lewdness, or takes as lessee any house, room, or other premises for any such purposes, or shall keep a lewd, ill-governed, or disorderly house to the encouragement of fornication or other misbehavior, shall be guilty of a misdemeanor. Liquor Tax Law (Consol. Laws 1909, c. 34) § 36, subd. 7, declares that, if the holder shall be convicted of keeping a disorderly house, he shall forfeit his certificate. *Held* that, where the holder of a liquor tax certificate pleaded guilty to willfully, etc., allowing immoral women to entertain men in his saloon, which acts were known to him, and endangered public peace and outraged public decency, it sufficiently appeared that he was convicted of maintaining a "disorderly house," for which his certificate could be canceled.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 113, 115; Dec. Dig. § 106.*

For other definitions, see Words and Phrases, vol. 3, pp. 2108–2110.]

Petition by William M. Farley, as State Commissioner of Excise, for an order canceling liquor tax certificate No. 20,503, issued to John Vessa. Granted.

Arthur J. Ruland, of Binghamton (A. M. Sperry, of Binghamton, of counsel), for petitioner.

Thomas F. Rogers, of Corning, for defendant.

CLARK, J. On or about September 21, 1912, the treasurer of Steuben county, on proper papers being presented to him, issued to defendant, John Vessa, a liquor tax certificate authorizing him to traffic in liquors at the premises No. 78 West Market street in the city of Corning for the excise year ending September 30, 1913, and defendant conducted a business and was engaged in traffic in liquors under said liquor tax certificate at the premises aforesaid until on or about January 8, 1913, when he was indicted by the grand jury of Steuben county under an indictment containing two counts, the second count charging him with a violation of section 43 of the Penal Law (Consol. Laws 1909, c. 40), and particularly charging in said count:

That "the said John Vessa willfully and wrongfully and unlawfully on the 26th day of December, 1912, at No. 78 West Market street in the city of Corning, state and county aforesaid, did allow dissolute women to entertain men in his saloon at No. 78 West Market street for the purposes of prostitution; that said acts were to him known and did thereby endanger public

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

peace and openly outrage public decency against the peace of the people of the state of New York and their dignity."

Subsequently at a term of the Steuben county court, held on the 24th day of February, 1913, the defendant pleaded guilty to the second count of said indictment above quoted and was sentenced to pay a fine of $150.

This is an application to revoke the liquor tax certificate which had been issued to defendant because of said indictment and conviction, but defendant contends that the crime of which he pleaded guilty is not one of those specified in subdivision 7 of section 36 of the Liquor Tax Law (Consol. Laws 1909, c. 34), and that he has not been convicted of any crime which would authorize the revocation of his certificate.

[1] While it is true, as urged by defendant, that the section in question must be strictly construed, and any doubt arising must be resolved in favor of the accused (Matter of Rupp, 55 Misc. Rep. 313, 106 N. Y. Supp. 483), it seems to me there can be no doubt whatever, in view of the facts established in this case, as to the crime acknowledged by defendant by his plea of guilty. Subdivision 7 of section 36 of the Liquor Tax Law says in substance that, if the holder of a liquor tax certificate should be convicted of keeping a disorderly house, he shall forfeit the certificate held by him at the time of such conviction.

[2] Chapter 619 of Laws of 1910 provides, among other things, as follows:

"Whoever keeps or maintains a house of ill fame, or a place for the practice of prostitution or lewdness, or takes as lessee any house, room or other premises for any such purposes, or shall keep a lewd, ill-governed or disorderly house to the encouragement of fornication or other misbehavior shall be guilty of a misdemeanor."

The defendant plead guilty of—

"willfully and wrongfully and unlawfully allowing dissolute women to entertain men in his saloon at 78 West Market street, Corning, for the purposes of prostitution; that said acts were known to him; and that they endangered public peace and outraged public decency."

Giving the words their natural meaning, it is perfectly clear that defendant was convicted of keeping a disorderly house in violation of section 1146 of the Penal Law (Consol. Laws 1909, c. 40), as amended by Laws 1910, c. 619, and that would forfeit the liquor tax certificate held by him at the time of such conviction. Liquor Tax Law, § 36, subd. 7. The mere fact that the second count of the indictment charges a violation of section 43 of the Penal Law does not foreclose petitioner from claiming that defendant was charged with keeping a disorderly house, for he pleaded guilty to the whole of the second count of the indictment, and the facts as detailed therein would clearly bring the offense within the definition of a disorderly house and maintaining disorderly premises.

My conclusion is that the defendant by his plea was convicted of keeping a disorderly house within the meaning of the Penal Law, and that his liquor tax certificate should be forfeited. An order may be entered accordingly.

(82 Misc. Rep. 157)

REISTERER v. REISTERER et al.

(Supreme Court, Equity Term, Erie County. September, 1913.)

1. SPECIFIC PERFORMANCE (§ 59*)—CONTRACTS ENFORCEABLE—PERFORMANCE BY PLAINTIFF.
   Where, pending actions for the recovery of real estate, defendant placed in escrow with an attorney a deed with instructions to deliver to plaintiff when "lis pendens and civil actions are discontinued and agreement signed by both parties," plaintiff could not compel specific performance merely upon dismissal of the actions and cancellation of lis pendens, since he was not entitled to a conveyance until there was an "agreement signed by both parties."
   [Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 181; Dec. Dig. § 59.*]

2. FRAUDS, STATUTE OF (§ 55*)—REAL PROPERTY AND ESTATES THEREIN.
   It was for the purpose of accurately and definitely settling the terms and conditions of sales of real estate that the statute of frauds was originally enacted.
   [Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 82; Dec. Dig. § 55.*]

3. SPECIFIC PERFORMANCE (§ 94*)—PART PERFORMANCE BY PLAINTIFF.
   Where, pending actions for the recovery of real property, defendant placed in escrow with an attorney a deed with instructions to deliver to plaintiff when "lis pendens and civil actions are discontinued and agreement signed by both parties," the dismissal by plaintiff of the actions and cancellation of lis pendens was not such a part performance as to entitle him to specific performance, since, there having been no change of ownership, he was not prejudiced, as the actions could be restored by vacating the order of discontinuance.
   [Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 249–256; Dec. Dig. § 94.*]

Action for specific performance by Edward G. Reisterer against Lida L. Reisterer and another. Dismissed.

Norman D. Fish, of No. Tonawanda, for plaintiff.
W. B. Simson, of No. Tonawanda, for defendants.

BROWN, J. [1] On October 13, 1911, there were pending two actions wherein this plaintiff was plaintiff and the defendant Lida L. Reisterer was defendant, in which the plaintiff claimed an interest in certain real estate in the city of Tonawanda, the title to which was in the defendant Lida L. Reisterer; notice of the pendency of each of said actions had been filed and recorded in the office of the county clerk. On that day the plaintiff and the defendant Lida L. Reisterer met at the law office of E. B. Harrington, where a paper of which the following is a copy was signed by them:

"Tonawanda, N. Y., Oct. 13, 1911. E. B. Harrington—Dear Sir: The deed given by E. G. Reisterer to Lida L. Reisterer, and deed of Lida L. Reisterer to E. G. Reisterer are placed in escrow with you and are to be delivered when lis pendens and civil actions are discontinued and agreement signed by both parties. E. G. Reisterer. Lida L. Reisterer."

The deed from E. G. Reisterer to Lida L. Reisterer was signed by E. G. Reisterer but not acknowledged; the deed from Lida L. Reis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terer to E. G. Reisterer was not signed by Lida L. Reisterer and was without any conditions therein. With these deeds in this condition they were delivered to E. B. Harrington, together with the paper above quoted. The defendant Lida L. Reisterer thereafter refused to execute the deed thus left with Mr. Harrington. The plaintiff caused the discontinuance of each of said actions and the lis pendens therein to be canceled of record November 25, 1911. On December 5, 1911, the plaintiff joined with the defendant Lida L. Reisterer in the execution of several mortgages upon a part of the real estate described in the unexecuted deed then in the hands of Mr. Harrington. On February 5, 1912, the plaintiff brought this action to compel the defendant to convey to the plaintiff an undivided half of a part of the premises described in the unexecuted deed of Lida L. Reisterer and to compel the defendant to assume and pay one-half of the plaintiff's debts, and for judgment decreeing that on the death of Lida L. Reisterer her undisposed of interest in certain of such real estate should go to the plaintiff in trust for the defendant Frances M. Reisterer, and that upon the death of Lida L. Reisterer the plaintiff should have the life use of certain other of such real estate.

Upon the trial the plaintiff claimed that the conditions sought to be enforced by the decree asked for had been orally agreed to by the defendant, and that such oral agreement, together with the memorandum above quoted, constituted a valid contract of sale, the performance of which could be enforced by the court, upon the theory that the plaintiff had partially performed the same by discontinuing the prior actions and canceling the lis pendens filed and recorded therein. The defendant denied the making of any such agreement relative to conveying such real estate upon such conditions, assuming plaintiff's debts, the creation of a trust, or the giving of a life use of such real estate to the plaintiff.

Assuming that the memorandum is an agreement on the part of Lida L. Reisterer to execute the deed to plaintiff left with Mr. Harrington, it is observed that such deed is to be delivered only when "lis pendens and civil actions are discontinued and agreement signed by both parties." It is not the discontinuance of the prior actions and the cancellation of the lis pendens that entitled plaintiff to the conveyance, but it is the signing by both parties of an agreement reduced to writing embodying the conditions that the plaintiff now claims the defendant orally agreed to, but which the defendant denies.

[2] It was for the very purpose of accurately and definitely settling the terms and conditions of sales of real estate that the statute of frauds was originally enacted. It is of the greatest importance that the terms and conditions upon which title was to vest in the plaintiff under defendant's deed left in escrow should be exactly defined and unquestionably known; and apparently the parties realized such importance when they stipulated that the deeds were to be delivered only when this agreement as to such conditions should be definitely and accurately fixed by a writing to be signed by both parties. It is thus seen that the memorandum above quoted is a direction to the custodian of the escrow that when the parties shall have completed this agreement relative to the conveyance of the lands described in

the escrow deeds, and shall have had their minds meet as to the terms of such conveyance, providing for the life estates, trusts, and debts, and that when the provisions as to such matters shall have been reduced to writing and signed by the parties, then the deeds are to be delivered, and not before. Such time has not yet arrived; the court would not be warranted in decreeing that the defendant Lida L. Reisterer must execute and deliver to plaintiff a conveyance embodying plaintiff's claims as to the terms and conditions, when the parties by their written agreement have provided that such conveyance shall not be made until the parties shall have agreed in writing as to these conditions. The court cannot make a new contract for these parties. They have stipulated that there should be no conveyance until they agree in writing what the terms of such conveyance should be; the court cannot say that there must be a conveyance in any particular form until the parties specify what that form is; the court cannot compel a specific performance of an agreement not made; the terms of the agreement specifying the conditions upon which the conveyance was to be made were to be reduced to writing and signed by both parties; those terms and conditions are unknown. The paper of October 13, 1911, was merely a direction to the custodian of the deeds providing for their delivery when the parties had agreed in writing as to the manner the title to be conveyed should be held. The parties have failed to make such agreement.

The fact that plaintiff joined in the execution of the mortgages to the loan association does not prejudice him; he executed the mortgages upon the execution by defendant of her last will and testament willing all her property to him.

[3] The discontinuance of the prior actions and the canceling of the lis pendens by the plaintiff is not such part performance on his part as to entitle him to specific performance. He has not been prejudiced by such discontinuance; the defendant's interest in the property has not changed. The plaintiff having parted with nothing by such discontinuance, his claim can be restored to him simply by vacating the order of discontinuance. He must be restored to the same situation as when he discontinued his prior actions; the orders discontinuing those actions and canceling the lis pendens must be set aside and the lis pendens restored to their former status.

The plaintiff is entitled to judgment vacating and setting aside the stipulations and orders of discontinuance and the order canceling the lis pendens and restoring such actions and the lis pendens therein to their former status; in all other particulars his complaint must be dismissed, but without costs. Let findings be prepared.

(158 App. Div. 87)

VAN DENBERG v. SCOTT.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. FRAUD (§ 48*)—DAMAGES—PLEADING IN MITIGATION—NOTE AS OFFSET.
In an action of tort for false representations made by defendant in the sale of property, in which the plaintiff claimed damages for the full purchase price paid, including an unpaid note for a portion thereof, the fact that defendant still owned the note and that it was unpaid could be set up in the answer so that it might be considered in assessing the damages.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 43; Dec. Dig. § 48.*]

2. FRAUD (§ 50*)—ACTIONS—PRESUMPTION.
In an action for damages by misrepresentations as to property sold to plaintiff by the defendant, the presumption is that the seller was still the holder of an unpaid note, given for part of the purchase price, which was in his possession at the trial.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.*]

3. APPEAL AND ERROR (§ 1151*)—DISPOSITION OF CAUSE—MODIFICATION OF JUDGMENT.
In an action for damages for misrepresentations as to property sold to plaintiff by defendant, it appeared that the seller held the buyer's unpaid note for part of the purchase price. The buyer's damages were assessed on the theory that the whole purchase price had been paid, including the note, which plaintiff refused to allow to be deducted from the judgment. *Held*, that it was proper, under Code Civ. Proc. § 1317, authorizing the court to modify, as well as to affirm or reverse, judgments, to order a reversal provided plaintiff should not agree to a modification deducting the note from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4506; Dec. Dig. § 1151.*]

Appeal from Trial Term, Schenectady County.

Action by Frank A. Van Denberg against Vedder C. Scott. Judgment for plaintiff (78 Misc. Rep. 281, 138 N. Y. Supp. 149), and defendant appeals. Reversed, and new trial granted, with the proviso that, if plaintiff shall agree to a modification of the judgment, the judgment may be modified and affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

R. J. Cooper, of Schenectady, for appellant.

N. B. Spalding, of Schenectady, for respondent.

LYON, J. This action was brought to recover damages on account of false and fraudulent representations alleged to have been made by defendant to plaintiff in connection with the sale of a coal and ice business and the personal property connected therewith. The purchase price thereof was $5,300, of which the plaintiff paid the defendant $4,000 in cash and the remaining $1,300 by giving to the defendant the promissory note of the plaintiff of date January 18, 1912, indorsed by Ida L. Perry, plaintiff's sister, payable four months after date to the order of the defendant at the Citizens' Trust

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company, Schenectady, N. Y. There was served with the summons March 28, 1912, a notice that the plaintiff rescinded the contract of purchase consummated January 18, 1912, upon the ground of false representations made by the defendant to the plaintiff as an inducement to the plaintiff to enter into the contract. The notice demanded the immediate restoration of the sum of $5,300 and the collateral which secured the same and tendered to the defendant the property so purchased. The plaintiff entered upon the coal and ice business January 22d and carried it on until April 20, 1912, when he practically closed it and disposed of the greater part of the property. The note was duly presented for payment May 20th, and payment demanded, which was refused, whereupon the note was duly protested for nonpayment.

The answer herein was served May 22d and denied the making of false and fraudulent representations, but made no reference to the promissory note, except to claim that, by reason of the plaintiff having tendered a return of the property purchased and having demanded the return of the note and of the money, he had made an election of remedies and could not maintain the action. The answer also denied that the plaintiff had suffered damage in the sum of $5,300. Upon the trial of the action in September, 1912, the defendant produced the note with notice of protest and introduced them in evidence. In the charge the trial justice stated as follows:

"Considerable has been said about the $1,300 note. That note has been given for the balance of the purchase price. Four thousand dollars has been paid. At the time the answer was filed, that $1,300 note was not due, and so the defendant's counsel takes the position that he could not plead it as an offset or counterclaim, and he has not seen fit at the trial to take the position that it should be considered as an offset in any respect in the case. Therefore, in considering the question of damages, gentlemen, you must, on the theory on which the attorney for the defendant has tried the case, look upon it as a payment. It has not been collected; it is outstanding. We haven't any proof as to who is the present owner of it. Presumably it belongs to the man to whom it was given, but other proof is not here. So, as far as you are concerned, you will consider that the entire purchase price has been paid; and if the defendant holds this note judgment goes against him. It is for him to see that the $1,300 is offset against the damages. So that, if you should take the $1,300 out of any damages you saw fit to give the plaintiff, you would put it in position so it would be taken out twice. If you make an award of damages, make it as if that $1,300 had been paid the same as the $4,000 has concededly been paid."

Later the following appears in the record:

"Defendant's Attorney: I except first to your honor's charge, the substance of which I cannot state exactly, that part of your honor's charge that refers to the $1,300 note, in which you say in substance that it is a part of the plaintiff's damage. The Court: I say that it is to be taken as if it had been paid, on account of the position you have taken in the trial. You may have your exception. Defendant's Attorney: I except to the charge as made in that respect and I request your honor to charge that the plaintiff has not been damaged to the extent of that $1,300 because he has not paid it, and therefore it cannot be considered damages to him until he is compelled to or does pay it. The Court: I refuse to so charge because of the theory upon which it has been tried by the defendant and because the note is outstanding and the court is not informed who is the present owner of it. Defendant's Attorney: It was produced in court by the defendant. The Court: It proba-

bly is the defendant, but that position has not been taken by the defendant at all. Defendant's Attorney: I except to the refusal to charge as requested. The Court: If both attorneys agree it can be very well dealt with in this case, but it cannot be, as I think, without an amendment of the answer. So I will leave the charge as it is and give you your exception."

The jury then rendered a verdict in favor of the plaintiff for $1,800, whereupon the following took place:

"The Court: You make that finding under the instructions of the court without regard to the note, whether that is collected or not, do you? The Foreman: We did. The Court: This is the loss considered as if the note were part of the purchase price? The Foreman: Part of the purchase price. Defendant's Attorney: I move that the verdict be set aside and a new trial directed upon the following grounds, in addition to all the grounds stated in section 999 of the Code: On the grounds that the evidence in the case as to the damages was indefinite and uncertain; that there was no correct measure of damages that the jury could ascertain from the evidence; and the other grounds stated in the section. On the further ground that the $1,300 note held by the defendant, made by the plaintiff and indorsed by one Ida L. Perry, should have been taken into consideration by the jury in fixing the measure of damages. The Court: That could not have been done under the theory under which the defendant tried the case. You notice that the $1,800 is the difference between your witness' estimate of the value of the property and the selling price exactly. They have allowed $3,500. The motion is denied. (Defendant excepts.)"

Upon the argument of this appeal, the defendant, claiming that the note was worthless, produced it and tendered it to the appellee's attorney, asking that it be received in reduction of the judgment. The statement that the note is uncollectible seemed to be borne out by the fact that it has not been paid, and that the plaintiff is not willing that it should be applied in reduction of the judgment, and in fact the claim of its worthlessness was not strenuously questioned upon the argument. Plaintiff's attorney declined to accept the tender of the note, saying he had no authority from his client to accept it. The court thereupon directed defendant's attorney to file the note with the clerk of this court, which he did; the court telling plaintiff's attorney to consult his client in regard to accepting the note in reduction of the judgment and, if he consented to do so, to so advise the court. The tender of the note has not been accepted by the plaintiff, and the note still remains in the possession of the clerk of the court. The suggestion was made upon the trial that the defendant had not seen fit at the trial to take the position that the note should be considered as an offset in any respect in the case.

[1] As the action was in tort, it is difficult to see how the note could have been pleaded as an offset or counterclaim. However, the answer might have alleged the giving of the note as part of the purchase price; that it had been protested for nonpayment, which occurred two days prior to the service of the answer; that it was uncollectible; and that it was still held by the defendant, and had demanded that it be taken into account in connection with any verdict which might be rendered in favor of the defendant in the action.

[2] Practically these facts did appear, as the presumption was that, the note having originally been given to the defendant and being in his possession upon the trial, he was the holder thereof. The plain-

tiff having failed to comply with the terms of the contract, his right to recovery was restricted to the damages which he had in fact sustained and which the jury found to be $1,800 only in the event of the payment by him of the $1,300 note, or in effect $500 in case the note were treated as not paid.

[3] To allow the plaintiff to avoid the payment of the $1,300 note and to enforce the collection of the verdict for $1,800 in face of the declaration of the jury would be a rank injustice. The case calls for the exercise of the power vested in this court by the provisions of section 1317 of the Code of Civil Procedure.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to appellant, unless plaintiff within ten days from the service upon his attorney of a copy of the order granted by this court shall file a stipulation with the clerk of this court, accepting tender of said note and stipulating that $1,300 be deducted from the face of the judgment appealed from, in which event the judgment as so modified should be affirmed, without costs of this appeal to either party. All concur, except SMITH, P. J., not voting.

(158 App. Div. 110)

PEOPLE ex rel. MERCANTILE SAFE DEPOSIT CO. v. SOHMER, Comptroller.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. TAXATION (§ 376*)—CORPORATE FRANCHISE—MODE OF COMPUTATION—"DIVIDEND."

A corporation, of whose capital stock $300,000 had been issued, in 1875 purchased the good will, business, and lease of another company, which it succeeded in business, for $200,000. The lease was subsequently modified, renewed, and extended for a period of 50 years from January 1, 1901, with the privilege to the lessee of a further extension of 50 years. The lessor, to secure the surrender of such lease, paid such corporation $1,050,000 and gave a new lease for 23 years, subject to termination by either party on six months' notice. The corporation divided this sum among its stockholders and then reduced its capital stock to $100,000. In a proceeding to assess its franchise tax, there was no evidence as to the value of the lease which it purchased or the value of the lease for 23 years, and there was testimony indicating that the lease purchased was in force only until 1876, when a new lease was obtained. *Held* that, under Tax Law (Consol. Laws 1909, c. 60) § 182, providing for a franchise tax to be computed upon the basis of the amount of the capital stock employed "during the preceding year" within the state and upon each dollar of such amount at the rate of one-fourth of a mill for each 1 per centum of dividends made or declared upon the par value of the capital stock during the year, the amount paid for the surrender of such lease, less $200,000, was a "dividend," since it was no part of the capital but was a product of capital representing the corporation's profit on its lease.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629–631; Dec. Dig. § 376.*

For other definitions, see Words and Phrases, vol. 3, pp. 2143–2147.]

2. TAXATION (§ 376*)—CORPORATE FRANCHISES—MODE OF COMPUTATION.

Such franchise tax for the year during which such distribution and such reduction in the capital stock was made should have been computed upon the basis of $300,000 as the amount of the capital stock em-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ployed during the preceding year, since "during the preceding year" evidently means "within the preceding year" and does not require that all of the capital stock must be employed during the entire year in order to furnish the basis for the computation of the tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629–631; Dec. Dig.§ 376.*]

3. TAXATION (§ 376*)—CORPORATE FRANCHISES—MODE OF COMPUTATION.

There being no testimony as to the value of the lease purchased by such company, such value should not be deducted from the price for which the lease was surrendered to ascertain the profits, especially in view of the facts that, in addition to the sum paid, the company obtained a new lease for 23 years, the value of which was not taken into consideration, and that the testimony indicated that the lease purchased was in force only until 1876.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629–631; Dec. Dig. § 376.*]

Original certiorari proceeding by the People, on relation of the Mercantile Safe Deposit Company, against William Sohmer, as Comptroller of the State of New York, to review his proceedings in determining a franchise tax against the relator. Determination of the Comptroller confirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Alexander & Green, of New York City (Allan McCulloh and Campbell E. Locke, both of New York City, of counsel), for relator.

Thomas Carmody, Atty. Gen. (Franklin Kennedy, Deputy Atty. Gen., of counsel), for respondent.

LYON, J. The relator was incorporated in December, 1875, under the laws of this state, with an authorized capital stock of $500,000, only $300,000 of which was ever issued. Immediately following its incorporation it purchased from the Mercantile Trust Company, which was carrying on the business of safe-keeping and guaranteeing personal property in the building of the Equitable Life Assurance Society at No. 120 Broadway in the city of New York, for the sum of $200,000, the good will, business, and lease of that company, and itself at once engaged in the prosecution of such business. The remaining $100,000 received from the sale of its capital stock the relator invested in dividend-paying securities and the same is still so invested. In January, 1883, the relator and the Equitable Society entered into a leasehold agreement which was the subject of later modifications, and which in October, 1900, was renewed and extended for the period of 50 years from January 1, 1901, with the privilege to the relator of a further extension of 50 years. During the months of January, April, and May, 1910, the relator paid to its stockholders dividends aggregating $38,250, or 12¾ per cent. upon its issued capital stock.

As one of the results of the insurance investigation of 1905, it appeared that the relator was paying but $23,000 yearly rental for premises, the rental value of which was $95,000 per annum, and accordingly an action was brought by the new management of the Equitable Society to obtain a cancellation of this lease. The suit was settled on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

or about May 1, 1910, by the relator surrendering the lease and the Equitable Society paying to the relator the sum of $1,050,000 and giving a new lease for the term of 23 years with the privilege to either party, at any time, of terminating the lease by giving to the other party six months' notice of its desire so to do. May 2, 1910, the relator divided pro rata among its $300,000 holders of stock said $1,050,000 and in July, 1910, reduced its capital stock to $100,000. Concededly the capital stock of relator has at all times been worth at least par.

In fixing the amount of the annual franchise tax to be paid by the relator under the Tax Law (Consol. Laws, c. 60) § 182, the State Comptroller deducted from the said $1,050,000 the sum of $200,000 as representing the capital of the relator invested in its lease, good will and business, being the sum at which the same had been carried as an asset upon the books of the company, and treated the division of the same as a division of capital or assets, and treated the balance of $850,000, together with the sum of $38,250, the amount of the prior dividends, declared by the relator as before stated, or the total of $888,250, as the aggregate of the dividends made or declared by the relator during the year ending October 31, 1910, and assessed the same as the dividend paid upon $100,000 of capital stock, or at the rate of 888¼ per cent., and fixed the tax to be paid by relator at $22,206.25. The Comptroller having refused to revise and readjust said assessment, the relator has brought the matter before us for review.

The relator in its petition for the writ of certiorari complains that the Comptroller erred in two particulars: (1) In treating $850,000 of the said $1,050,000 as a dividend made or declared within the meaning of section 182 of the Tax Law; and (2) in assessing the tax upon the sum of $100,000 as being the par value of the capital stock of the petitioner during the year ending October 31, 1910.

[1] The first ground of complaint does not seem to be well founded. The sum of $850,000 was no part of the capital but was the product of capital. It was derived from an increase in value of the assets of the company. It represented the profit of relator upon its lease, and its division among the stockholders constituted a dividend from surplus profits. Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 77 N. E. 13, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213; Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796; People ex rel. Pullman Co. v. Glynn, 130 App. Div. 332, 114 N. Y. Supp. 460, affirmed 198 N. Y. 605, 92 N. E. 1097; Commonwealth v. Western Land & Improvement Co., 156 Pa. 455, 26 Atl. 1034.

[2] As to the second ground of complaint we think the tax should have been computed upon the basis of $300,000 as the amount of the capital stock of relator employed during the preceding year. That sum was the amount of the relator's capital stock from November 1, 1909, to July 7, 1910, a period of 8 months and 6 days, and $100,000 was the amount of relator's capital stock from July 7, 1910, to October 31, 1910, a period of 3 months and 24 days. The dividends for the year, aggregating $888,250, were declared and paid before the reduction of the capital stock to $100,000 and constituted dividends of 296 1/12 per cent. to each holder of the $300,000 of capital stock. The statute requiring the payment to the State Treasurer, annually in ad-

vance of an annual tax "to be computed upon the basis of the amount of its capital stock employed during the preceding year within this state, and upon each dollar of such amount," should not be construed as requiring that all such capital stock must be employed during the entire year in order to furnish the basis for the computation of the tax. The expression "during the preceding year" was evidently used in the sense of "within the preceding year." Such seems to have been the construction given to it by the court in People ex rel. N. Y. C. & H. R. R. Co. v. Gaus, 200 N. Y. 328, 93 N. E. 988, in which it was held that the franchise tax should be computed upon the basis of the whole outstanding stock at the end of the tax year, and as a 6 per cent. stock, although about 20 per cent. of the stock had been outstanding but ten months and had paid a less dividend than 6 per cent., but at that rate per annum.

In the proceeding at bar the Comptroller assessed the dividends which had been paid to the holders of $300,000 of stock aggregating 296 1/12 per centum of the par value of the stock at three times that per centum, or at 888¼ per centum, upon one-third such amount of capital stock, claiming that under the case of People ex rel. N. Y. C. & H. R. R. Co. v. Gaus, supra, the amount of dividends paid must be assessed upon the amount of stock outstanding October 31, 1910, as the Comptroller had to assume that the amount of the then outstanding stock was the amount which would be employed the succeeding year. While the amount of tax to be paid by the relator would be the same in each case, we think the Gaus Case cannot be considered an authority for the proposition contended for. The question was not there up for determination, and in that case the capital stock of the relator was as large on October 31st as at any time during that tax year. We think the statute did not necessarily contemplate computing the tax upon the amount of the capital stock outstanding on October 31st. Such practice might give rise to abuses upon the part of corporations. The statute requires that the computation be upon the basis of the amount of the capital stock employed during the preceding year, within this state and upon each dollar of this amount, and that the tax shall be at the rate of one-fourth of a mill for each 1 per centum of dividends made or declared upon the par value of the capital stock during the year. As all the dividends were declared by the relator upon the whole $300,000 of stock and aggregated 296 1/12 per centum thereof, we think that was the basis which should have been adopted by the Comptroller in making the computation.

[3] In its brief the relator suggests that the value of the lease purchased by it from the Mercantile Trust Company should also be deducted from the sum of $1,050,000 in case the court should hold that such sum, less the price paid for the good will, business, and lease, constituted profits. The value of the lease so purchased by relator in 1875 was not attempted to be shown upon the hearing and there is nothing in the evidence from which its value can be ascertained.

Furthermore, the president of the relator testified that relator's original lease with the Equitable was obtained by it in 1876, which would indicate that the lease purchased by it from the Mercantile Trust Company was in force only to the time of procuring its original lease

in 1876. But, upon the other hand, relator received as consideration for the surrender of its lease not only the sum of $1,050,000, but also a lease for 23 years, the value of which the Comptroller did not take into consideration in fixing the amount of franchise tax. Possibly the value of each was difficult of determination or it may have been thought advisable to offset one against the other. In any event, no evidence whatever was offered as to the value of either lease, and both were entirely disregarded by both parties and hence are not to be considered by us upon this appeal.

We therefore conclude that the determination of the Comptroller should be confirmed. All concur.

(158 App. Div. 102)

SEARS v. SOVIE.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. LANDLORD AND TENANT (§ 161*)—PROPERTY OF TENANT LEFT ON PREMISES—RIGHTS OF TENANT.

A tenant of farm land did not convert stacks of hay thereon, owned by a former tenant which he had failed to remove during the term, by forbidding him to enter on the land for the purpose of removing them at a time when the land was soft and the wagon wheels cut ruts from 2 to 12 inches deep, since the former tenant was a trespasser, and the present tenant simply exercised dominion and control over the real property of which he was rightfully in possession to the extent only of forbidding the former tenant to enter thereon at an unsuitable time when such entry would do serious damage.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 627, 628; Dec. Dig. § 161.*]

2. TROVER AND CONVERSION (§ 4*)—NATURE AND ELEMENTS OF "CONVERSION."

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the alteration of their condition or the exclusion of the owner's rights.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 25–37; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 2, pp. 1562–1570; vol. 8, p. 7618.]

Appeal from St. Lawrence County Court.

Action by Charles Sears against Daniel P. Sovie, brought in justice's court. From an order of the County Court and the judgment entered thereon, reversing the judgment of the justice's court in favor of defendant and directing a new trial before another justice, defendant appeals. Order and judgment of the County Court reversed, and judgment of the justice's court affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Edward P. Lynch, of Ogdensburgh, for appellant.

Forrest K. Moreland, of Ogdensburgh, for respondent.

LYON, J. [1] During the year ending February 29, 1912, the plaintiff was the lessee of his father's farm of about 40 acres, situated

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the town of Oswagatchie, St. Lawrence county. The defendant became the tenant of the farm for the following year, commencing March 1, 1912. The plaintiff, when he removed from the farm, left in the meadow two small stacks of hay. Early in June he came with his team and wagon, drove through the meadow, a distance from 1,800 to 2,100 feet, and drew away three loads of hay. The meadow was somewhat soft and the wagon wheels cut ruts therein from 2 to 12 inches deep. When the plaintiff came to get a fourth load, the following conversation occurred, according to the testimony of plaintiff:

"Q. State the conversation that you had with Mr. Sovie at that time. A. He simply just stopped me. He said for me to keep off the premises. I did not answer him. I did not go back again."

Early in August the plaintiff brought this action in justice court to recover the value of four or five tons of hay, still remaining in the stacks. The answer was a general denial. Upon the trial the justice dismissed the complaint, with costs. Upon appeal the County Court reversed the judgment of the justice court as against the weight of evidence and ordered a new trial before another justice. From the order and judgment of the County Court this appeal has been taken. In our opinion the judgment of the justice court was right and should have been affirmed. The plaintiff was a trespasser in entering the meadow. He says that the reason why he did not draw the hay off during his term was that he was moving and had a lot of things to do and the roads were bad. This did not excuse him from not drawing the hay off the premises during his term, or in at least drawing it to the highway where he could have obtained it without doing damage to defendant, or in drawing it from the meadow early in the spring, when doing so would not seriously injure defendant's crop. Defendant's objection to plaintiff drawing the hay at that time was apparently based solely upon the injury which would thereby be done to the growing crop of grass which defendant testified would cut from two to three tons to the acre. Plaintiff does not seem to have proposed to make defendant good for any damage which defendant might sustain by having the hay drawn across the meadow, and defendant was not obliged to suffer this damage and trust to the results of a lawsuit and to the responsibility of the plaintiff for remuneration for such loss under penalty of being held liable for the value of the hay as having exercised dominion over it. The plaintiff has never demanded the hay or sought at any other time to take it away, and the defendant has never interfered with the hay or done anything to reduce it to his ownership or possession, except as is claimed to have resulted from the above detailed conversation. If defendant was justified at the time and under the circumstances in refusing to allow plaintiff to go upon the land occupied by defendant to draw the hay away, he cannot be said to have converted the property.

[2] Conversion at law is defined to be:

"An unauthorized assumption and exercise of the right of ownership over goods or personal chattels, belonging to another to the alteration of their condition, or the exclusion of the owner's rights." Industrial & General Trust v. Tod, 170 N. Y. 233, 63 N. E. 285.

In the case at bar the defendant simply exercised dominion and control over the real property of which he was rightfully in possession and to the extent only of forbidding the plaintiff to enter thereon at an unsuitable time, when such entry would do the defendant serious damage.

We think that under the circumstances the defendant was justified in doing as he did and cannot thereby be held liable for a conversion of the property. We have examined the cases cited by the respective counsel, but in none of them were the facts similar to those in the case at bar. The finding of the justice was not against the weight of evidence and the County Court erred in reversing the judgment and ordering the new trial.

The order and judgment of the County Court should be reversed, and the judgment of the justice court affirmed, with costs to the appellant in this court and in the County Court. All concur.

(158 App. Div. 105)

PAYNE v. LEHIGH VALLEY R. CO.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. MASTER AND SERVANT (§ 180*)—LIABILITY FOR INJURIES—NEGLIGENCE OF "VICE PRINCIPAL."

Under Railroad Law (Consol. Laws 1910, c. 49) § 64, providing that, in actions against a railroad corporation for personal injuries to an employé or death resulting therefrom, it shall be held that persons intrusted by such corporation as a part of their duty for the time being, with physical control or direction of the movement of a locomotive engine, car, train, etc., are vice principals of the corporation and not fellow servants of the injured or deceased employé, the engineer of a freight train was a vice principal as to the conductor of such train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359–361, 363–368; Dec. Dig. § 180.*

For other definitions, see Words and Phrases, vol. 8, pp. 7313–7316.]

2. MASTER AND SERVANT (§ 278*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an action for the death of the conductor of a freight train from injuries sustained while between two cars for the purpose of uncoupling them, evidence that the engineer of the train, after allowing the engine to remain at rest for several minutes, without giving any warning suddenly reversed it, although a rule of the company provided that the engine bell must be rung when an engine was about to move, supported a finding of negligence on the part of the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an action for the death of the conductor of a freight train caused by injuries sustained while between two cars for the the purpose of uncoupling them, evidence as to a projecting bolt and the defective condition of the coupling apparatus and the sill of one of the cars *held* to make a question for the jury as to defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. § 286.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. MASTER AND SERVANT (§ 106*)—LIABILITY FOR INJURIES—DEFECTIVE APPLIANCES.

A railroad company was not relieved of liability for the death of an employé caused by defects in a freight car, which was being drawn over its road, by the fact that such car was not its own.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 193–198; Dec. Dig. § 106.*]

5. MASTER AND SERVANT (§ 289*) — ACTIONS FOR INJURIES — QUESTIONS FOR JURY.

In an action for the death of the conductor of a freight train caused by injuries sustained while uncoupling cars by the backing of the train, evidence *held* sufficient to make a question for the jury as to whether deceased was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. § 289.*]

Smith, P. J., dissenting.

Appeal from Trial Term, Madison County.

Action by Alice M. Payne, as administratrix of Frederick Payne, deceased, against the Lehigh Valley Railroad Company. From a judgment for plaintiff and order denying a motion to set aside the verdict and for a new trial, defendant appeals. Affirmed.

Argued before SMITH, P. J., and LYON, HOWARD, and WOODWARD, JJ.

Taber & Brainard, of Auburn, for appellant.

Miller & Matterson, of Syracuse, for respondent.

LYON, J. On the evening of January 29, 1910, an extra freight train of defendant, of which plaintiff's intestate was the conductor, became stalled in the snow on the upgrade at Black Tavern crossing while on its way from Cortland to Canastota. For the purpose of lightening the load upon the engine, and with a view of drawing the train in sections and placing a portion of it upon a siding not far from the crossing, the engineer directed the train uncoupled about eight cars back from the engine, which was about the middle of the train, and then endeavored by backing and pulling to move this section of the train, but was unable to do so. After three or four attempts had been thus made, decedent, who stood on the crossing watching the engineer's efforts, stepped between a box car and a gondola car, two or three car lengths from the rear of the shortened train, for the purpose of uncoupling these cars and further relieving the engine. While decedent was between these cars the engineer backed the engine, and decedent was caught between the cars, and a bolt, which projected from the box car, was forced through the walls of his abdomen, causing a hemorrhage which produced his death a few minutes later. This action has been brought by his administratrix to recover damages on account of his death. The trial resulted in a judgment for the plaintiff.

The material points relied upon by the defendant as grounds for a reversal of the judgment are the absence of negligence upon the part of defendant, the negligence of decedent, exceptions to rulings of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trial justice, and the improper action of plaintiff's counsel during the trial of the action.

[1] As to the negligence of the defendant, the engineer was not a fellow servant of the decedent for whose negligence the defendant was not responsible, but in operating the engine he was a vice principal as to the conductor. Railroad Law (Consol. Laws 1910, c. 49) § 64.

[2] That the evidence fully justified the finding of the jury that the defendant was guilty of negligence cannot be seriously questioned. Rule 30, governing the operating of defendant's trains, provided:

"The engine bell must be rung when an engine is about to move."

Concededly no warning signal was given by the engineer before backing his engine at the time decedent was injured. Witnesses called by the plaintiff testified that, after the last unsuccessful effort to move the section of the train, the engineer allowed his engine to remain at rest for several minutes and then, without giving any warning that he was about to move the engine, suddenly reversed it, inflicting the injury which caused decedent's death.

[3] Furthermore, it appears that attached to the front sill of the box car, which was a foreign car, by four bolts were two blocks one above the other, each about 4½ inches in thickness, constituting what was commonly known as a dead block or stop block, underneath which the drawhead was located, and that one of these bolts, bearing two nuts and a washer, projected 3½ inches beyond the face of the dead block and three-fourths of an inch beyond the surface of the outside nut, which some of the witnesses testified was an unusual projection not commonly to be found upon such cars upon defendant's road.

[4] The fact that a car which is being drawn over its road was not its own does not relieve a defendant from liability for the consequences of a defect which exists thereon. Gottlieb v. N. Y., L. E. & W. R. R. Co., 100 N. Y. 462, 3 N. E. 344. Attached to the rear sill of the gondola, which was defendant's car, were two iron bumpers, or dead blocks, 12 inches in thickness, between which the drawhead was located. One of plaintiff's witnesses testified that in such a construction the drawheads became bumpers and took all the resistance of the cars when they came together, and that, when the drawheads were in good condition and coupled together, there was sufficient room for a man to stand sideways between the dead blocks of the two cars and reach over the coupler and get hold of the angle cock of the air hose. The space between these cars, within which a person uncoupling them might safely stand, was lessened by this projecting bolt and was much more lessened by the defective condition of the coupling apparatus and the shattered condition of the sill of the gondola; certain witnesses testifying that the timbers constituting the draft rigging underneath the car had spread so that when a coupling was made the drawhead was no longer held 10 or 12 inches from the sill, as it should have been, but was forced back against the sill, wearing the sill away to the depth of several inches and allowing the drawhead to be driven back into the sill and to be forced under the car 6 or 7 inches farther

than it would have been had the coupling apparatus and the sill been in proper condition. There was evidence also that there was no fresh cutting of the sill apparent, but that the surface was dark, indicating that such condition had existed for some time. If defendant could have discovered the defective condition of the coupling apparatus by reasonable and proper tests, care, and inspection, it must be deemed to have had knowledge thereof before and at the time decedent's injury was sustained, and when proven upon the trial constituted prima facie evidence of negligence upon the part of defendant. Railroad Law, § 64, supra. The effect of lessening by six or seven inches the space between the cars within which decedent might safely stand is apparent in view of the testimony of the surgeon, who examined the body of decedent, that the penetration of the bolt into the body did not exceed one inch. While the evidence introduced by the plaintiff as to the negligence of the defendant was more or less controverted by the proofs of the defendant, yet such issue was clearly one for the determination of the jury.

[5] A more serious question arises as to the negligence of plaintiff's intestate. By a rule of the defendant he was responsible for the movements and safety of his train which on a stormy winter evening in January was stalled in the snow on an upgrade, blocking the track. There was but one trainman to assist him; the other having been sent to the rear of the train with a flag. The engineer having failed in several attempts to move the eight cars, it became necessary to lessen the number, and decedent thereupon stepped between the cars to uncouple them. He gave no signal to the engineer of his intention and, as the injury on the right side of the abdomen would indicate, was undoubtedly standing sideways, facing the rear of the train for the purpose of reaching across the coupling and closing the angle cock of the air hose with his right hand, when the engineer forced the cars together. It is the claim of the defendant that, in going between the cars to uncouple them, decedent was acting outside the line of his employment; that he was endeavoring to perform the act in an improper and careless manner; and that he was negligent in stepping between the cars without having given the engineer the stop signal, indicating that the train was not to be moved until a further signal had been given. In support of these contentions defendant calls attention to certain of defendant's rules, introduced in evidence, with which concededly decedent was familiar. None of these rules, however, in any way prohibited a conductor from coupling or uncoupling cars, but upon the other hand provided that conductors must assist in making up their trains when necessary. The duties of decedent, instead of having been supervisory, as appellant contends, seem to have been active and general, as indicated by the rules introduced in evidence, extending even to the unloading of freight, in which work the trainmen were by rule required to assist the conductor. The plaintiff introduced evidence to the effect that the manner in which decedent was attempting to perform the act of uncoupling the cars and closing the angle cock, which latter act was advisable, was the customary one upon defendant's railroad, and that, had the cars been in proper condition, there

would have been sufficient space within which decedent might have stood and performed the operation in safety. Defendant called witnesses who testified that it was decedent's duty to give the stop signal before stepping between the cars. Upon the part of plaintiff, however, there was testimony to the effect that, the engineer having held the engine passive for several minutes, decedent had the right to conclude that the engineer had abandoned the attempt to move the eight cars, and that the engineer as vice principal would observe the rule requiring him to give a signal by ringing the bell when about to move the engine, and hence that it was safe for decedent to enter between the cars and uncouple them without decedent having first given the stop signal. Of two disinterested witnesses who were watching the train, one testified that the engine stood still from three to five minutes, and the other that it stood still from four to five minutes before backing up at the time decedent was caught between the cars. That decedent had the right to expect that rule 30 would be observed after the engine had become passive is also established by the testimony of the engineer, as follows:

"We keep trying to move it (the engine) until we come to the conclusion ourselves that we can't move it; then we give it up and let the engine lie dormant. Before we move our engine again in any way we are supposed to give a signal. When the engine has been at a standstill, the signal on the Lehigh requires that the bell shall be rung before the engine is moved."

Evidence was also introduced by plaintiff that it was customary upon defendant's road, when an engine had remained stationary for three or four minutes after backing and filling, for a person to walk between cars without signaling the engineer, and that it was also customary under such conditions for the engineer to give a signal before moving his engine. Under a fair construction of the evidence most favorable to plaintiff, to which she is entitled upon this appeal, the question as to the negligence of the decedent was plainly one for the consideration of the jury.

The charge of the trial justice was able and impartial and clearly covered all the issues involved, and there are no exceptions calling for a reversal of the judgment. While some of the remarks of plaintiff's counsel made during the trial of the action, of which defendant complains, are perhaps justly the subject of criticism, yet we do not think that the rights of the defendant were seriously prejudiced thereby.

The verdict was fully warranted by the evidence, and the judgment and order appealed from should be affirmed. All concur, except SMITH, P. J., dissenting. KELLOGG, J., not sitting.

SCHULTHEIS v. SCHULTHEIS et al.

(Supreme Court, Special Term, Kings County. September, 1913.)

WILLS (§ 302*) — ACTIONS TO ESTABLISH LOST WILLS — SUFFICIENCY OF EVIDENCE.

Under Code Civ. Proc. § 1861, authorizing actions to procure a judgment establishing a will where a will of real or personal property, or both, has been so executed that it might under the laws of this state be admitted to probate, but has been lost or destroyed by accident or design, section 1862 providing that, if the facts necessary to establish the validity of a will as prescribed in the preceding section are satisfactorily proved, final judgment must be rendered establishing the will accordingly, and section 1865 providing that the plaintiff is not entitled to a judgment unless the will was in existence at the time of the testator's death or was fraudulently destroyed in his lifetime, and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness, where there was no attempt at any proof that the will sought to be established was fraudulently destroyed in the testator's lifetime and the evidence to show its existence at the time of the testator's death was scanty, unconvincing, and conflicting, judgment would be denied.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700–710; Dec. Dig. § 302.*]

Action by Mary Schultheis against William H. Schultheis and another to establish a lost will. On application for judgment by default. Denied.

E. W. C. Cunningham, of Brooklyn, for plaintiff.

BENEDICT, J. This action is brought under the provisions of section 1861 et seq. of the Code of Civil Procedure to establish the last will of Henry Schultheis, who is alleged to have died on January 12, 1913, a resident of the borough of Brooklyn, leaving both real and personal property within this state.

The plaintiff is the widow and the defendants are two sons of the decedent. The defendants have failed to appear or plead in the action and the papers were submitted to the Special Term for ex parte applications after such default upon depositions of witnesses sworn to before the court but not testifying orally.

It is alleged that the testator executed a will in favor of his wife more than 20 years before his death, and it is sought to prove the contents of that document, which it is attempted to show was lost shortly before the decease of the alleged testator. In order to maintain this action, the facts necessary to establish the validity of the will, as prescribed in section 1861, must be satisfactorily proved (section 1862). Section 1865 provides as follows:

"But the plaintiff is not entitled to a judgment, establishing a lost or destroyed will, as prescribed in this article, unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime; and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness."

The proofs submitted do not satisfy the court that the will was in existence at the time of the testator's death, and there is no attempt at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any proof that it was fraudulently destroyed in his lifetime. In fact, the evidence in support of the first proposition is quite unsatisfactory (Collyer v. Collyer, 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405; Matter of Kennedy, 167 N. Y. 163, 60 N. E. 442), and the court would not be justified in pronouncing a judgment establishing a will upon such scanty, unconvincing, and conflicting evidence, especially as some of it is incompetent as well as insufficient. The affidavit of service upon the defendant Robert B. Schultheis is defective in several particulars, and there is no proof at all in support of the allegation that the defendants are the only heirs at law and next of kin of the testator.

These last are matters of minor consequence, however, and might be remedied if the court held other views as to the merits of the proceeding than those indicated above; but, holding these views, I am compelled to deny the application.

(82 Misc. Rep. 165)

PEOPLE ex rel. ROBIN v. HAYES, Warden of Penitentiary.

(Supreme Court, Special Term, Ulster County. September 11, 1913.)

1. OFFICERS (§ 73*)—IMPEACHMENT—NATURE OF FUNCTION.
The power of impeachment is a judicial power vested in the Assembly, in which the Governor and Senate cannot participate, and is not a legislative subject.
[Ed. Note.—For other cases, see Officers, Cent. Dig. § 100; Dec. Dig. § 73.*]

2. STATES (§ 52*)—IMPEACHMENT OF GOVERNOR—WHEN POWER MAY BE EXERCISED.
The Constitution empowers the Assembly to impeach the Governor, but it does not specify when the power shall be exercised, and the Assembly is the sole judge of the time as well as the grounds for impeachment, free from control by the executive or the courts.
[Ed. Note.—For other cases, see States, Cent. Dig. §§ 43, 57; Dec. Dig. § 52.*]

3. STATES (§ 52*)—IMPEACHMENT OF GOVERNOR—POWER OF ASSEMBLY TO CONVENE ITSELF.
The Assembly, having been given the judicial power by the Constitution of impeaching the Governor, without limitation as to the time the function shall be exercised, may convene itself for that purpose, though without power to do so ordinarily, as the conferring of a general power carries with it every particular power necessary for its exercise.
[Ed. Note.—For other cases, see States, Cent. Dig. §§ 43, 57; Dec. Dig. § 52.*]

4. STATES (§ 52*)—IMPEACHMENT OF GOVERNOR—EXTRAORDINARY SESSION OF ASSEMBLY.
The impeachment of the Governor by the Assembly while in extraordinary session is valid, though Const. art. 4, § 4, provides that no subject shall be acted on at such a session except such as the Governor recommends, and it had not been recommended, as the power of impeachment is a judicial and not a legislative power and one that should always be independent of outside control.
[Ed. Note.—For other cases, see States, Cent. Dig. §§ 43, 57; Dec. Dig. § 52.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. PARDON (§ 4*)—"IMPEACHMENT" OF GOVERNOR—EFFECT ON POWER TO PARDON.

Under Const. art. 4, § 6, providing that "in case of the 'impeachment' of the Governor * * * the powers and duties of the office shall devolve upon the Lieutenant Governor * * * until the disability shall cease," after "impeachment," which is a method of procedure in a criminal case against a high official, the reins of government are transferred to the Lieutenant Governor, and a pardon granted by the Governor while under impeachment is void.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 4–6½; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 4, pp. 3419, 3420; vol. 8, pp. 7681, 7682.]

6. HABEAS CORPUS (§ 19*)—PROCEEDINGS REVIEWABLE—VALIDITY OF PARDON.

It is the duty of a court or judge having jurisdiction to entertain proceedings in habeas corpus to protect the liberty of a prisoner, though his right depends on a pardon, in passing on the validity of which a different conclusion may be reached as to the powers of the Governor while under impeachment from that of the Court of Impeachment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 19.*]

7. HABEAS CORPUS (§ 92*)—SCOPE OF INQUIRY—PARDON BY GOVERNOR WHILE UNDER IMPEACHMENT—VALIDITY OF IMPEACHMENT.

In habeas corpus proceedings by a prisoner to secure his freedom on the strength of a pardon, the court has no jurisdiction to inquire into the sufficiency of charges for which the Governor was under impeachment when the pardon was issued, nor whether the proceedings were properly conducted, unless at their foundation the Constitution is violated.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. § 92.*]

8. HABEAS CORPUS (§ 65*)—LEGISLATIVE RESTRICTIONS UPON HABEAS CORPUS—WHERE WRIT MAY BE MADE RETURNABLE.

The right of a court or justice having jurisdiction to grant writs of habeas corpus to protect the liberties of the people cannot be restricted by the Legislature, and the writ may be made returnable to another county than that in which the prisoner is restrained, though a court be in session in that county, regardless of legislative provisions.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 58, 59, 80; Dec. Dig. § 65.*]

Habeas corpus by the People, on the relation of Joseph G. Robin, against Patrick Hayes, Warden of New York Penitentiary. Writ quashed, and relator remanded.

Benjamin F. Tracy, William S. Bennet, and Robert D. Ireland, all of New York City, for relator.

A. R. Watson, of New York City (Asst. Dist. Atty. Clarke, of counsel), for respondent.

John T. Norton, of Troy, for the Attorney General.

Lynn J. Arnold, of Albany, amicus curiæ.

Edgar T. Brackett, of Saratoga Springs, for Managers of Impeachment, amicus curiæ.

HASBROUCK, J. A writ of habeas corpus was granted to Joseph G. Robin, a prisoner in the New York penitentiary, upon formal petition, and a writing, purporting to be a pardon of the said Robin,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

signed, "William Sulzer, Governor of the State of New York," and attested by the seal of the state. The warden of the penitentiary has made return to the writ in accordance with its terms and has set forth, among other things, that Governor Sulzer has been lawfully impeached, and that the Lieutenant Governor, Martin H. Glynn, only is competent to discharge the duties of the executive office. Counsel for the relator in support of the writ stand alone upon the pardon. There is no question but that the pardon is sufficient warrant for the restoration of the prisoner to his liberty if Governor Sulzer possessed the authority to grant it.

On the part of the relator, it is pointed out, and there is no dispute of the fact, that on or about the 16th day of June, 1913, Governor Sulzer called an extraordinary session of the Legislature, and that it convened, and has not yet adjourned sine die, and that the Assembly, on or about August 11, 1913, voted to impeach the Governor, and thereafter presented articles of impeachment to the Senate. The journal of the Assembly shows that it had been in session and regularly adjourned to the time and place when the vote of impeachment was had. Against the legality and constitutionality of such act of the Assembly, the relator makes but one objection; i. e., that it is in violation of section 4 of article 4 of the Constitution, which provides:

"The Governor * * * shall have power to convene the Legislature, or the Senate only, on extraordinary occasions. At extraordinary sessions no subject shall be acted upon except such as the Governor may recommend for consideration."

It is urged that this provision contains a prohibition against the consideration by the Assembly of the subject of impeachment; that one of the purposes was to hinder the Assembly when in such extraordinary session from impeaching the Governor; that the only time when the Assembly could consider the subject of impeachment was when it was in regular session; and that it has no power to convene and sit except at regular and extraordinary sessions. In other words, having adjourned sine die in any year, it is without power, no matter what hideous acts of crime or monstrous acts of tyranny or usurpation a Governor may be guilty of, to set the machinery of his punishment in motion until the stated day of the meeting of both branches of the Legislature.

[1] The subject of impeachment, like the power of a legislative body to punish for contempt, has a different character from subjects requiring the action of both branches of the Legislature and of the Governor in order that laws may be enacted. The power conferred upon the Assembly to impeach the Governor is a judicial power. Speaking of the division of powers under our Constitution, Judge Rapallo of the Court of Appeals says:

"Notwithstanding this general division of powers, certain powers in their nature judicial are, by the express terms of the Constitution, vested in the Legislature. The power of impeachment is vested in the Assembly." People ex rel. McDonald v. Keeler, 99 N. Y. 482, 2 N. E. 615, 52 Am. Rep. 49.

The power of impeachment, therefore, being a judicial power of the Assembly, cannot be participated in by the Governor or the Senate,

and therefore does not constitute a legislative subject. Having no power in the premises, an acting Governor could not call the Assembly into session for the purpose of impeaching an absent Governor. Neither is the Assembly shorn of its impeaching power by the summons of the Legislature in extraordinary session. The whole design of constitutional government would fail of protection of popular rights and relief from oppression and wrong against those in exalted place, if there were no independence nor power in the Assembly to make impeachments.

[2] Judge Cooley, in his great work on Constitutional Limitations, says:

"In considering state Constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed." Cooley's Cons. Lim. (3d Ed.) 36.

The measure of the power of our rulers in the Assembly as respects the Governor is that it may impeach him. Once impeached, that function ends. What time during its yearly office, the Constitution does not specify. The Assembly is the Assembly, whether in regular or extraordinary session or whether self-convened. It is the sole impeaching functionary, and in its exercise of power it is beyond the let or hindrance of the executive or the courts. It is the exclusive and final judge of the occasion or time it shall select to impeach, and of the acts of the Governor it may specify as grounds for impeachment. This great power is political. History is replete with illustrations of its use and abuse. It is reserved to the state for its preservation and the destruction of its enemies and is beyond the control of every court except the court empowered to try the impeached and find his guilt or innocence. Martin v. Mott, 12 Wheat. 29, 6 L. Ed. 537; Matter of Guden, 171 N. Y. 529, 64 N. E. 451; People ex rel. Broderick v. Morton, 156 N. Y. 136, 50 N. E. 791, 41 L. R. A. 231, 66 Am. St. Rep. 547.

[3] The argument that the Assembly clothed with the power to impeach has no power to convene itself for such purpose has little to commend it, for it is at war with that interpretation of our federal and state Constitutions which have made them equal to all the vicissitudes involved in a century and a third of national life. Judge Cooley has stated the rule with precision:

"Where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is conferred." Cooley's Cons. Lim. p. 63; People ex rel. McDonald v. Keeler, 99 N. Y. 463, 2 N. E. 615, 52 Am. Rep. 49.

The case of People ex rel. Carter v. Rice, 135 N. Y. 485, 31 N. E. 924, 16 L. R. A. 836, does not aid the contention of the relator. Judge Peckham in it says:

"The Constitution provides for the assembling of the Legislature on the first Tuesday in January in each year. When it adjourns sine die, has not the session of the Legislature ended? The term of office of its members may not have ended, but the legislative session has certainly terminated by an adjournment without day. It could not again assemble and perform any valid

act unless the Governor, under the special power given him by the Constitution, should convene it."

This language has reference only to the Legislature. It was not written of or concerning the Assembly as an independent state body exercising a function of a judicial character.

[4] These considerations lead to the conclusion that the Governor has been lawfully and constitutionally impeached.

[5] The relator claims that, even so, disability does not fall upon the Governor until the court has tried the issues raised by the articles and the plea thereto.

The common-law and statutory right of the accused to the presumption of innocence is invoked as being at war with an interpretation of the Constitution that would warrant the suspension of the Governor from his office. Professor Dwight, in writing of impeachments in England and under the Constitution of the United States, says of the impeached:

"The law still presumes his innocence." Am. Law Reg. N. S. vol. 6, p. 261.

But there is a wide difference between the state and the national Constitution on the result of the impeachment of the Governor or President. The President by impeachment is not suspended in or ousted of his functions, and therefore the rule of the presumption of innocence remains undisturbed. Under our Constitution, if our interpretation of it be correct, this fundamental rule in the criminal law is invaded. For the Constitution provides (article 4, § 6):

"In case of the impeachment of the Governor, or his removal from office, by death, inability to discharge the powers and duties of said office, resignation, or absence from the state, the powers and duties of the office shall devolve upon the Lieutenant Governor for the residue of the term, or until the disability shall cease."

The presumption of innocence may still be claimed by the accused, but he is quite as effectively shorn of his power by this provision, which needs no interpretation and which is perfectly clear, as if a judgment of eviction had been passed against him, unless he is acquitted. For what is disability following impeachment under this section but suspension, and what is suspension but removal from office? It seems an unjustifiable and unreasonable provision. For delay in the prosecution to the end of the term works the same result in the main that judgment of removal would, and delays in such proceedings have been known to be long. The impeachment proceeding against Warren Hastings lasted 13 years. However full of or wanting in reason, the province of the court is only to say what the law is. It holds section 6 to be self-executory and to transfer the reins of power from the hands of the Governor to the Lieutenant Governor. There is no doubt about the meaning of the word "impeachment." It is a method of procedure in a criminal case against a high official. Article 4, § 6, Con. State of New York; Article 6, § 13; Am. Law Reg. N. S. vol. 6, p. 261; Webster's Works, vol. 5, p. 513; Elliot's Fed. Debates, vol. 5, p. 329. Entertaining these views, the conclusion follows that Governor Sulzer was without authority

to grant the relator a pardon, and that the paper purporting to grant it is void.

[6, 7] It was suggested to the court, on the argument by one of the distinguished counsel for the management of the impeachment, that the court ought to refuse to entertain the proceedings for the reason that there might arise a conflict between the Court of Impeachment and the Supreme Court upon the question of where the right to discharge the duties of the executive office reposed at the date of the pardon. The difficulty with the suggestion lies in the fact that the primary duty of the court here is to investigate the right of the prisoner to release from his imprisonment. To accept the suggestion would be to invade his privilege to the great shield of liberty. Has the Court of Impeachment any jurisdiction to grant and sustain or quash this great writ? Clearly it has not. The duty of the court or judge with jurisdiction, then, is to entertain the proceeding. It can protect the liberties of the prisoner. It has no jurisdiction to inquire into the sufficiency of charges for which a Governor may be impeached, nor, I take it, whether the proceedings looking to that end were properly conducted, unless at their foundation, in their exercise, constitutional guaranties are broken down or limitations ignored. Story on Const. Law, §§ 374 and 379.

[8] The objection that the writ was improperly made returnable at Kingston has not been overlooked; and since the argument I have re-examined the objections which occurred to me at the time of its issuance. Before the issuance of the writ, my attention was not called to People ex rel. Whitman v. Woodward et al., 150 App. Div. 770, 135 N. Y. Supp. 373, decided May 2, 1912, as a support to the objection raised by the learned corporation counsel. The right of a justice to make a writ returnable in another county than that in which the prisoner is restrained, where a court is in session in such county, not neglecting appreciation of the learned opinion in the Hyde Case, still remains in doubt. The Appellate Division in the Second Department has held, if I correctly apprehend its substance, that the Legislature had no power to place restriction upon the use of the writ by judges in courts having jurisdiction to grant it (People ex rel. Patrick v. Frost, 133 App. Div. 180, 117 N. Y. Supp. 524) and decided in accordance with its opinion. But in the Hyde Case, while it stated the law quite the other way, its decision did not conform to its view, for it issued no prohibition against Judge Woodward acting on the return in the habeas corpus proceeding. Since then, and on June 21, 1912, the Court of Appeals has decided the case of People ex rel. Martin F. Hubert v. Harry M. Kaiser, 206 N. Y. 46, 99 N. E. 195, in which the writ issued by Judge Gerard to the warden of Dannemora Prison required him to produce Brandt before the judge in New York. This decision, though the question was not discussed in the court's opinion, would seem to approve at least the jurisdiction of Judge Gerard in the premises. To attempt to regulate where, in the state, the writ of habeas corpus should be made returnable and the issue tried is to place its privileges under legislative control and to deny them to the citizen. This is not per-

missible. People ex rel. Tweed v. Liscomb, 60 N. Y. 567, 19 Am. Rep. 211. Conditions may arise where local feeling is so intense or the domination of local officials so complete that a fair trial of the issues under a writ might not be possible. The question should have the authoritative utterance of the Court of Appeals.

Writ quashed, and relator remanded.

(81 Misc. Rep. 416.)

GENEVA MINERAL SPRINGS CO., Limited, v. STEELE et al.

(Supreme Court, Equity Term, Ontario County. June, 1913.)

1. COSTS (§ 276*)—STAY OF PROCEEDINGS—WAIVER.

Where defendant's motion to amend a judgment entered by plaintiff on appeal to the Appellate Division was granted with costs, and it was necessary that an appeal by him to the Court of Appeals be taken during the stay of plaintiff's proceedings under Code Civ. Proc. § 779, authorizing such stay until payment of costs, the fact that defendant took steps necessary to preserve his right of appeal did not waive his rights under the stay.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1045–1047, 1058–1060; Dec. Dig. § 276.*]

2. COSTS (§ 276*)—STAY OF PROCEEDINGS—EFFECT.

Where plaintiff, after an order restraining him from proceeding further has been served upon him, retaxes his costs and takes other proceedings, such retaxation and proceedings, except those in relation to an appeal taken by defendant will be vacated.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1045–1047, 1058–1060; Dec. Dig. § 276.*]

Action by the Geneva Mineral Springs Company, Limited, against Charles A. Steele, impleaded with others. Motion for retaxation of costs. Decreed according to opinion.

See, also, 156 App. Div. 879, 140 N. Y. Supp. 1120.

Myron D. Short, of Canandaigua, for plaintiff.

William S. Moore, of Geneva, for defendant Steele.

SAWYER, J. Upon April 26, 1913, a Special Term order was granted on defendant's motion amending a judgment on appeal to the Appellate Division, theretofore entered herein by plaintiff.

[1] The situation here presented has arisen from the effort of plaintiff's attorney to offset the $10 costs of motion there allowed against his general costs of the action. This is contrary to the well-established rule governing the practice in relation thereto. Marshall v. Meech, 51 N. Y. 140, 10 Am. Rep. 572; Tunstall v. Winton, 31 Hun, 219; Gibbs v. Prindle, 11 App. Div. 471, 42 N. Y. Supp. 329. The order was entered in the office of the clerk of Ontario county upon the 2d day of May, 1913, and a copy with notice of its entry on the same day served upon plaintiff's attorney by mail. Plaintiff not having paid the costs provided therein, all further proceedings in the action upon its part became automatically stayed after the 15th day of May following. Code Civ. Proc. §§ 779–798; Reeder v. Lockwood, 30 Misc.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Rep. 531, 62 N. Y. Supp. 713. On May 6th plaintiff taxed the costs of appeal and caused same to be included in the judgment theretofore entered, and upon the 12th served same, together with a notice of retaxation, upon defendant's attorney, which retaxation was noticed for the 21st day of May. Such taxation of costs and notice of retaxation was properly made, for, as above stated, the stay of proceedings did not become operative until after 13 days from service of the order upon counsel.

As soon as notice of taxation of the costs and of their retaxation was received, defendant's attorney noticed this motion to vacate and set them aside on the ground that same had been irregularly had, and procured from a justice of this court an order specifically staying all plaintiff's further proceedings until its hearing and determination. These motion papers, together with the staying order so obtained, were served upon plaintiff's attorney personally upon the 17th day of May, 1913. Disregarding, however, both the operation of section 779 of the Code of Civil Procedure and the specific injunction of the restraining order, that attorney at the time fixed in his notice, namely, May 21,1913, proceeded to and did retax his costs. There was no intention of wantonly violating either the statute or the order of the Supreme Court justice involved, for he insists that neither was then in effect because defendant's attorney had, by taking onward steps in the action, waived all benefit of either stay.

It appears that defendant's time in which to appeal to the Court of Appeals from the judgment as amended would have expired upon the 20th day of May, 1913, and that on or about the 15th he filed a notice of such appeal, together with an undertaking with the county clerk, and afterward, and on the 20th day of May, 1913, served them upon plaintiff's attorney.

The question is thus squarely presented as to whether, by adopting this precaution, defendant waived the various stays in his favor and opened the door for any and all proceedings which plaintiff might subsequently desire to adopt; that, by taking the steps necessary to preserve his right to appeal, defendant waived the stays to the extent of allowing plaintiff to meet and protect itself against the appeal is undoubted. Mattice v. Shelland, 76 App. Div. 236, 78 N. Y. Supp. 537. It was there held that section 779 was not intended to prevent a party moved against from asserting his natural legal right of self-defense, but the court refused to determine whether such a stay was wholly or only partially waived by onward acts of the party in whose favor it existed, or, if the latter, to define the extent of the waiver.

None of the cases to which my attention has been called by counsel goes beyond this doctrine of self-defense (Verplanck v. Kendall, 47 N. Y. Super. Ct. 513; Eisenlord v. Clum, 52 Hun, 461, 5 N. Y. Supp. 512; Reeder v. Lockwood, supra; Dout v. Brooklyn Heights R. R. Co., 84 App. Div. 618, 82 N. Y. Supp. 996), and I have failed to discover any authority, other than the opinion of certain text-book writers, which does.

In the case at bar defendant's situation demanded that his appeal be taken during the operation of the stay. Instead of relying upon the prohibition of section 779, as he might have done, he followed the

appeal with the precautionary measure of a judge's order, thereby giving plaintiff full notice that it was not intended to in any manner disturb the existing status, except in so far as same might be affected by the appeal itself. To hold that by such appeal defendant waived all his rights under the stay, whether involved with the appeal or otherwise, would seem not in accord with the intent of the Code or the ordinary principles of law. The general doctrine of implied waiver is based on the necessities of a given situation and is simply a presumption that by one's acts the relinquishment of existing known rights inconsistent therewith is intended. Further than this it does not go, and under its mantle one laboring under the disability of a statutory stay, while entitled to defend himself against attack, would not appear to be privileged to extend that license beyond the requirements of his defense.

[2] In the lack of authoritative precedent on the subject and the consequent uncertainty of practice, plaintiff might, however, very well have assumed that it was justified in treating the appeal as a waiver of all restraint under section 779 upon his further proceedings in the case. Such view, however, ought not to have been taken of the enjoining order with which it had been served. This order was granted after the notice of appeal and undertaking had been filed with the clerk and was served upon plaintiff's attorney four days before the costs were retaxed by him. The justice granting the order was accessible and could readily have been reached had it been desired to vacate or modify it. Instead of doing this counsel proceeded to retax in accordance with his expressed intention upon the theory that the notice of appeal served upon him the day before the costs were retaxed and three days after he received the restraining order freed him from obeying its direction. Both the command of, and the reason for, the order should have been understood by him and full opportunity to preserve his rights by suitable application have been afforded. Whatever its effect may have been upon the stay existing under section 779, the appeal did not operate, under such circumstances, to abrogate the restraint of the order or relieve plaintiff from the necessity of adopting the usual and orderly practice for its modification, if oppressive.

In so far as it is sought to vacate the taxation of costs had upon May 6th, the motion is denied. The retaxation of costs and all other proceedings taken by plaintiff in this action after May 15, 1913, except those had in relation to the appeal and undertaking, are vacated and set aside, with costs of this motion.

Ordered accordingly.

(158 App. Div. 319.)

PEOPLE ex rel. CITY OF NEW YORK v. DEYO et al., Board of Assessors.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. MUNICIPAL CORPORATIONS (§ 958*)—TAXATION—PROPERTY SUBJECT—STATUTORY PROVISIONS.

Greater New York Charter (Laws 1901, c. 466) § 480, providing that lands taken for furnishing a water supply to the city shall be assessed and taxed in the counties in which they are located "exclusive of the aqueducts," was not repealed by Laws 1905, c. 598, providing that all lands in Ulster county, thereafter acquired by the city of New York for the purpose of furnishing a supply of water for such city, shall be assessed and taxed in the towns where situated in the same manner as other real property owned by persons and individuals in such town, or by chapter 724, authorizing the acquisition by the city of New York of lands or interest therein for the construction of reservoirs, dams, aqueducts, etc., for the purpose of supplying an additional supply of pure and wholesome water for such city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2023–2037; Dec. Dig. § 958.*]

2. MUNICIPAL CORPORATIONS (§ 958*)—TAXATION—PROPERTY SUBJECT—CONSTITUTIONAL PROVISIONS—"GENERAL LAW"—"GENERAL CITY LAW"—"SPECIAL CITY LAW."

Greater New York Charter (Laws 1901, c. 466) § 480, providing that lands taken for constructions necessary for furnishing a water supply to such city shall be assessed and taxed in the counties in which they are located in the manner prescribed by law, "exclusive of the aqueducts," was not repealed by the provision of Tax Law 1909 that property of a municipal corporation situated outside its corporate limits shall be subject to taxation, in view of Laws 1909, c. 596, § 1, providing that all special laws in force at the time of the enactment of the consolidated laws shall be of the same force as they were before such enactment, and Const. art. 12, § 2, providing that laws relating to the property, affairs, or government of cities are divided into general and special city laws, "general city laws" being those which relate to all cities of one or more classes, and "special city laws" those which relate to a single city, or less than all the cities of a class, since the New York Charter, although a public law, is not a "general law," which is one that operates throughout the state upon all the people or upon all of a class.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2023–2037; Dec. Dig. § 958.*

For other definitions, see Words and Phrases, vol. 4, pp. 3065–3071; vol. 8, pp. 7669, 7670.]

3. MUNICIPAL CORPORATIONS (§ 967*)—TAXATION—PROPERTY SUBJECT—MUNICIPAL PROPERTY.

Where an aqueduct owned by a city and used to supply it with water was exempt from taxation, a discharge pipe or blow-off, through which the water in the aqueduct might be drawn off and discharged into a creek, if it constituted an essential part of the aqueduct and was necessary to its operation, was also exempt.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2062–2067; Dec. Dig. § 967.*]

Appeal from Special Term, Ulster County.

Certiorari by the People, on relation of the City of New York, against Abraham Deyo and others, constituting the Board of Assessors of the Town of Gardiner, Ulster County. From an order dis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

missing the writ, the relator appeals. Reversed, and assessment of relator stricken from the roll.

Argued before SMITH, P. J., and KELLOGG, LYON, and WOODWARD, JJ.

Archibald R. Watson, of New York City, for appellant.

Hector Sears, of Gardiner (Augustus H. Van Buren, of Kingston, of counsel), for respondents.

LYON, J. The important question at issue upon this appeal is whether the aqueduct constructed by the city of New York, to convey water from the Ashokan reservoir in the county of Ulster to the city of New York, is exempt from taxation. Pursuant to the provisions of chapter 724 of the Laws of 1905, said city has acquired title to a continuous strip of land extending from said reservoir to said city. The portion thereof extending through the town of Gardiner, Ulster county, is about 200 feet wide and 7 miles long, and contains about 160 acres. Throughout the length of the strip in said town said city has laid a concrete tube or aqueduct, upwards of 17 feet inside diameter, through which the water is to be conveyed. The city has also acquired title to about 28 acres of adjoining land, upon which it has constructed a concrete tube about 7 feet in diameter, leading from the aqueduct to Walkill creek, termed a blow-off, through which the water in the aqueduct may be drawn off and discharged into the creek. Upon both said strip and parcel of land are other structures erected by the city, the nature of which is not disclosed, and is perhaps immaterial upon this appeal. The respondents assessed said strip and parcel of land at $61,000, and in their return to the writ of certiorari state that in determining the value thereof they considered the cost and value of the aqueduct, blow-off and buildings, and the uses for which they were designed, but did not fix a separate value upon either, but considered them with and as a part of the entire property, and fixed the value of the land accordingly. The matter was submitted to the Special Term, upon the petition and return. The court dismissed the writ upon the ground that the aqueduct and blow-off were taxable. This we think was error.

[1] Section 480 of the Greater New York Charter (chapter 466, Laws of 1901), provided that lands theretofore taken or to be taken for constructions, necessary for furnishing a water supply to the city—

"shall be assessed and taxed in the counties in which they are or may be located, in the manner prescribed by law, exclusive of the aqueducts."

The respondents contend that this provision was repealed by chapters 598 and 724 of the Laws of 1905, and also by the General Tax Law (Consol. Laws, c. 60, Laws 1909, c. 62). Neither act expressly repeals the provision in question, nor can either be said to repeal it by implication.

[2] Furthermore, the acts of 1905 were special acts. The general tax law of 1909 provided that all the property of a municipal corporation situated outside the corporate limit should be subject to taxation. Respondent's counsel cite, as authority for their contention that

the provision above cited of section 480 of the Greater New York Charter was repealed by implication by the General Tax Law, the Matter of City of New York v. Mitchell, 183 N. Y. 245, 76 N. E. 18. In that case the court reviewed the various statutes from 1840 to and including chapter 466, § 480, of the Laws of 1901, relating to exemption from taxation of the city of New York, for property belonging to it situate outside the municipal limits, and held that the General Tax Law of 1896 (Laws 1896, c. 908) took away the exemption which had theretofore existed in favor of said city as to such property; that in 1897 (chapter 378), the Legislature restored to the city such exemption from taxation as it had previously enjoyed, under special legislation, and that by chapter 466 of the Laws of 1901 it withdrew the exemptions, and left the municipal property not within the corporation subject to assessment and taxation, exclusive only of the aqueducts. Section 1 of Chapter 596 of the Laws of 1909, provided that:

"All special laws in force at the time of the enactment of such consolidated laws, shall be of the same force and effect as they were before the enactment of such consolidated laws."

However, the respondent contends that the Greater New York Charter is not a special law, but was a public act, and hence was not saved by the provision above quoted, apparently assuming that the terms "general law" and "public law" are synonymous. Such, however, is not always the case. While a general law is necessarily a public law, every public law is not necessarily a general law. A general law operates throughout the state upon all the people, or upon all of a class, and while the application of an act which is restricted to a single municipality, as the Greater New York Charter, is a special law, a special law may be, and frequently is, by the act itself made a public law, and thereby becomes an act which need not be specifically pleaded, and of which the court takes judicial notice, but which does not thereby become a general law.

Section 2 of article 12 of the state Constitution provides that:

"Laws relating to the property, affairs or government of cities, and the several departments thereof, are divided into general and special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class."

[3] We conclude that the portion of the Greater New York Charter of 1901 which excluded the aqueduct from assessment and taxation has not been repealed, and that the respondents should not have taken the aqueduct into consideration in fixing the assessment. As to the discharge pipe, termed the blow-off, the record is devoid of evidence as to its nature; but, if the same constitutes an essential part of the aqueduct, and was necessary to its operation, it would seem to be a part of the aqueduct and exempt from taxation and assessment.

The order of the Special Term should be reversed, and the said assessment of the relator stricken from the roll as illegal, with costs to the relator. All concur.

(82 Misc. Rep. 174)

PEOPLE v. DUNBAR CONTRACTING CO. et al.

SAME v. ETNA CONST. CO. et al.

(Supreme Court, Special Term, Rockland County. September 18, 1913.)

1. CONSPIRACY (§ 43*)—INDICTMENT—SHOWING OTHER OFFENSE.
An indictment charging conspiracy to cheat and defraud, which sets out the acts, devices, and schemes employed in the conspiracy, is not invalid and is not subject to demurrer simply because the facts alleged constitute larceny or other crimes.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. § 43.*]

2. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY—CONSPIRACY.
An indictment charging conspiracy to cheat and defraud the state by defective and dishonest work, by failure to furnish materials as required by contract, and by false and fraudulent statements and representations in regard to such work and materials charges only a single crime.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. § 125.*]

3. CRIMINAL LAW (§ 627½*)—TRIAL—INSPECTION OF MINUTES OF GRAND JURY.
The defendant in a criminal prosecution is not entitled to the minutes of the grand jury in order to enable him to prepare for trial; the only ground upon which a motion to inspect the minutes of the grand jury can be granted is to enable the defendant to move to set aside the indictment upon one or more of the statutory grounds.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1431, 1434, 1435; Dec. Dig. § 627½.*]

4. CRIMINAL LAW (§ 627½*)—TRIAL—INSPECTION OF MINUTES OF GRAND JURY.
That an alleged Special Deputy Attorney General appeared before the grand jury while evidence was being taken and participated in the prosecution of the cases is not sufficient ground for a motion to inspect the minutes of the grand jury for the purpose of moving to set aside the indictment, where it is admitted that he did so appear, as nothing would be gained by the inspection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1431, 1434, 1435; Dec. Dig. § 627½.*]

5. CRIMINAL LAW (§ 627½*)—TRIAL—INSPECTION OF MINUTES OF GRAND JURY.
A motion to inspect the minutes of the grand jury will not be granted to support a motion to dismiss the indictment on the ground that the district attorney improperly advised the grand jury, where the allegations of the moving affidavits are based on hearsay and surmise and the court cannot determine therefrom whether such advice was given or acted upon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1431, 1434, 1435; Dec. Dig. § 627½.*]

6. CRIMINAL LAW (§ 627½*)—TRIAL—INSPECTION OF MINUTES OF GRAND JURY.
Inspection of the minutes of the grand jury will not be granted to enable the defendant to ascertain whether grounds exist for a motion to dismiss the indictment; such inspection will only be allowed to support a motion to dismiss the indictment upon grounds shown by the moving papers to actually exist, or facts from which a good ground may be inferred.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1431, 1434, 1435; Dec. Dig. § 627½.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. GRAND JURY (§ 41*)—SECRECY AS TO PROCEEDINGS.

The secrecy of the proceedings before the grand jury are always zealously guarded and preserved in order to promote freedom in the disclosure of crimes, to prevent perjury and subornation of perjury by the accused in attempting to disprove the evidence by false testimony, and to avoid the danger of the accused's escaping before being arrested.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 86, 87; Dec. Dig. § 41.*]

The Dunbar Contracting Company and others and the Etna Construction Company and others were indicted on two separate indictments for conspiracy to cheat and defraud by criminal means and false pretenses. On demurrers to the indictments, and motions to permit inspection of the minutes of the grand jury. Demurrers and motions overruled.

Thomas Gagan, Dist. Atty., of Haverstraw, for the People.

Mortimer B. Patterson, of Nyack (William T. Jerome, of New York City, of counsel), for defendants Dunbar Contracting Co. and others.

Benjamin Levison, of Nyack, for defendants Etna Const. Co. and others.

TOMPKINS, J. [1] The demurrers to the indictments are overruled. They charge the defendants with the crime of conspiracy to cheat and defraud the state of New York out of money by criminal means and false pretenses, and they set forth in detail the acts, devices and schemes alleged to have been committed and employed by the defendants in planning and consummating the conspiracy and the fact that these acts, devices, and schemes may have constituted other and distinct crimes does not invalidate the indictment, nor is it good ground for demurrer that the indictment alleged facts constituting the crime of larceny. The defendants may be indicted and convicted of a conspiracy to commit the crime of larceny, even though the conspirators accomplished their purpose and feloniously got the state's money.

[2] The indictments charge but a single misdemeanor, namely, a conspiracy to cheat and defraud the state out of its money by defective and dishonest work, and a willful failure to furnish materials required by certain contracts which the defendants the Etna Construction Company and the Dunbar Contracting Company had with the state, and by means of false and fraudulent statements and representations in respect to the said work and materials.

[3] The defendants move for an inspection of the minutes of the grand jury for use upon a motion or motions to dismiss the indictments. It is well settled that the defendants are not entitled to the minutes to enable them to prepare for trial, and that the only ground upon which a motion of this kind can be granted is to enable the defendants to move to set aside the indictments upon one or more of the grounds given by the statute for such a motion.

Section 313 of the Code of Criminal Procedure provides when an indictment may be set aside by the court. First. When it is not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

found, indorsed, and presented as prescribed in sections 268 and 272. Second. When a person has been permitted to be present during the session of the grand jury, while the charge embraced in the indictment was under consideration, except as provided in sections 262, 263, and 264. These are the only statutory grounds given for a motion to dismiss an indictment that have any application to these cases. The Court of Appeals, however, has held that the court has inherent power "to set aside indictments whenever it appears that they have been found without evidence or upon illegal or incompetent testimony." The defendants, on these motions, assert that motions to dismiss these indictments are contemplated and will be made in good faith; but the only specific ground stated in the affidavits for such a motion is that one Peter P. Smith, an alleged Special Deputy Attorney General, was constantly in attendance at the sessions of the grand jury that found these indictments, and that he was not one of the persons permitted to be present by the statute.

[4] It is undisputed that the said Peter P. Smith was present before the grand jury while these cases were under consideration and testimony was being taken, but not during the expression of opinions by the grand jurors or the giving of their votes upon the question of these indictments, and there is no claim that he was present at such times. His presence before the grand jury while testimony was being taken, and his participation in the presentation of the cases to the grand jury, is justified by the district attorney by undisputed proof that said Smith was duly designated as a Special Deputy Attorney General by the Attorney General of the state to assist in the prosecution of these cases, and that he duly qualified as such Special Deputy Attorney General before he undertook the work, and besides, before the said Smith attended upon said grand jury, the district attorney, pursuant to section 264 of the Code of Criminal Procedure, duly nominated him in writing to attend upon the said grand jury, to assist in the investigation of these cases, and upon such nomination he was duly appointed by Hon. Isaac M. Kapper, the justice of the Supreme Court who presided at the term of the court for which the said grand jury was summoned, and at which said indictments were found, to attend upon said grand jury as an assistant to the said district attorney. So that the presence of the said Peter P. Smith before the grand jury is admitted on this motion, and therefore the minutes are not required to enable these defendants to make their contemplated motions upon that ground. The minutes can show no more with respect to the appearance of Mr. Smith before the grand jury than is admitted by the district attorney upon this motion. In other words, there is no question but that Mr. Smith did appear before the grand jury and examine the witnesses and take part in the investigations that resulted in the finding of these indictments; and, if his appearance was unauthorized, the defendants may make their motions upon that ground, and they do not need, for that purpose, the minutes of the grand jury.

[5] The only other ground upon which a motion to dismiss the indictments can be properly based is that they were not found, indorsed,

and presented as prescribed in sections 268 and 272 of the Code of Criminal Procedure. The defendants claim, in that respect, that the district attorney incorrectly and improperly advised the grand jurors that they could not reconsider their vote, by which these indictments had been ordered, before the indictments were physically before the grand jury and actually signed by the foreman. The allegations in the defendant's moving affidavits are only hearsay and surmises. No fact is stated or information given from which the court can determine that any such advice or instruction was given to the grand jury or followed by that body. The allegations and conclusions of the affidavits made by the defendant's attorney are based solely upon rumors and inferences that are not justified by any statement of fact.

[6] It is well settled that the court will not allow an inspection of the minutes of the grand jury to enable a defendant to ascertain whether or not grounds exist for a motion to dismiss an indictment, but only to support a motion that may be made upon grounds shown by the moving papers to actually exist or facts from which a good ground may reasonably be inferred.

[7] The secrecy of proceedings before the grand jury has always been zealously guarded and preserved, both at common law and under the statutes of this state. The reasons therefor have been well stated as follows:

"The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold. One is that the utmost freedom of disclosure of alleged crimes and offenses by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made." Commonwealth v. Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741.

It is for these reasons that the rule has been laid down in this state that a defendant shall not in any event be permitted to inspect the minutes of the grand jury to enable him to prepare for trial, or to use, as the basis of a motion to dismiss the indictment, unless the motion papers upon which an inspection is asked clearly disclose statutory grounds for such a motion, and unless it reasonably appears that the minutes asked for will show grounds for such a motion.

The motion papers upon these motions are not sufficient to justify the court in granting an inspection of the minutes, and the motions will therefore be denied.

(81 Misc. Rep. 376.)

GRISWOLD et al. v. McDONALD et al.

(Supreme Court, Special Term, New York County. June, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 329*)—SALE OF REAL PROPERTY—PROCEEDINGS—DEFICIENCY JUDGMENT.

Where a deficiency judgment was rendered against the deceased mortgagor's administrators, a proceeding brought by the judgment creditors under Code Civ. Proc. §§ 2749–2801, for the sale of the other real property of deceased for the payment of debts, was proper, though such real property had already been sold in partition proceedings instituted by his heirs at about the same time as the foreclosure action; the proceeds of the partition sale standing in the place of the real property sold.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052, 1059, 1342, 1350–1364; Dec. Dig. § 329.*]

2. EXECUTORS AND ADMINISTRATORS (§ 337*)—SALE OF REAL PROPERTY—PROCEEDINGS—PARTIES.

Code Civ. Proc. § 2754, which requires that in proceedings for the sale of real property of a decedent to pay debts the surrogate "must issue a citation according to the prayer of the petition," requires merely that the surrogate issue citation to all the necessary parties whose rights may be affected and to any others he may deem proper, and not to persons having no interest in the suit though they be named in the petition; and hence, where the only real parties in interest were the heirs, devisees, and creditors, failure to issue citation to the administrator, occupants, and one who had been a lienor was not fatal to the surrogate's jurisdiction, though these persons were named in the petition.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1397–1409; Dec. Dig. § 337.*]

3. EXECUTORS AND ADMINISTRATORS (§ 349*)—SALE OF REAL PROPERTY—IRREGULARITIES—COLLATERAL ATTACK.

Failure of the surrogate to issue citation to a person who, though named in a petition, is not a necessary party in proceedings under Code Civ. Proc. §§ 2749–2801, for the sale of a decedent's real estate for the payment of his debts, is at most a mere irregularity and cannot be raised in a collateral proceeding to enforce the surrogate's decree.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1446, 1449–1455; Dec. Dig. § 349.*]

Action by Almon W. Griswold and another, as administrators, etc., against Charles E. McDonald and others to enforce a decree of the Surrogate's Court of Sullivan county. Judgment for plaintiffs.

See, also, 153 App. Div. 898, 138 N. Y. Supp. 1118.

C. H. & J. A. Young, of New York City (Albert Ritchie, of New York City, of counsel), for plaintiffs.

Wentworth, Lowenstein & Stern, of New York City (Bertram L. Marks, of New York City, of counsel), for defendant Ruby Draper.

G. R. Brennan, of New York City, for Charles E. McDonald.

DELANY, J. The plaintiffs in this action, as administrators of Henry U. Perry, deceased, seek the enforcement of a decree of the Surrogate's Court of Sullivan county and certain other equities (about which there is no dispute), provided this court deems it proper that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the enforcement of the surrogate's decree should be directed. The defendants in this action are the heirs at law of Charles McDonald, deceased, and some of their sureties on undertakings given by them on the withdrawal of certain proceeds of sale under a judgment had in a partition action. It appears, among other facts, that some time in 1891 Charles McDonald executed a bond and mortgage which were ultimately assigned to the committee of plaintiffs' intestate, then an incompetent, to secure $23,000. On May 5, 1907, McDonald, the mortgagor, died intestate, having prior to his death conveyed the mortgaged property, subject to the mortgage, to some other person, and on May 31, 1907, one James A. Roberts was appointed administrator of the decedent's estate. In November, 1907, the plaintiffs, as committee of Perry, the assignee of the mortgage, began an action for foreclosure. An interlocutory judgment directing the sale of the mortgaged premises was obtained; a sale was held; and a final judgment for a deficiency of $9,110.24 was entered against Roberts, as administrator of McDonald, deceased. At about the time when the foreclosure action was begun, an action for the partition of the estate of McDonald, under section 1538 of the Code, was commenced by one of the heirs, and in January, 1910, final judgment in said action was entered directing the referee to divide the net proceeds of the sale in partition into eight equal parts and pay the same into the Supreme Court by depositing them with the treasurer of Sullivan county to the credit of the eight heirs entitled to share in the proceeds. Thereafter several of the eight defendants withdrew their shares, and upon so doing each filed with the clerk of Sullivan county his bond with certain sureties; the condition of such obligation being that, if the county treasurer should pay either of the aforesaid eight the amount deposited to his credit, the person receiving the said payment would pay all claims not exceeding the amount of the deposit to his credit when required to do so by order of the Supreme Court or by order of the Surrogate's Court in a proceeding to mortgage, lease, or sell the real property of McDonald, the decedent.

The plaintiffs herein, as creditors of McDonald, deceased, began a proceeding in the Surrogate's Court in Sullivan county in May, 1910, under the provisions of chapter 18, tit. 5, §§ 2749 to 2801, of the Code, praying for the decree for the sale, mortgage, or lease, etc., of McDonald's real property to pay his debts, and thereafter a decree was made wherein it was found that the judgment in the foreclosure action entered March 3, 1909, in favor of the plaintiffs, as committee, etc., against Roberts, as administrator of McDonald, was a valid and subsisting debt against the decedent McDonald's real property of which he died seised; that the plaintiffs were entitled to have a sale of the same; and that, as it had already been sold, plaintiffs' debt was a lien upon the proceeds resulting from the sale of the said real estate in the partition action, and which were deposited with the treasurer of Sullivan county. Regarding the fund resulting from the sale of the real estate in the partition action in the same light as if it were the real property itself (to which but for the change in its condition it is clear they, as creditors, would be entitled to have recourse), the plain-

tiffs proceeded under the provisions of chapter 18, tit. 5, §§ 2749 to 2801, of the Code, before the surrogate and obtained the decree, as set forth above, and they now seek to have that decree enforced against the fund in the hands of the county treasurer and bring this action in this court because the fund in question is under its control. The objections which are urged to the demands herein made are: First, that the proceeding conducted before the surrogate is not the proper one and is justified by no provision of law, because there was no real estate of the decedent to sell at the time of the presentation of the petition to the surrogate for the sale of the decedent's property to pay debts; and, second, that, even if it were the proper proceeding, the surrogate did not acquire jurisdiction of the same because of the failure of the petitioners to comply with certain statutory provisions necessary to confer jurisdiction, in that citation was not served upon (a) the administrator of the decedent McDonald's estate, (b) the occupants of the real estate of the decedent which had been sold in the partition action, and (c) the mortgagees of the interest of one of the heirs of the decedent. Before the amendment to section 1538 of the Code, which now allows the sale of the real estate free and clear of the decedent's debts in a partition action, it could not be so sold, and, if sold by the heirs at law, a creditor, in a proper case, had a right to pursue the real property of the decedent and to resell it in pursuance of a decree providing for the payment of a decedent's debts.

[1] The plaintiffs herein claim that, there being no other provision of the Code applicable to a case where property is sold free from debts, the rights of a creditor are unaffected by the sale in the partition action, except that the money acquired from the sale stands in the place of the property sold and is held for the benefit of the creditors and may be reached in a proceeding under section 18, tit. 5, §§ 2749 to 2801; the decree adjusting itself to the changed condition of the property. No reason appears to be in conflict with this contention. On this suggestion it may be said that chapter 18, tit. 5, is still effective. It has been held that:

"The funds in the hands of the chamberlain, being the proceeds of real property owned by the decedent at the time of his death, are clearly applicable to the payment of his creditors, and a proceeding under title 5, c. 18, of the Code of Civil Procedure, is the appropriate method to determine who are such creditors, and how much is due to each of them respectively; the decree in such a proceeding operating not on the real estate itself but upon the fund which represents it."

See Lichtenberg v. Lichtenberg, 156 App. Div. 532, 141 N. Y. Supp. 356.

"Notwithstanding such sale the proceeds of the real property of the decedent stood in the place of the land until final distribution." Matter of Dusenbury, 34 Misc. Rep. 666, 70 N. Y. Supp. 725.

I am therefore clearly of the opinion that the proceeding conducted before the surrogate was the proper one and that the prior sale of the property in the partition action did not affect it.

[2] The question, however, as to whether in this case the surrogate acquired jurisdiction will depend upon a consideration of the

provisions of section 2749 et seq. of the Code. The proceeding to sell real estate in the Surrogate's Court is a statutory one. It is conceded that a compliance with the provisions of the statute is necessary for the acquisition of jurisdiction. Section 2750 requires that the proceeding shall be initiated by a petition praying for the sale of the decedent's real property and that "the parties named in the petition and all other necessary parties, as prescribed in the subsequent sections of this title, may be cited to show cause," etc. Section 2752, among other things, requires that the petition shall state the name of each occupant, if any, of the land, the names of all the heirs, and every person claiming under them, and if the petition is presented by a creditor the name of the administrator. Section 2754 provides that, where the surrogate is satisfied that the debts cannot be paid without resorting to the real estate, "he must issue a citation according to the prayer of the petition," and, if upon inquiry, "it appears to the surrogate, that any heir, * * * or person claiming an interest in the property under an heir, * * * is not named in the petition, the citation must also be directed to him."

In the proceeding under consideration the plaintiffs were creditors, and their petition did set forth the names of all the heirs of the administrator, of the various occupants of the land, and of the mortgagees of the interest of one of the heirs, but prayed that citation be issued to the heirs and to the administrator only. The citation, however, was not issued directed to the occupants of the land, the administrator, or the mortgagees of the interest of one of the heirs, but was to all the heirs, and the defendant Ruby Draper, one of the heirs now objecting to the surrogate's proceedings on the ground of failure to cite the occupants, the administrator, and the mortgagees of the interest of the heir Frank C. McDonald, was duly served but failed to appear on the return of the citation. The administrator had already given the statutory notice to all the creditors, closed his estate, rendered his accounting, and had no interest whatever in the proceeding, which in no event would bring money into his hands or require him to do any acts whatever in connection with the proceeding. An administrator is merely the formal medium through which the rights of creditors may be enforced against the real estate and he has no interest in the premises. The real parties in interest are the heirs at law, devisees, and creditors. Richardson v. Judah, 2 Bradf. Sur. 157; Turner v. Amsdell, 3 Dem. Sur. 19. The administrator or executor may not contest the application of the real property to payment of decedent's debts (Code Civ. Pro., § 2755), and section 2754 does not name the administrator as one of the parties upon whom citation is directed to be made. The question, therefore, turns upon a sentence in section 2754, which reads that "he [referring to the surrogate] must issue a citation according to the prayer of the petition." If this should be construed to mean that each person named in the petition is indispensable and must be cited, then, of course, the issuance of a citation to each person so named would be regarded as a prerequisite to jurisdiction. But it seems to me that all that would be necessary would be for the surrogate to direct that citation issue

to all the necessary parties whose rights might be affected by the proceeding and perhaps to such others as for special reasons he might deem proper. Section 2754. He might, in a proper case, even dispense with service where he deemed the circumstances warranted his doing so, but I do not think that the section means that the surrogate must direct citation to issue to every person named in the petition nominatim, however unnecessary, who does not appear to have either rights or interests. I think the jurisdiction of the court is acquired by the issuance of a citation "according to the prayer of the petition" when the citation is issued to all those persons who are shown by the petition to be necessary parties; such parties being those interested in the subject-matter or shown to have rights incidental thereto.

[3] A substantial compliance with the provision of the statute, therefore, would give the court jurisdiction, and, if a person named in the petition clearly had no rights, failure to cite him would at most constitute a mere irregularity and not a jurisdictional defect. An objection based on such an irregularity could not be raised in a collateral proceeding as the one before us is and therefore is ineffective now. Greenblatt v. Hermann, 144 N. Y. 13, 19, 38 N. E. 966; Matter of Dolan, 88 N. Y. 309; O'Connor v. Huggins, 113 N. Y. 511, 519, 21 N. E. 184. It cannot be assumed that, because the citation did not issue to the occupants of the land which had previously been sold in the partition action, a substantial compliance with the provisions of section 2754 has not been made. The conditions existing at the time of the filing of the petition in the surrogate's proceedings made it unnecessary to comply with any provision seemingly requiring citation to issue to occupants of the land, and it cannot be assumed that the law will require the doing of an unnecessary and meaningless act. The allegation in the petition to the surrogate sets forth on information and belief that:

"Frank C. McDonald, one of the heirs of the said decedent, and Mabel McDonald, his wife, heretofore and on September 8, 1908, executed a mortgage of their interest and share in the said property to the Paicinez Company for the sum of $1,800, and the same has not been paid."

But inasmuch as three months before this time the lien had been released by payment, pursuant to an order made in the Supreme Court action, it may be inferred that, before citation issued, that fact became known to the surrogate, and the alleged lienor was not cited because he was not a necessary party and had no right to citation, The allegation viewed in this light was surplusage and might be ignored without affecting the substantial compliance with the statute, or, if a stricter rule be insisted on, it was a mere irregularity curable by amendment, not depriving the court of jurisdiction and not, in any event, contestable collaterally, as is attempted here. In view of the ineffectual attempts of the plaintiffs heretofore to procure satisfaction of the surrogate's decree out of the proceeds of the sale in question, it would appear to be necessary for this court to give the plaintiffs the relief sought. Everything disclosed in the case shows the validity of the plaintiffs' claim, and resort to this court is only made in

order that a just debt, so determined by the surrogate, may be, as far as possible, paid out of the fund which is in the hands of the Supreme Court and under its control.

Judgment for plaintiffs.

(81 Misc. Rep. 391.)

In re COFFIN'S WILL.

(Surrogate's Court, Kings County. June, 1913.)

1. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE.

Where, on proceedings for the admission to probate of a will and codicil, the evidence shows that testator lived apart from his wife and children during the last 10 years of his life, and that during the same period he maintained a meretricious intimacy with the chief beneficiary under the will, but does not show, other than by inferences from the circumstances disclosed, that any undue influence of such beneficiary extended to the making of these instruments, both instruments should be admitted to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

2. WILLS (§ 215*)—ADMISSION TO PROBATE—DECISION OF SURROGATE.

Under Code Civ. Proc. § 2653a, entitling a contestant of a will, where the surrogate's decision is in favor of the will, to submit anew to a jury the whole question of "will or no will," the surrogate's determination is practically merely provisional.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 522, 523; Dec. Dig. § 215.*]

Proceedings upon the probate of the will and codicil of George C. Coffin, deceased. Probate decreed.

Hamilton Anderson, of New York City, for proponent, William H. Blain, executor.

Atwater & Cruikshank, of New York City (Alfred B. Cruikshank, of New York City, of counsel), for Belle C. Provost, legatee.

Augustus Van Wyck, of New York City, for contestants, heirs at law and next of kin.

KETCHAM, S. It cannot be questioned that the will and codicil here propounded were duly executed, nor is it doubtful that the testator was possessed of testamentary capacity; but it is urged that the instruments were induced by the undue influence of the sole beneficiary named in the will.

[1] The testator, for the last ten years of his life, separated himself from his wife and children without any excuse. For a period precisely corresponding with this estrangement from his family, he maintained with the beneficiary an intimacy which must be found, in the euphemism of the law, to have been meretricious. The evidence is convincing that the only cause for the decedent's desertion of his home was his devotion to the beneficiary, and that, having once detached his affections, she established an influence over him which lasted for his remaining days and barred his return to marital and parental duty. There is no need for a recital of the facts which sup-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

port these conclusions. They plainly exhibit a malign influence which, whether imposed upon the testator by evil persuasions or embraced by his own choice, tended not only to divorce him from those to whom he owed loyalty and companionship but to divert from them the material benefits of his estate.

But though it is thus manifest that the testator was subject to the undue influence of an association which warped his life and controlled his conduct in its most important relations, the question must remain: Is there evidence that this undue influence extended to the testamentary acts? The case sharply illustrates a notorious obliquity in our procedure. It is the duty of the surrogate to fairly and faithfully try the present controversy and a fair decision to render thereon according to the proofs. This is the requirement of the law as to every trial. It is imposed by the oath of office. It is distinctly enjoined by the statute as to contested wills. Code Civ. Pro. § 2622.

[2] It would result from these commonplaces, and, indeed, is the legal pretense, that a decision thus reached must be authoritative and final; but the practical truth is that the surrogate's determination is empty and provisional. If it be in favor of the will, the contestant will not be thereby prevented from maintaining her action under section 2653a of the Code, in which she may submit anew to a jury the whole question of "will or no will," with but formal embarrassment from the surrogate's decree. If it be against the will, the Appellate Division will inevitably subvert the result and direct a trial of the same question before a jury if the case comes to their attention upon appeal.

The considerations which constrain an appellate court in reviewing a decree of the surrogate rejecting a will are well known.

In Matter of Tompkins, 69 App. Div. 474, 74 N. Y. Supp. 1002, the court, in reversing a decree refusing probate, says:

"In Matter of Van Houten, 11 App. Div. 208 [42 N. Y. Supp. 919], we held that when the disposition which should be made of the questions of fact presented by the evidence was not free from doubt, and when the result reached in the Surrogate's Court was not entirely satisfactory, the case should be reconsidered by a jury. Matter of Will of Ellick, 19 Wkly. Dig. 231; Matter of Hannah, 11 N. Y. St. Repr. 807; Reynolds v. Root, 62 Barb. 250; Matter of Pike, 83 Hun, 327, 331 [31 N. Y. Supp. 689], citing Howland v. Taylor, 53 N. Y. 627; Matter of Lansing, 2 N. Y. Supp. 117;[1] Van Orman v. Van Orman, 11 N. Y. Supp. 931.[2] See, too, Sutton v. Ray, 72 N. Y. 482, 484. * * * We are careful to say that this reversal, which is made necessary by our conclusion, does not indicate, in our opinion, that the learned and able surrogate positively erred in the result reached by him but merely that such result on the evidence adduced before him and contained in the record now before us is not entirely satisfactory to this court."

Hence the burden which rests upon the probate court is to be discharged under the menace of a rule which controls the appellate court even though it finds that no error is assigned and that the trial

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 49 Hun, 610.

[2] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 58 Hun, 606.

judge's conclusions are supported by the evidence and are not against the weight of evidence. It may be, as it often has been, that the court sitting in review may commend every step taken upon the trial and may concede that no other step could in justice have been taken; it may even confess that the result has not only been according to the law as administered by an enlightened mind but probably right, yet, because of an undefined caution, a vague sense that the result is "not free from doubt," the same court, vaguely doubting and vaguely "dissatisfied," will direct another trial without any assignable basis in the record.

Thus a determination rendered upon conscience under the constraint of fixed and well-known rules which would not permit of any other result may properly be set aside by the application of another set of rules neither of the same nor of like effect as those which compelled the original result. Both judgments may be right, though repugnant, for the surrogate was bound by duty and oath to find against the will and therefore did right, while under the same just duress the other court in reaching the other result equally does right. The latter court must reverse the decree for "doubt," while the trial court is forbidden to doubt and is sworn to resolve all hesitation. One court cannot lawfully base its decision upon doubt; the other, in the same case, must.

There is no other aspect of litigation known to this state where the rule applicable upon the trial differs from the rule upon appeal. In appeal from the humblest court and in every issue carried up from the Surrogate's Court except a case of probate, the inquiry is:

"Where is the error either in the progress of the trial or in the final disposition?"

It is not the result of this procedure which is unfortunate, for few will deny the expediency of submitting to a jury the complex and sacred interests which are frequently involved in a will contest. There can be no question of the duty of the appellate court to send these cases down for jury trial, for the court itself is bound upon the wheel of the present system and must follow its dizzy revolutions. The mischief is in the mechanism itself which takes courts and litigants with it in its irrational round.

Where the instinct of the law has broken beyond the confines of its own methods to do righteousness despite its own restraints, the course for justice should be made so that it need no longer break its way.

The present condition is an intellectual scandal, the butt of intelligent laymen as it is a shame of the profession. Its remedy is as obvious as its disorders. All of wisdom which it contains would be preserved and all of folly which it surely holds would be expelled if a trial by jury in the first instance were by statute made available upon seasonable demand. Then the abuses which have been remarked with Catonian iteration in former opinions of this court would abate and idle and humiliating tasks such as the present case imposes would be unknown.

The learned surrogate, whose decision was reversed in Matter of Tompkins, supra, doubtless after he had given his best thought and endeavor to a just and patient result, says:

"Where the surrogate rejects probate upon the ground of the incompetency of the testator, and the record shows it to be a doubtful question, the appellate court will reverse and send the issue to a trial by a jury without indicating in any way its opinion upon the facts as disclosed in the record."

And he then concludes, in view of sections 2622 and 2623 of the Code of Civil Procedure, as follows:

"In view of the provisions of the Code, and of the authorities cited, I think the course to be pursued by a surrogate, where the factum of the will is satisfactorily established, is to grant probate, unless want of testamentary capacity, fraud, or undue influence is established beyond a reasonable doubt."

The opinion last quoted, so far as it would introduce into a civil case the rule that the issue should be determined by evidence establishing a given fact beyond a reasonable doubt, is not accepted by this court, but the search for the fair preponderance of evidence, which is the only test, may well be made with a caution measured by the thought that, if a jury trial is desired by the contestant, it can be had at once under section 2653a of the Code of Civil Procedure better than through the expensive and toilsome apparatus of appeal.

In the case at bar the evidence is wholly circumstantial and contains no direct view of the beneficiary in the act of unduly influencing the testator in making either his will or codicil, and both instruments may be admitted to probate.

Probate decreed.

(81 Misc. Rep. 386.)

In re WEED et al.

(Surrogate's Court, Saratoga County. June, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 507*)—ACCOUNTING—JURISDICTION.
Under Code Civ. Proc. § 2726, which empowers the Surrogate's Court to compel a judicial settlement of an executor's account, such court had power to determine on an accounting whether the executors had exercised proper care and diligence in selling real property pursuant to a power contained in the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2004, 2005, 2178–2191; Dec. Dig. § 507.*]

2. ESTOPPEL (§ 90*)—SALE OF PROPERTY UNDER POWER—CONSENT.
Where testator devised land to his children in equal shares subject to the life estate of their mother, and the executors under a naked power given by the will sold the land to one child for $5,000, a residuary devisee, who had stated that if the others were willing to sell for $5,000 she would take the same, was estopped from claiming that the executors' accounts should be surcharged for negligence in selling the land for less than its fair market value without proper effort to obtain such value.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 242–244, 248–256; Dec. Dig. § 90.*]

Proceedings upon the judicial settlement of the account of Sickler P. Weed and another as surviving executors, etc. Decreed according to opinion.

Irwin Esmond, of Ballston (James W. Verbeck, of Ballston, of counsel), for Sickler P. Weed and Leonard J. Weed.

H. E. McKnight, of Ballston Spa, for Jennie E. Witbeck.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

OSTRANDER, S. Deceased devised certain real estate for life to his widow, with remainder to his six children equally. He gave his executors "full power and authority to sell and dispose of any and all of my real property as to them may seem best." The executors were not trustees, and the above power is a naked power of sale. The executors acting under this power sold a farm to one of the children for $5,000 and have brought the proceeds into court for distribution. Contestant, Mrs. Witbeck, one of the residuary devisees, objects to the price received, alleging that the executors violated their duty by negligently selling this farm for less than its fair market value, without proper effort to obtain such value. She seeks to surcharge their account with the loss so occasioned. The executors challenge the jurisdiction of this court to determine this controversy, claiming that the jurisdiction of the court is strictly confined to the distribution of the proceeds of sale as produced in court by the executors, and that this court may not question the propriety of their acts in reference to the sale.

No question is presented of the power to sell. Nor is there any question of fraud involved; nor any question of a testamentary trustee's dealing with his trust, as in Matter of McInerney, 62 Misc. Rep. 441, 116 N. Y. Supp. 1039. Nor does the will give the executors absolute discretion as to the amount for which the property shall be sold. It gives, rather, a discretion as to how much of the property shall be sold, if any, and when.

[1] Under section 2726 of the Code, the Surrogate's Court may compel a judicial settlement, after one year, of an executor's account, where he has sold any of decedent's real estate pursuant to a power contained in the will. There being no question of fraud alleged, nor any question involved requiring relief in equity, I think this court has power to determine on this accounting the question of the executors' care and diligence in selling the property. Baldwin v. Smith, 3 App. Div. 350, 38 N. Y. Supp. 299. Any other conclusion would leave to the court the mere clerical duty of dividing such sum as the executors chose to bring in after selling property in the most careless manner, a result which I do not think the statute contemplates.

[2] This brings us to the question whether the executors were negligent in selling the farm at less than its fair market value. There is no evidence or claim of any corrupt action by the executors. They sold their own share as well as contestant's share. They also sold the shares of all the others, equally interested, none of whom, except contestant, complain of the price received. While this is not conclusive upon the question of negligence, it is a circumstance to be seriously considered.

There was a great divergence of opinion among the witnesses as to the value of the farm at the time it was sold. The contestant's witnesses place the value at from $6,162 to $8,337.50, while the executors' witnesses place it from $4,000 to $5,000. Contestant and her husband say that they told one of the executors that he (contestant's husband) would furnish a man who would pay $6,000 for it. This is flatly denied by the executors. One of the executors testified that he had inquired of a number of people, including one of the town assessors, what the farm ought to bring and that not one thought it

worth over $5,000. But it is not necessary to pass upon this issue of fact, since the contestant says that she afterward told the executors that, if all the rest were willing to sell for $5,000, she would take what the rest would take. The executors having acted on this consent given by her, which she does not dispute but expressly admits, she is estopped from questioning the acts of the executors done in pursuance of it.

I do not think that the evidence warrants a decree surcharging the executors. The objections are therefore disallowed, without costs to any party.

Decreed accordingly.

(81 Misc. Rep. 389.)

In re SLINEY'S WILL.

(Surrogate's Court, Dutchess County. June, 1913.)

WILLS (§ 489*)—CONSTRUCTION—EXTRINSIC EVIDENCE—BENEFICIARY.

Where it conclusively appears from extrinsic evidence that a money bequest to an unincorporated branch of an incorporated mission society was intended by testatrix for the main society, the Surrogate's Court will rectify the mistake and order the bequest paid over to the beneficiary intended by the testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037–1046; Dec. Dig. § 489.*]

Proceedings upon the judicial settlement of the accounts of executors of Mary Sliney, deceased. Decreed according to opinion.

Fred E. Ackerman, of Poughkeepsie, for executors.

Morschauser, Mack & Mulvey, of Poughkeepsie, for residuary legatees.

William J. Fanning, of New York City, for St. Joseph's Union.

John J. Mylod, of Poughkeepsie, for State Comptroller.

HOPKINS, S. Mary Sliney, a resident of Wappingers Falls, Dutchess county, N. Y., died, leaving a will, which in and by its third paragraph provided as follows:

"Third. I give and bequeath unto St. Joseph's Union at No. 375 Lafayette street, New York City, New York, the sum of one thousand dollars."

Upon this accounting by her executors, the residuary legatees under said will, who are nephews and nieces of the testatrix, claim that this legacy fails and should pass into the residuary estate and be distributed among them upon the grounds:

First. "That St. Joseph's Union is an unincorporated association and cannot take the bequest," and

Second. "That the gift is absolute, and did not create a trust, and cannot be sustained under the provisions of section 113 of the Real Property Law." Consol. Laws 1909, c. 50.

In examining the cases of a similar nature passed upon by the higher courts, I find that there is a conflict of opinion upon identical facts, and therefore as I am unable to make a distinction, or to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

say why similar facts should require or produce different decisions and judgments, will confine myself to the facts of the case before me. The cases referred to are Bowman v. Domestic & Foreign Mission Society, 182 N. Y. 494, 75 N. E. 535, and Fralick v. Lyford, 107 App. Div. 543, 95 N. Y. Supp. 433, affirmed 187 N. Y. 524, 79 N. E. 1105.

It appears from the testimony in this proceeding that St. Joseph's Union is a branch of the Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children, an incorporated society, and engaged in the same charitable work; that both of said societies were founded by a priest named Father Drumgold, who was formerly the pastor of a church at Wappingers Falls where the testatrix worshiped; that testatrix was interested in the work conducted by said priest; that both of said societies occupied offices in the same building in the city of New York, and both have the same officers, the union being maintained as a branch of the mission. It is claimed by the union that from these facts the testatrix intended that this bequest should be for the benefit of the society conducted by her former pastor, and that she desired it to be so paid to, and used for, the purposes for which the mission was incorporated, and that in the preparation of her will she misnamed the society intended.

The intention of the testatrix should prevail, so far as it is possible to ascertain that intention from her will and the extrinsic evidence produced, and so far as it is consistent with law. It is evident that she did not intend that her nephews and nieces should have the amount of the legacy in question, and it is equally evident that she did intend it for the society. If she made a mistake in naming the proper beneficiary, so that the object of her bounty could not be ascertained from the will alone, it is the duty of this court to rectify such mistake and direct the payment of said legacy to the society contemplated by the testatrix, if such can be determined from the evidence and surrounding circumstances.

Therefore it seems to me that the testatrix intended this bequest for the Mission of the Immaculate Virgin, and that the use of the name "St. Joseph's Union" in said will was a misnomer, and that her intention will be carried out by paying over the bequest to the mission, and thus substantial justice will be done.

Decreed accordingly.

(82 Misc. Rep. 180)

KOELLHOFFER v. PETERSEN et al.

(Supreme Court, Special Term, Kings County. September 17, 1913.)

1. CREDITORS' SUIT (§ 1*)—NATURE OF REMEDY.

The action authorized by Code Civ. Proc. § 1871, by a judgment creditor whose execution has been returned unsatisfied, to compel the discovery of property belonging to the judgment debtor, and of any money, thing in action, or other property due him or held in trust for him, is virtually the same as the creditor's bill for the discovery of assets under the old chancery practice.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

2. CREDITORS' SUIT (§ 42*)—PLEADING—SCOPE OF RELIEF OBTAINABLE.

Under Code Civ. Proc. § 1871, authorizing a judgment creditor's action to compel the discovery of property of the judgment debtor or of any money or other property due him or held in trust for him, and section 1873 providing for the satisfaction of the sum due the creditor out of any money or other personal property discovered in such action, while a judgment creditor may maintain an action for a discovery, and in that action reach property of the debtor not specifically set forth in the complaint, where a complaint to set aside fraudulent transfers specified and for a discovery of property of the debtor or held in trust for him not only failed to allege the existence of any property other than that specified but affirmatively alleged that the debtor had no other property out of which a satisfaction of the judgment could be obtained, no transfers except those specifically mentioned could be set aside.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 175–177; Dec. Dig. § 42.*]

3. FRAUDULENT CONVEYANCES (§ 314*)—ACTIONS—PERSONAL JUDGMENT.

Where a husband transferred property to his wife to defraud creditors, but the wife did not participate in the fraudulent intent, and the property had been sold in foreclosure and she had none of the proceeds, a personal judgment for the value of the property would not be rendered against her.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 972; Dec. Dig. § 314.*]

4. FRAUDULENT CONVEYANCES (§ 163*)—FRAUDULENT INTENT OF GRANTEE—EFFECT.

Where property was transferred with a fraudulent intent to hinder and delay creditors by putting the debtor's property out of his possession and out of the reach of his creditors, the transaction was fraudulent although the property was transferred as collateral security for a genuine debt.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 510, 517; Dec. Dig. § 163.*]

5. FRAUDULENT CONVEYANCES (§ 314*)—ACTIONS—PERSONAL JUDGMENT.

Where stocks were transferred by a debtor with intent to hinder and delay creditors, in which intent the transferee participated, so that it could not be reached by supplementary proceedings, and it was necessary to bring an action to set aside the transfer, pending which the property became valueless, a personal judgment may be rendered against the fraudulent transferee for the value of the stock as of the date of the supplementary proceeding, when, but for the transfer, it might have been subjected to the payment of plaintiff's judgment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 972; Dec. Dig. § 314.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. EVIDENCE (§ 265*)—ADMISSIONS—CONCLUSIVENESS.

Where, in supplementary proceedings, a judgment debtor and a fraudulent transferee of stock testified that the stock was worth $50 a share, but in a suit to set aside the transfer it appeared that it was valueless, they were bound by their admission as to its value, and a personal judgment would be rendered against the transferee for that amount.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029–1050; Dec. Dig. § 265.*]

Judgment creditor's action by Silverius Koellhoffer against Andrew N. Petersen and others. Judgment for plaintiff against the defendant named.

Gross & Surpless, of Brooklyn, for plaintiff.
Joab H. Banton, of New York City, for defendant.

BENEDICT, J. The complaint in this action sets forth certain transfers of real and personal property alleged to have been made by the defendant Henry Hillebrand to the defendant Emily E. Hillebrand, his wife, and to the defendant Andrew N. Petersen, which transfers are alleged to have been fraudulent as to the plaintiff, a judgment creditor of Henry Hillebrand. The demand for judgment asks that the transfers set forth be declared fraudulent and void, and that the plaintiff have a discovery of property of the defendant Henry Hillebrand or held in trust for him.

Upon the trial evidence was introduced by the plaintiff, over defendants' objection and exception, of transfers of property other than those set forth in the complaint, and the court is asked to declare such transfers fraudulent; plaintiff claiming that the demand for discovery enables him to reach in this action any property belonging to the judgment debtor or held in trust for him, whether specifically mentioned in the complaint or not.

[1] Article 1 of title 4 of chapter 15 of the Code of Civil Procedure provides for the maintenance by a judgment creditor whose execution has been returned unsatisfied of an action "to compel the discovery of any thing in action, or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him, or held in trust for him." Section 1871. Section 1873 provides for the satisfaction of the sum due to the plaintiff "out of any money, thing in action, or other *personal* property, belonging to, or due to the judgment debtor, or held in trust for him, *which is discovered in the action.*" The scope of the action seems not, however, to be limited to personal property but may also include real property. See Le Roy v. Rogers, 3 Paige, 234, and Throop's Annotated Code, note to section 1873; also Preliminary Note, preceding article 1 of title 4 of chapter 15 of the Code. The action provided for by the article of the Code above cited is virtually the same as the creditor's bill for the discovery of assets under the old chancery practice. It was authorized by the Revised Statutes (2 R. S. 173, §§ 38, 39, original numbers) but is not believed to have had its origin in a statute but to have been part of the inherent jurisdiction of equity. See Throop's Code, note to section 1871.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] The complaint in the case at bar seems, judging from the prayer for relief, to be framed in a double aspect, namely: First, to set aside certain transfers of property particularly mentioned; and, second, to obtain a discovery of any property of the judgment debtor or of property held in trust for him by the other defendants. There would seem to be no doubt of the right of a judgment creditor to maintain an action for a discovery and to reach in that action property of the debtor not specifically set forth in the complaint. Le Roy v. Rogers, 3 Paige, 234; Hart v. Albright, 28 Abb. N. C. 74, 18 N. Y. Supp. 718; Scoville v. Shed, 36 Hun, 165. But the complaint in the case at bar contains no allegation of the existence of any property of the judgment debtor, or held in trust for him, except the stock and the two parcels of real property alleged to have been fraudulently transferred. In fact, there is a statement that the judgment debtor has no other property out of which a satisfaction of the judgment can be obtained. See Complaint, par. 24. In other words, except for the prayer for discovery in the demand for relief, the complaint is appropriate to an action to set aside as fraudulent certain distinct transfers of property, and there is no allegation of fact in the complaint to support any prayer for discovery except with respect to the particular properties and transactions therein set forth. Under the old chancery practice it was necessary that the bill should charge "that the defendant has some property or equitable interests or things in action which ought to be applied to the payment of the complainant's judgment." 2 Barb. Ch. Prac. *164. This charge, however, might, it would seem, be in general terms, without specifying particular property. Id. *165; Bradt v. Kirkpatrick, 7 Paige, 62. And see Le Roy v. Rogers, 3 Paige, 234, and Hart v. Albright, 28 Abb. N. C. 74, 18 N. Y. Supp. 718, for the allegations appropriate to such a discovery. In a case like the present, there is a substantial reason for requiring, in addition to the allegations of particular transfers, a general allegation of other transfers or of the existence of other property, so that the defendants may be advised that other transactions than those specifically alleged are to be inquired into. I cannot, therefore, declare void any transfers other than those set forth in the complaint.

[3] There are three transfers of property set forth in the complaint: (1) That of the real property at Floral Park in Nassau county, conveyed first to Petersen and by him conveyed to Mrs. Hillebrand; (2) that of the East Fifth street property, conveyed directly to Mrs. Hillebrand; (3) that of the 88 shares of stock in the Farragut Realty Company, transferred to Petersen. The two properties conveyed to Mrs. Hillebrand are no longer in her legal ownership, as they have been sold in foreclosure, nor does she hold any proceeds thereof. From the evidence, I do not think that she participated in the fraudulent intent of her husband, and hence it would be improper to render a personal judgment against her for the value of these properties.

[4] The only remaining questions to be considered are whether the plaintiff is entitled to any relief with respect to the transfer to Petersen of the stock of the Farragut Realty Company, and, if so, to what relief. This stock Petersen still holds, claiming that it was given him

as collateral security for certain debts due from Henry Hillebrand or Hillebrand & Kluge. I am of opinion, however, that these claims, or some of them, are not genuine debts. But, assuming them to be genuine, there is a further question to be considered. If Hillebrand was actually indebted to Petersen, even in the full amount which the latter claims, but there was in fact a fraudulent intent to hinder and delay creditors by putting the debtor's property out of his possession and out of the reach of his creditors for his benefit, the transaction was fraudulent notwithstanding the debt. Metcalf v. Moses, 161 N. Y. 587, 56 N. E. 67; Tompkins v. Hunter, 149 N. Y. 117, 121, 43 N. E. 532. In my opinion the transfer of the stock to Petersen was with the intent on the part of Hillebrand, participated in by Petersen, that the stock should be held by the latter for the former to keep it out of reach of the former's creditors.

[5] Plaintiff claims to be entitled to a personal judgment for the value of this stock on the ground that it had a value at the time of the transfer and at the time he was maintaining supplementary proceedings on his judgment, but that it now has no value. Ordinarily a trustee of an express trust is not liable for the depreciation of securities in which he has properly invested the trust fund, unless he is chargeable with negligence; but there is abundant reason for applying a different rule to one declared a constructive trustee because of his participation in a wrongful act. In a case like the present, if Peterson had not accepted the transfer of the stock it would have remained in the judgment debtor's hands and could have been reached by supplementary proceedings. The transfer has prevented that and compelled the bringing of this action, during the pendency of which, it is claimed, the stock has depreciated in value. It is equitable that, if the transfer was fraudulent, the plaintiff should recover of the defendant Peterson the value of the stock as of the time when it might have been subjected to the payment of the plaintiff's judgment but for the transfer. This conclusion is supported by Ingersoll v. Weld, 103 App. Div. 554, 564, 93 N. Y. Supp. 291, 298 (First Dept. 1905), where the court, in an action to raise a constructive trust out of presumptive fraud based on the relations of the parties, said:

"As the defendant was obligated to restore the property to the true owners upon the death of Mrs. Blanchard, his refusal so to do was a wrongful act upon his part, and the plaintiffs were authorized to resort to any remedy which would protect the property and secure its return. They were therefore authorized to apply for and obtain an injunction pendente lite restraining Weld from disposing of the property, and if during that period, by reason of a decline in the value of the property, loss was entailed, such loss was a direct consequence of the act of the defendant in his refusal to surrender to the true owners the property of which he was possessed."

It was held, however, that he could not be required to restore the property and also pay its value, and the judgment was modified so as to be interlocutory and to direct an accounting. See, also, Hosmer v. Tiffany, 124 App. Div. 287, 108 N. Y. Supp. 943.

[6] In the case at bar the defendants Hillebrand and Petersen both testified in supplementary proceedings in June, 1911, that the stock was worth $50 a share or five times its par value and on the

trial, two years later, that it was worth nothing. Despite the claim that they made a mistake in their earlier testimony, I think they are properly held bound by their admission. The fraudulent transfer and Petersen's participation therein have thus resulted in damage to the plaintiff to the extent of $4,400, with interest from June, 1911; and for this amount the plaintiff should have judgment against Petersen.

Submit decision and judgment accordingly.

MOFFETT v. EAMES et al.

In re EAMES.

(Supreme Court, Special Term, Kings County. September, 1913.)

1. TRUSTS (§ 315*)—COMPENSATION OF TRUSTEE.

Where the deed or instrument creating a trust does not fix compensation of the trustee, he will be allowed the same compensation as is allowed by law to executors and guardians.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 433–443, 474–479; Dec. Dig. § 315.*]

2. TRUSTS (§ 316*)—COMPENSATION OF TRUSTEE.

Where a trustee sold trust property subject to a mortgage and did not charge himself in his account with the gross value but only with the equity received above the mortgage, he cannot be allowed commissions on the gross value.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 445–459; Dec. Dig. § 316.*]

Suit for specific performance by James Moffett against Harris G. Eames, substituted trustee, and others. Heard on application of Harris G. Eames, substituted trustee, for settlement of his account.

Robert E. Moffett, of Brooklyn, for plaintiff.
Joseph P. Reilly, of Brooklyn, for trustee.
Cornelius S. Pinkney, of New York City, for claimant.

BENEDICT, J. These applications have been referred to me by Mr. Justice Crane. They arise out of the proceedings of the applicant Eames, who was appointed by this court to be the substitute of a conventional trustee, deceased, appointed by a certain deed of trust dated March 22, 1912, made between John and Ferdinand Luck and certain judgment creditors of the settlors.

The deceased trustee had in his lifetime sold, or otherwise disposed in accordance with the terms of the trust instrument of, all the real property of the trust estate with the exception of one parcel particularly described in the complaint in this action. This last-mentioned parcel he had offered for sale at public vendue, and it had been struck down for the sum of $30,000 to the plaintiff Moffett, who had signed the usual auction terms of sale therefor and had paid a deposit of $3,000 to the auctioneer.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A dispute having arisen between the settlors and the trustee, the trustee failed and refused to carry out the terms of sale and convey the property, and the purchaser began this suit for specific performance of the contract. Pending the suit the trustee died and Eames was appointed his successor by order of this court dated February 28, 1913. The suit resulted in a decree of specific performance in favor of the plaintiff after a trial on June 26, 1913, and costs were awarded to the plaintiff in the sum of $255.86. Subsequently the substituted trustee conveyed the property to the plaintiff, received the purchase money less the amount of a mortgage, and has filed his account showing his total receipts, which are all the moneys with which he charges himself. These amounted to $15,005.25, and he now has a balance on hand of $890.75, out of which he asks compensation for his own and his attorney's services. He also asks to be discharged as trustee and to have his bond canceled.

[1] Since the decision of Chancellor Walworth in Meacham v. Sternes, 9 Paige, 399, it is the settled law in this state that where the deed or instrument creating a trust contains no provision on the subject of compensation to the trustee for his personal services in the execution of the trust, and where there is no agreement on the subject for a different allowance, the trustee, upon the settlement of his accounts, will be allowed the same fixed compensation for his services, by way of commissions, as are allowed by law to executors and guardians, and to be computed in the same manner.

"In other words, the court will consider the statute allowance to executors, administrators, and guardians as the compensation tacitly understood and agreed on by the parties to all trusts, of a similar nature, where nothing appears to show a different agreement or understanding on the subject of compensation."

In the present case the trust deed is silent on the subject, and I shall therefore allow to the substituted trustee compensation at the rates allowed by law to executors upon the sum which he charges himself with having received and which he already has disbursed or will under this order pay out.

[2] I cannot allow him compensation in respect of the total value of the property without regard to the mortgage incumbrance upon it, as was allowed by the General Term in this Department (see Cox v. Schermerhorn, 18 Hun, 16), because the trustee has not charged himself in his account with the gross value but only with the value of the equity received above the mortgage of $16,000, and so under the rule applied in Matter of Dean, 86 N. Y. 398, Matter of Fulton, 30 Hun, 258, he cannot be allowed commissions on the gross value.

The commission allowed to him is therefore the sum of $340.05. I allow to him as compensation for the services of his attorney the sum of $275 and $32.70 disbursements, making together the sum of $307.70. See Case v. Beloe, 125 App. Div. 906, 109 N. Y. Supp. 168. The balance then remaining in his hands, viz., $243, I direct to be paid to the plaintiff Moffett on account of the costs and disbursements of this action as taxed. Settle order on notice.

(82 Misc. Rep. 186)

MARSH v. CONSUMERS' PARK BREWING CO. et al.

(Supreme Court, Special Term, Kings County. September, 1913.)

1. WILLS (§§ 614, 634*)—CONSTRUCTION—ESTATE DEVISED—"DESCENDANT."
Testator devised his real and personal property to his wife for life in lieu of dower, remainder to his children equally; the descendants of any deceased child to take the share which his deceased parent would take if living. Testator left surviving a widow and four children, one of whom died before the widow, leaving three children who survived her. *Held*, that such provision created a life estate in the widow, with a vested remainder to testator's children living at the time of his death, which, however, was subject to be divested, as to any child, by his death during the life of the widow, the share of such deceased child passing to augment the shares of the other surviving children, unless the deceased child left descendants surviving at the widow's death, in which case they took the share that their deceased parent would have taken if living, the word "descendant" as used in the will signifying "issue" rather than descendants generally; nor was such construction affected by a provision of the codicil giving to the widow discretionary power to spend so much of the principal of the estate as she might find necessary for the education of testator's children, other necessary expenses of the family, and for her own support.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393–1416, 1488–1510; Dec. Dig. §§ 614, 634.*

For other definitions, see Words and Phrases, vol. 3, pp. 2014–2017; vol. 8, p. 7635.]

2. POWERS (§ 32*)—EXERCISE—DEEDS.
A nonresident testator conferred on his widow, as executrix, a power of sale of his real property, but by a later clause appointed B. as special executor as to all testator's real estate and property situated in New York, conferring on him power to convey such real property, or any part thereof, with the consent of the widow, to be manifested by her signing the deed or deeds with B. therefor. B. alone qualified as executor in New York. *Held*, that a valid exercise of the power of sale required the deed of B. as the donee of the general power in trust, and that a conveyance of certain of testator's real property, made by the testator's widow, in which B. did not join, and not purporting to have been executed by the widow in her capacity as executrix, passed no title.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 104–109, 128–132; Dec. Dig. § 32.*]

Action for partition of real property by Helen E. Marsh against the Consumers' Park Brewing Company and others. Judgment for complainant.

Paul Bonynge, of New York City, for plaintiff.

Edward M. Perry, of Brooklyn, and Edward E. Sprague, of New York City, for defendant Consumers' Park Brewing Co.

Louis Bevier and Henry Pegram, both of New York City, for defendants Cameron and Kinsey.

BENEDICT, J. This action involves the construction of the last will of Leonard Marsh, a former owner of the premises sought to be partitioned, who died seised thereof at Burlington, Vt., leaving a last will bearing date the 3d day of October, 1868, and a codicil thereto bearing date the 28th day of October, 1868, which, after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

having been admitted to probate in the proper court in the state of Vermont, were recorded in the office of the surrogate of the county of Kings on March 20, 1871, as constituting the will of said testator. The will contained the following provision:

[1] "Second. All the estate real and personal of whatsoever name and description which shall belong to me at the time of my decease and the rents, issues, income and profits thereof, I give, devise and bequeath to my wife Ann during her natural life in lieu of all her dower, share, thirds or portion of my estate and on her death I give, devise and bequeath the same to my children equally share and share alike, the descendants of any deceased child to take the share which his or her deceased parent would take if living."

The testator left him surviving his widow and four children, one of whom, George F. Marsh, died before his mother, leaving three children who survived her. One of these three children is the plaintiff in this action, and the other two are the defendants Carlotta M. Cameron and Caroline M. Kinsey. The plaintiff and her two sisters each claim in this action title to one-twelfth of the property upon the ground that the undivided one-fourth thereof so constituted, which was vested in remainder in their father at the death of his father, Leonard Marsh, subject to the life estate of his widow, their grandmother, was not vested absolutely in George F. Marsh but was held by him subject to the liability of its being divested by his death during the widow's lifetime, in which event it would, they claim, vest absolutely in them under the provisions of the will just quoted. If they are correct in this contention, they are entitled to maintain this action, because as they were not entitled to possession of the property until the decease of their grandmother, which occurred on September 22, 1904, there can be no claim of adverse possession as against them. I shall not attempt any extended review of the varied and inharmonious decisions of our courts in construing testamentary provisions which bear a more or less close resemblance to that under consideration. The touchstone by which every will is to be judged is the intention of the testator; when this is clearly expressed, there is no reason and little room for the application of the artificial and arbitrary rules of construction which the courts have adopted ex necessitate rei in attempting to interpret obscure provisions of wills in such a manner as to approximate as nearly as may be the results which the testator is presumed to have intended and which he would have expressed had he spoken plainly.

I have examined the cases cited in the briefs of counsel as well as many others bearing more or less closely upon the question here presented. The subject is one that has been fruitful in litigation and has often, I think, resulted in court-made wills which have expressed not so much the wishes of the testator as the bias of the judge. In the present case I think that the testator's intention can be ascertained from the plain language of the will itself as quoted above. The natural and ordinary meaning of the language employed by the testator in the second clause of the will would be to give to the testator's widow an estate for her own life in all of his property, real and personal, and the rents, issues, income, and profits

thereof, in lieu of all her claims against his estate for dower, thirds, or other share, and upon her death to give the said property to the testator's children who should then be living and to the descendants (that is, to the issue) of any child of the testator who might then be dead leaving issue then surviving; the estate to be divided into as many equal shares as there should be children of the testator then living and children who had died leaving issue then living. This natural interpretation of the language used by the testator ought to be followed unless a different intent on his part is more clearly evidenced in some other part of the will. If it be followed, then the clause would be construed as giving a vested remainder to the children of the testator who might be living at the time of his decease, but such remainder would nevertheless be subject to be divested as to any child by the death of such child during the survivorship of the testator's widow, the share of such deceased child to go in augmentation of the shares of the other surviving children, unless such deceased child should leave descendants surviving at the widow's death, in which case the descendants would "take the share which his or her deceased parent would" have taken if living; the word "descendant" as used herein signifying "issue" rather than descendants generally.

The rest of the will and the codicil thereto will be searched in vain for an expressed testamentary intention to the contrary, and none should, I think, be given to it by implication or in obedience to artificial rules of construction. The provision contained in the codicil giving to the widow the discretionary power to use and expend so much of the principal of the estate as she might find necessary for the education of the testator's children, the other necessary expenses of the family, and for her own support does not, I think, evidence an intention on the part of the testator to make a different disposition of such part of the residue or remainder of his estate as should not be used or expended for those purposes. On the contrary, I think it may be fairly inferred that it indicates his purpose to be as already stated, because, read in connection with the primary residuary clause, it shows that the gift of the remainder was to operate only on that part of his estate which should remain unused and unexpended at the death of the widow, and so that not only the quantum of the estate in remainder but the beneficiaries thereof were to be referred to and ascertained as of that date rather than as of the date of his own decease.

To any one who may be interested to follow the course of judicial writing on this subject, the following are some of the authorities in the courts of this state in favor of the theory of interpretation which I have adopted in this case, viz.: Lyons v. Ostrander, 167 N. Y. 135, 60 N. E. 334; Schwartz v. Rehfuss, 129 App. Div. 630, 114 N. Y. Supp. 92, affirmed 198 N. Y. 585, 92 N. E. 1101; Riker v. Gwynne, 201 N. Y. 143, 149, 94 N. E. 632, semble; Camp v. Cronkright, 59 Hun, 488, 13 N. Y. Supp. 307; Flanagan v. Staples, 28 App. Div. 319, 51 N. Y. Supp. 10; Weymann v. Weymann, 82 App. Div. 342, 81 N. Y. Supp. 959; Huber v. Case, 93 App. Div.

479, 87 N. Y. Supp. 663; Hebbard v. Lese, 107 App. Div. 425, 95 N. Y. Supp. 333; Ranhofer v. Hall Realty Co., 143 App. Div. 237, 128 N. Y. Supp. 230; Weinstein v. Kratenstein, 150 App. Div. 789, 135 N. Y. Supp. 334. See, also, Matter of Farmers' Loan & Trust Co., 189 N. Y. 202, 207, 82 N. E. 181, and Robinson v. Martin, 200 N. Y. 159, 93 N. E. 488.

The following are some of the authorities against this theory (although on examination it will be found that most, if not all, of them are distinguishable from the case at bar in that the clauses of the wills under consideration do not bear a close resemblance to the clause of the will of Leonard Marsh now under consideration), viz.: Nelson v. Russell, 135 N. Y. 137, 31 N. E. 1008; Stokes v. Weston, 142 N. Y. 433, 37 N. E. 515; Connelly v. O'Brien, 166 N. Y. 406, 60 N. E. 20; Trowbridge v. Coss, 126 App. Div. 679, 110 N. Y. Supp. 1108, affirmed 195 N. Y. 596, 89 N. E. 1114; Morgan v. Collins, 152 App. Div. 158, 136 N. Y. Supp. 605.

[2] The contention which was advanced by the contesting defendants that a valid title to the property had been derived through a deed of conveyance made by the testator's widow finds no support in the provisions of the will. The testator appointed Judge Charles L. Benedict to be the special executor of his will as to all his real estate and property situated in the state of New York and conferred upon him power to convey the said real property or any part thereof with the consent of the widow to be manifested by her signing the deed or deeds *with him* therefor. Judge Benedict qualified and received letters testamentary from the surrogate's court of Kings county, but he did not join in the conveyance of the property which is the subject of this suit. It is manifest that a valid exercise of the power of sale required his act and deed as the donee of the general power in trust conferred by the will. It is true that in an earlier clause of the will there is conferred upon the widow, as executrix, a power of sale over the testator's real property, but the widow did not qualify as executrix in the state of New York, nor did she purport to execute the deed to Sidney V. Lowell in her capacity as executrix. The testator had in mind, I think, only his Vermont property as the subject of a sale by his executrix under this power; but, if his intention as expressed in that part of the will was broad enough to apply to real property in New York state, then it conflicts and is inconsistent with the later provision by which Judge Benedict was, as above mentioned, given special power of sale over that part of the testator's estate.

I therefore decide that the plaintiff is entitled to the relief prayed for in the complaint. Requests for findings may be presented on or before September 23, 1913.

In re BOARD OF DIRECTORS OF SUBURBAN CONST. CO.

(Supreme Court, Special Term, Kings County. August, 1913.)

1. BANKRUPTCY (§ 20*) — STATE COURT RECEIVER — ACCOUNT — ALLOWANCE — FEES.

Where a receiver of an insolvent corporation is appointed by a state court in voluntary dissolution proceedings, and within four months the corporation is adjudged a bankrupt, the state court has jurisdiction to allow the receiver's account and fix the compensation for his own services, and for those of his attorney, prior to ordering payment of the assets to the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

2. BANKRUPTCY (§ 20*)—INSOLVENT CORPORATION—RECEIVERSHIP IN STATE COURT—ALLOWANCES—ATTORNEYS PROCURING RECEIVER.

Where a receiver of an insolvent corporation was appointed by a state court and within four months the corporation was adjudged a bankrupt, the attorneys who procured the appointment of the receiver were not entitled to an allowance for their services from the state court on the settlement of the receiver's account prior to turning over the assets to the bankrupt's trustee, but were only entitled to prove their claim, as unpreferred, in the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

Petition of a majority of the Board of Directors of the Suburban Construction Company for a voluntary dissolution thereof. On motion to pass a receiver's account and to fix allowances of the receiver and his counsel. Granted.

Arnon L. Squiers, of New York City, for receiver.
Latson, Tamblyn & Pickard, of New York City, for petitioners.
Robert P. Levis, of New York City, for Rosenberg & Levis.

BENEDICT, J. [1] This is an application to fix the compensation of a temporary receiver of a corporation in proceedings for the voluntary dissolution thereof, and also to fix the compensation of the receiver's attorney and of the attorneys who procured his appointment. The corporation has been adjudged a bankrupt in proceedings commenced within four months after the appointment of the receiver by this court, and it was stated on the argument that a trustee in bankruptcy had been appointed, although that fact is not disclosed by the motion papers.

Upon the authority of Randolph v. Scruggs, 190 U. S. 533, 538, 539, 23 Sup. Ct. 710, 47 L. Ed. 1165, I think the receiver is entitled to an allowance for services rendered and for disbursements and expenses made or incurred by him which have been of benefit to the bankrupt estate—that is, which have been of value in conserving the property of the bankrupt, increasing its amount or income—whether rendered before or after the filing of the petition in bankruptcy. See, also, In re Weedman Stave Co. (D. C.) 29 Am. Bankr. Rep. 460, 465, 199 Fed. 948.

The question is presented, however, whether such allowance can

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be made by the state court which appointed the receiver—that is, by this court—or whether it must be made by the bankruptcy court. Randolph v. Scruggs, supra, does not determine this question, and I have not been referred to, nor have I been able to find, any case in the federal Supreme Court which does determine it directly. In Matter of Watts, 190 U. S. 1, 35, 23 Sup. Ct. 718, 727 (47 L. Ed. 933), however, the Supreme Court, by way of dictum, said:

"It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter."

This apparently recognizes the right of the state court to fix the allowances of its receiver for compensation and expenses. And so it was interpreted in Loveless v. Southern Grocer Co. Ltd., 20 Am. Bankr. Rep. 180, 159 Fed. 415, 86 C. C. A. 395 (U. S. C. C. A., 5th Cir.), where a state receiver, prior to the filing of the petition in bankruptcy, had paid out of the assets in his hands various sums for court costs, keeper's fees, taxes, attorney's fees, and receiver's commissions. The Circuit Court of Appeals reversed an order of the District Court requiring the state receiver (who was also the trustee in bankruptcy) at once to pay into the registry of the bankruptcy court all moneys which had come into his hands as receiver of the state court, thus leaving it to the state court to go ahead and settle his account in proceedings therefor which were then pending. This clearly involved the recognition of the right of the state court to pass upon the propriety of the expenditures above indicated.

The right of the state courts to fix the allowances to their receivers or other officers of a similar nature is also supported by other authorities. Mauran v. Crown Carpet Lining Co., 6 Am. Bankr. Rep. 734, 740–743, 23 R. I. 324, 344, 50 Atl. 331, 387; Wilson v. Parr, 8 Am. Bankr. Rep. 230, 115 Ga. 629, 42 S. E. 5; In re Scholtz (D. C.) 106 Fed. 834. Contra: In re Standard Fuller's Earth Co. (D. C.) 186 Fed. 578. The reason of the rule is well stated in the first of these cases as follows:

"A receiver is an officer of the court, holding property under its order for the benefit of the party entitled to it. All courts therefore hold that the receiver should be paid from the fund, as a part of the expense of the proceeding. It would greatly embarrass courts in securing good receivers if this rule should not be adhered to. They should not be subjected to the uncertainty, inconvenience, and delay of awaiting other proceedings and of seeking their pay from other courts.

"It follows from this general rule that the fund or estate in the hands of a receiver, with reference to a party entitled to it, is the surplus over the charges allowed to the receiver. If so, we see no reason why the fund or estate for which a receiver is accountable to a trustee in bankruptcy is not the same surplus. If the fund had been adjudged to the bankrupt, that is all he could have received. Why should the trustee receive more? By the terms of the bankrupt law the trustee is vested only 'with the title of the bankrupt, as of the date he was adjudicated a bankrupt.' In the case before us the receiver's charges had been incurred before that time. It is true that the court had not, before that time, passed upon or allowed the receiver's charges; but that is a matter incidental to the administration of the estate. It is a step towards ascertaining the amount of the estate to be turned over. It can be done after the adjudication in bankruptcy as well as before.

"In Eyster v. Gaff, 91 U. S. 525 [23 L. Ed. 403], Mr. Justice Miller said: 'The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property, or of contracts, into the bankrupt court by the device of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view.'"

I conclude therefore that this court has power to pass the account of the receiver and to make an allowance to him for his services up to the time of the adjudication of bankruptcy, so far as they have been beneficial to the bankrupt estate, also to make allowances to his attorneys for services beneficial to the bankrupt estate.

[2] As to the attorneys who procured the appointment of the receiver, I think they are not entitled to any allowance, which shall constitute a lien or preferential charge against the assets, but they may prove their claim as an unpreferred claim in the bankruptcy court. Randolph v. Scruggs, supra, 190 U. S. at page 539, 23 Sup. Ct. 710, 47 L. Ed. 1165.

A careful consideration of the account and report submitted by the receiver clearly indicates that his services and those of his attorneys were of great benefit to the bankrupt estate. By the exercise of prompt attention and good business judgment the property coming under the receiver's control was not only protected from waste, but was rendered productive at a critical time, and many difficult and unusual questions of conflicting rights growing out of obligations and contracts were settled and disposed of without expensive litigation. For these services I think an allowance to the receiver of $2,000 would be appropriate, together with an allowance to him of a similar amount as compensation for the services of his attorneys, of which last-mentioned sum $150 should be paid to Rosenberg & Levis and the balance to Arnon L. Squiers.

(158 App. Div. 92)

FISH v. DELAWARE, L. & W. R. CO.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. STIPULATIONS (§ 14*)—EFFECT—AMENDMENT OF PLEADING.

In an action for personal injuries, a concession on the hearing of a demurrer to defenses alleging a release of liability for injuries in consideration of a reduced rate of transportation, that if the law of Michigan controlled such contract was invalid and that if the law of New York controlled it was valid, did not operate to so amend the answer as to allege that the contract was invalid under the laws of Michigan.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24–37; Dec. Dig. § 14.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PLEADING (§ 214*)—DEMURRER—ADMISSIONS—CONCLUSIONS OF LAW.
A demurrer does not admit an allegation of the pleading demurred to, that the law of another state as construed and enforced by the courts of that state is to a certain effect, nor does it admit conclusions of law.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525–534; Dec. Dig. § 214.*]

3. CONTRACTS (§ 2*)—LAW GOVERNING.
The law of the forum furnishes prima facie the rule of decision in an action, and if either party wishes the benefit of the lex loci contractus he must aver and prove it.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 2, 41, 145; Dec. Dig. § 2.*]

4. EVIDENCE (§§ 35, 80*)—JUDICIAL NOTICE—PRESUMPTIONS—LAWS OF OTHER STATES.
The courts of this state cannot take judicial notice of the laws of a foreign state, and in the absence of proof its laws will be presumed to be in accordance with our own.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51, 101; Dec. Dig. §§ 35, 80.*]

5. CARRIERS (§ 218*)—LIABILITY FOR INJURIES—RELEASE—VALIDITY.
A contract for the transportation of live stock by which the shipper, in consideration of his free transportation as caretaker of such stock, released the carrier of liability for any injury sustained by him through the carrier's negligence, is valid under the laws of this state, especially where such contract is a part and parcel of the tariffs, rules, regulations, and classifications of the carrier, published and filed pursuant to the laws of the United States regulating interstate commerce.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674–696, 927, 928, 933–949; Dec. Dig. § 218.*]

6. STIPULATIONS (§ 7*)—ORAL STIPULATIONS IN OPEN COURT.
Where, in an action against a carrier for injuries, on the hearing of a demurrer to defenses alleging that plaintiff in consideration of his free transportation as caretaker of live stock shipped by him from a point in Michigan to a point in New York, released the carrier of liability for injuries, though caused by its negligence, it was conceded in open court by the counsel for the respective parties that if the law of Michigan controlled the contract was invalid, while if the law of New York controlled it was valid, this concession, although constituting a somewhat informal stipulation, would be given the full effect contemplated by the parties.
[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 14; Dec. Dig. § 7.*]

7. APPEAL AND ERROR (§ 533*)—RECORD—MATTERS TO BE INCLUDED.
Under the amendment of 1910 of the General Rules of Practice, on an appeal to the Appellate Division, the opinion of the court below is a part of the record.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2339, 2400; Dec. Dig. § 533.*]

8. CONTRACTS (§ 2*)—VALIDITY—LAW GOVERNING.
The validity of ordinary commercial contracts is to be determined by the law of the place where the contract was executed, unless it can fairly be said that the parties at the time of its execution clearly manifested an intention that it should be governed by the laws of another state.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 2, 41, 145; Dec. Dig. § 2.*]

9. CARRIERS (§ 203*)—LIABILITY FOR INJURIES—RELEASE—VALIDITY.
Where a shipper contracted for the transportation of live stock from a point in Michigan to a point in New York over the lines of the initial car-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rier and certain connecting carriers, no contractual relation existed between the shipper and a connecting carrier to which the property was delivered at Buffalo until it was received by such company for transportation, and hence the validity of a provision of the contract releasing the carrier from liability for injuries to the shipper, though caused by the carrier's negligence, in consideration of the shipper's free transportation as caretaker, was governed, as to the negligence of such connecting carrier, by the laws of this state, as such must be presumed to have been the intention of the parties when the contract was executed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 203.*]

Appeal from Trial Term, Saratoga County.

Action by George D. Fish against the Delaware, Lackawanna & Western Railroad Company. From an interlocutory judgment (79 Misc. Rep. 636, 141 N. Y. Supp. 245) overruling a demurrer to the second and third defenses set forth in the answer, plaintiff appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Leary & Fullerton, of Saratoga Springs, for appellant.

Rockwood & McKelvey, of Saratoga Springs, for respondent.

LYON, J. The single question involved upon this appeal is as to the validity within this state of a clause in a contract for transportation from a point within a sister state to a point within this state, and of a release executed concurrently therewith, both of which were invalid in the state where executed but valid when executed within this state, exempting a common carrier from liability to a person being transported as a caretaker, who was injured while traveling over the line of a connecting carrier wholly within this state, through the negligence of such connecting carrier.

The action was brought to recover damages on account of personal injuries alleged to have been sustained by the plaintiff at the city of Elmira, N. Y., by reason of the negligence of the defendant while the plaintiff was riding as a passenger upon one of its trains; the plaintiff alleging that at the time he was injured he was traveling upon transportation purchased at Jackson, Mich., entitling him to travel as a passenger from that place to Ballston Spa, N. Y., by way of defendant's railroad from Buffalo to Binghamton.

The clauses of the answer demurred to allege that at the time of receiving any injuries, the plaintiff, who had shipped at Jackson, Mich., consigned to Ballston Spa, two horses and other property, was traveling upon what is commonly known as a drover's pass, pursuant to a contract and release executed by him in order to obtain a reduced rate of transportation, by which he voluntarily assumed all risk of personal injury, and released the contracting railroad as well as all connecting carriers, of which defendant was one, from all liability on account of any personal injuries which he might sustain, whether caused by the negligence of the contracting railroad or of any connecting carrier or otherwise.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

To these defenses the plaintiff demurred upon the ground that they were insufficient in law upon the face thereof. From the order overruling the demurrer this appeal has been taken.

[1] If the appeal is to be decided upon the defenses demurred to as they stood at the time the demurrer was served and as they appear upon the record, unquestionably the judgment overruling the demurrer must be affirmed. The answer contains no allegation that under the decisions of the courts of Michigan a contract and release of this character are invalid, and the concession hereinafter stated did not operate to so amend it.

[2] Moreover, a demurrer does not admit an allegation of the pleading demurred to, that the law of another state as construed and enforced by the courts of that state is to a certain effect, nor does it admit conclusions of law. Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 77 N. E. 877, 113 Am. St. Rep. 863; Park & Sons v. National Druggists' Association, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578.

[3, 4] It is the rule that the lex fori furnishes, prima facie, the rule of decision, and that if either party wishes the benefit of the lex loci contractus he must aver and prove it. We cannot take judicial notice of the laws of a foreign state, and in the absence of proof its laws will be presumed to be in accordance with our own. Monroe v. Douglass, 5 N. Y. 447; Latham v. De Loiselle, 3 App. Div. 525, 38 N. Y. Supp. 270, affirmed 158 N. Y. 687, 53 N. E. 1127; Humphreys v. Chamberlain, 1 Code R. (N. S.) 387.

[5] Under the decisions of this state the contract and release are valid. Hodge v. Rutland R. Co., 112 App. Div. 142, 97 N. Y. Supp. 1107, decision amended 115 App. Div. 881, 100 N. Y. Supp. 764, and affirmed 194 N. Y. 570, 88 N. E. 1121.

[6] It appears, however, that upon the trial of the demurrer the counsel for the respective parties in open court conceded that, "if the law of Michigan controls, the contract is invalid; if the law of New York, it is valid." And this concession is recognized and confirmed in the briefs submitted to us by the respective counsel. The concession was evidently entered into as furnishing the most expeditious and least expensive method of having determined the vital question involved in the action as to whether the legality of the contract and release is to be determined by the law of the state of Michigan or by the law of the state of New York. This question is not before us for determination, unless pursuant to the above-stated concession. In the case of Keene v. Newark Watch Case Material Co., 81 App. Div. 48, 50, 80 N. Y. Supp. 859, 860, the court refused to affirm the judgment appealed from upon the opinion of the court below, because it fixed an important date by a concession made upon the argument of a demurrer; the court saying:

"The sufficiency of a pleading to which a demurrer is interposed should not be determined on a concession which forms no part of the record, and is not incorporated in the pleading by an appropriate amendment."

[7] But since this decision was rendered, the opinion of the court below has been made as to this court a part of the record by the amend-

ment of 1910 of the General Rules of Practice. While the concession constituted perhaps a somewhat informal stipulation, yet it clearly evidenced the intention of the parties that, in the event of the court deciding that the validity of the contract and release are controlled by the law of Michigan, they should be held to be invalid and the demurrer sustained, and that, in the event of the court deciding that they are controlled by the law of New York, the contract and release should be held to be valid and the judgment sustaining the demurrer affirmed. The parties to the action had the right to make such a stipulation which should be binding upon them, and which should be enforced by the court at Special Term, and by this court as well.

"Parties by their stipulations may in many ways make the law for any legal proceedings to which they are parties, which not only binds them, but which the courts are bound to enforce, * * * and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced, and generally all stipulations made by the parties for the government of their conduct, or the control of their rights in the trial of a cause or the conduct of a litigation, are enforced by the courts." Matter of Petition of N. Y., L. & W. R. R. Co., 98 N. Y. 447; Crouse v. McVickar, 207 N. Y. 213, 100 N. E. 697; Cowenhoven v. Ball, 118 N. Y. 231, 23 N. E. 470.

"That parties may stipulate what the law is that governs their dispute, as well as what the facts are from which it arises, cannot be doubted; and the courts should and will give as complete effect to the former as to the latter class of stipulations." Matter of Cullinan, 113 App. Div. 485, 99 N. Y. Supp. 374.

In the case of Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401, plaintiff sought to avoid the effect of a verbal stipulation made in open court, which drew from the court the following statement:

"We think the stipulation was one which counsel had a right to make, but even if there were doubt upon that subject we think defendant's counsel is estopped by his conduct and laches from repudiating his stipulation at this late day."

In the case at bar neither counsel has sought to avoid the effect of his stipulation, but, as before stated, both have recognized and confirmed it, and we think we ought to give it the full effect contemplated by the parties and decide upon the merits the question intended to be submitted.

The first defense demurred to alleges that the Grand Trunk Railway Company, the Delaware, Lackawanna & Western Railroad Company, defendant herein, and the Delaware & Hudson Company, as common carriers, engaged in interstate commerce, and subject to the laws of the United States regulating the same, established a joint route at a rate of compensation pursuant to lawful tariffs, rules, and classifications theretofore established, published, and filed in accordance with the laws of the United States regulating interstate commerce, and that the contracts entered into between the Grand Trunk Railway Company and the plaintiff for the carriage of property over such joint route from Jackson, Mich., to Ballston Spa, N. Y., were for the benefit of all said common carriers and were part and parcel of the said tariffs, rules, regulations, and classifications, and that pursuant thereto and at reduced rates, because of the acceptance of said contracts by the

plaintiff, said common carriers transported said property between said points, carrying plaintiff free of charge as caretaker of the horses, and that such contract was as follows:

"And it is further agreed by said shipper, that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge, other than the sum paid or to be paid for the transportation of the live stock in charge of which he is, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier, from all claims, liabilities and demands of every kind, nature and description by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employés, or otherwise.

"And Geo. D. Fish does hereby acknowledge that he had the option of shipping the above-described live stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of said carrier and connecting railroad and transportation companies as common carriers of the said live stock upon their respective roads and lines, but has voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned."

The second defense demurred to alleges that at the time the plaintiff claims to have received personal injuries he was riding free of charge in a freight car as a caretaker of two horses, pursuant to his desire to so travel, having entered into the following written agreement with the common carriers who were engaged to transport the horses, of which carriers defendant was one:

"Release for Man or Men in Charge.

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock he is in charge, the undersigned does hereby voluntarily assume all risk of accidents or damage to his person or property and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities, and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employés or otherwise. Geo. D. Fish."

A similar contract and release were held to be invalid in the state of Michigan in the case of Weaver v. Ann Arbor R. Co., 139 Mich. 590, 102 N. W. 1037, 5 Ann. Cas. 764, which was an action brought to recover damages on account of personal injuries sustained by plaintiff, who was being transported within the state on a drover's pass, having executed a contract and release in practically the terms of the contract and release in the case at bar. The court held that the plaintiff was rightfully riding as a passenger for hire, and that the release executed by him was invalid upon grounds of public policy, and that the defendant as a common carrier of passengers could not lawfully stipulate for exemption from responsibility for its own negligence. Upon the other hand, it was held by the Supreme Court of Pennsylvania, in an action brought by an employé of the defendant who was traveling upon a free pass issued to him by the defendant in the state of New Jersey, in which state an ex-

emption clause contained in the pass was valid, who on his way to Elmira, N. Y., was injured in the state of Pennsylvania, in which state such exemption clause was invalid:

"It is to be presumed that parties enter into a contract with reference to the laws of the place of performance, and unless it appears that the intention was otherwise those laws determine the mode of fulfillment and obligation and the measure of liability for its breach." Burnett v. Pennsylvania R. Co., 176 Pa. 45, 34 Atl. 972.

Also:

"Where a contract containing a stipulation limiting liability for negligence on the part of a common carrier is made in one state, but with a view to its performance by transportation through or into one or more other states, it should be construed in accordance with the law of the state where its negligent breach causing injury occurs." Hughes v. Pennsylvania R. Co., 202 Pa. 222, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713.

In some other states such contract and release have been held to be valid and in other states to be invalid, but a further review of the decisions of the various states in which the question has been passed upon would be of little benefit. However, it is interesting to note the decision in 1873 of the United States Supreme Court in the case of Railroad Company v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, which was an appeal from the Circuit Court for the Southern District of New York. Lockwood was injured through the negligence of the New York Central Railroad Company, while traveling on a drover's pass from Buffalo to Albany. The court on appeal held that the railroad company could not lawfully stipulate exemption from responsibility for its own negligence, and that the release was void and Lockwood entitled to recover damages. This decision, however, has not been followed by the courts of our state; but, as before observed, such contract and release when executed within this state are held to be valid. Hodge v. Rutland R. Co., supra. And it would seem that such holding of the courts of our state, especially at the present day, in view of the Interstate Commerce Act, and the Public Service Commissions Law, regulating the rates for the transportation of passengers and freight, is founded in reason and justice.

In the case of Cappel v. Weir, 46 Misc. Rep. 441, 92 N. Y. Supp. 365, which was an action against an express company to recover the value of property received by it at Philadelphia, Pa., for transportation to New York City, and through the negligence of the defendant not delivered at the latter place, the court held:

"While in Pennsylvania a carrier may not by contract limit its liability for negligence, the rule only applies when the negligent act occurs in some jurisdiction whose laws forbid such limitation. But where, as in this state (New York), such limitation is valid, a contract made by an express company in Philadelphia, Pa., to deliver goods at a particular address in this state, limiting its liability to $50, will be enforced by the courts of this state in an action for failure to deliver the goods."

In the case of International Text-Book Co. v. Connelly, 206 N. Y. 188, 200, 99 N. E. 722, 727 (42 L. R. A. [N. S.] 1115), the court said:

"We think that the facts stated show that the contract wherever made was to be performed by both parties substantially in this state and that it should be governed by its laws."

[8] It is undoubtedly the law of this state that the validity of ordinary commercial contracts is to be determined by the law of the place where the contract was executed, unless it can fairly be said that the parties at the time of its execution clearly manifested an intention that it should be governed by the laws of another state. Union National Bank v. Chapman, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614; Grand v. Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490.

The Grand Trunk Railway Company, as well as the defendant, being engaged in interstate commerce, was required by the Interstate Commerce Act to establish through routes and just and reasonable rates applicable thereto, and the answer herein alleges that said contracts were part and parcel of the said tariffs and of the rules, regulations, and classifications of the Grand Trunk Railway Company, as well as those of the Delaware, Lackawanna & Western Railway Company, published and filed pursuant to the laws of the United States regulating interstate commerce, and in connection with and as a part of said tariffs. It was this classification so made and filed by the defendant of which this contract and release were parts, under which the plaintiff was agreed to be carried by the defendant over its road from Buffalo through Elmira to Binghamton.

The plaintiff knew at the time he executed the contract that he was to be transferred to defendant's railroad at Buffalo, as in his complaint he alleges that at Jackson, Mich., on or about November 4, 1910, he "purchased and paid for transportation * * * entitling him to ride from Jackson, Mich., to Ballston Spa, N. Y., and over defendant's lines between Buffalo, N. Y., and Binghamton, N. Y., and did thereupon enter as a passenger a car of defendant at Buffalo, N. Y., and was transported over defendant's said lines as a passenger on one of defendant's cars and train from Buffalo, N. Y., to Elmira, N. Y."

The plaintiff must be presumed to have known the contents of the contract and release, both of which he signed, and which in express terms extended to and exempted every connecting carrier from liability for any personal injuries which might be sustained by him, and that the same constituted a contract between himself and defendant upon his being transferred to defendant's car and railroad line at Buffalo.

[9] "In the case of transportation of property over several railroads constituting a continuous line, none of the roads can be said to be agents of the owner; each is exercising an independent employment, and is a contractor with the owner, the contract being either express or such as the law implies." Sherman et al. v. Hudson R. R. Co., 64 N. Y. 254, 260.

I think that no contractual relation existed between the plaintiff and defendant, and that the contract and release did not become binding as between them until the plaintiff was received by

the defendant at Buffalo for transportation over its line, and hence that the validity of the contract and release as between the plaintiff and defendant is governed as to the negligence of the defendant by the laws of the state of New York, and that such must be presumed to have been the intention of the parties at the time the contract and release were executed.

I have not overlooked the cases cited by the appellant. Dyke v. Erie Ry. Co., 45 N. Y. 113, 6 Am. Rep. 43; China Mutual Ins. Co. v. Force, et al., 142 N. Y. 90, 36 N. E. 874, 40 Am. St. Rep. 576; Grand v. Livingston, supra; Union National Bank v. Chapman, supra; and Valk v. Erie R. Co., 130 App. Div. 446, 114 N. Y. Supp. 964. In each of these cases, so far as they relate to the question of validity of a clause of exemption in a contract for transportation, the consignee was a through carrier, and no delivery was made to a connecting carrier, and nothing appeared from which it might be inferred that it was the intention of the parties when entering into the contract that any law other than that of the state in which the contract was executed should prevail during the performance of the contract.

We more willingly reach the conclusion that the validity of the contract in question is to be determined as between the plaintiff and defendant by the laws of this state, for the reason that it would be an injustice to allow the plaintiff, who appears to have intelligently executed the contract and release, to repudiate his contract, after having received the benefits therefrom in free transportation for himself and a reduced rate of transportation for his property over defendant's line.

The judgment overruling the demurrer should be affirmed. All concur.

(158 App. Div. 334)

O'CONNOR v. DUNNIGAN.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. BANKS AND BANKING (§ 129*)—TITLE TO DEPOSIT.

Money was deposited in a savings bank by a husband and wife, and the account read: "Payable to Mary Guilfoyle or Joseph Guilfoyle. Pay to either or the survivor of either." *Held*, that the form of the deposit indicated an intent to create a joint ownership with the right of survivorship.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 312–315, 326, 388; Dec. Dig. § 129.*]

2. BANKS AND BANKING (§ 131*)—TITLE TO DEPOSIT.

Where a husband and wife were joint owners of a bank deposit, a withdrawal of same by the wife, without the consent of the husband, and placing it in her individual name did not divest the interest of the husband.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 316–318, 333; Dec. Dig. § 131.*]

Woodward, J., dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Rensselaer County.

Action by Thomas O'Connor, executor, against Margaret Dunnigan, executrix. From a judgment in favor of defendant, plaintiff appeals. Reversed, and judgment directed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

John T. Norton, of Troy, for appellant.

James McPhillips, of Glens Falls (L. B. McKelvey, of Saratoga Springs, and J. W. Atkinson, of Waterford, of counsel), for respondent.

SMITH, P. J. This action was originally brought by Joseph Guilfoyle against the Cohoes Savings Institution to recover the sum of $3,000 which was on deposit in that institution in the name of Mary Norton Guilfoyle. The defendant, as executrix of the last will and testament of Mary Norton Guilfoyle, was impleaded. Joseph Guilfoyle thereafter died, and the plaintiff is substituted as his representative.

At the trial Joseph Guilfoyle was allowed to give evidence of personal transactions with his wife, Mary Norton Guilfoyle, which evidence before the decision of the action was properly stricken out by the trial judge. Apart from the evidence stricken out, however, these facts appear without contradiction. The moneys represented by this deposit were originally deposited by Joseph Guilfoyle and his wife Mary in this same institution in an account which read:

"Payable to Mary Guilfoyle or Joseph Guilfoyle. Pay to either or the survivor of either."

Four days before the death of Mary Guilfoyle, in the absence of Joseph Guilfoyle, she went to the bank, drew the money, and deposited it to an account in her own name. The next day she made a will purporting to dispose of the same. Under this will the defendant executrix claims title to the property.

[1] In Kelly v. Beers, 194 N. Y. 49, 86 N. E. 980, 128 Am. St. Rep. 543, one Kate V. Beers deposited in a savings bank moneys in an account which read as follows:

"In account with Kate V. Beers or Sarah E. Kelly, her daughter (the claimant), or the survivor of them."

[2] It was held that this language imported joint ownership by the decedent and claimant with final ownership in the survivor. It was further held in that case that it might be shown by other evidence that it was not the purpose in making the deposit in this form to create a joint ownership of the fund. In the case at bar the original deposit of these moneys was substantially in the same form as in the case cited. It cannot matter whether the moneys originally came from Joseph Guilfoyle or Mary Guilfoyle. The form of the deposit indicated an intent thereby to create a joint ownership with the right of survivorship. There is no evidence in the case which in any way would qualify such intent as is the natural import of the language used. As between the bank and Mary Guilfoyle, she had the right with the pos-

session of the book to withdraw the moneys from the account. Her change of the moneys, however, from this account to another in her individual name, in the absence of and as far as appears without the consent of Joseph Guilfoyle, could not divest Joseph Guilfoyle of his joint ownership in the property. It would be preposterous to claim that an appropriation of personal property by one joint owner to his personal use could divest the interest of the other joint owner or could in any way be presumed to have been by the consent of his co-owner. In order to change the joint ownership which presumptively existed, defendant was required to show that the ownership of Joseph Guilfoyle has been voluntarily surrendered. Of this there is no attempted proof. My recommendation, therefore, is that the judgment appealed from be reversed and that judgment be entered awarding the moneys in dispute to the plaintiff, with costs in this court and in the court below. The conclusion of fact of which this court disapproves being the conclusion that Mary Norton Guilfoyle was at the time of her death the owner of the moneys in question, and this court finds that at all times after the original deposit Joseph Guilfoyle and Mary Guilfoyle were joint owners with the right of survivorship of the deposit in question.

Judgment reversed on law and facts, and judgment directed awarding the moneys in dispute to the plaintiff, with costs in this court and in the court below. The finding of fact of which the court disapproves being the finding that Mary Norton Guilfoyle was at the time of her death the owner of the moneys in question, and this court finds that at all times after the original deposit Joseph Guilfoyle and Mary Guilfoyle were joint owners with the right of survivorship of the deposit in question. All concur, except WOODWARD, J., dissenting in opinion, and HOWARD, J., not sitting.

WOODWARD, J. (dissenting). Joseph Guilfoyle in his lifetime brought an action against the Cohoes Savings Institution to recover the sum of $3,000 which had been on deposit in that institution, represented by Book No. 29,396. This account appears to have been opened on the 4th day of April, 1905, and was, by its terms, payable to "Mary Guilfoyle or Joseph Guilfoyle; pay to either, or the survivor of either." It was closed on the 12th day of May, 1909, and on the same day a new account was opened by the same institution, represented by Book No. 35,185, payable to Mary Norton Guilfoyle, and showing a balance of practically $3,000. There is no dispute that this new account was created out of the funds in the old account, represented by Book No. 29,396, and the Cohoes Savings Institution does not question that it is the custodian of this fund, and, by an interpleader, it is now holding the same subject to the final judgment in this action.

On the 15th day of May, 1909, and three days after the transfer of the account above noted, Mary Norton Guilfoyle executed her last will and testament and on the following day died. Margaret Dunnigan was, by the provisions of that will, made executrix of the same, and upon its probate she was given letters testamentary and entered upon the discharge of her duties, demanding the amount of the deposit in the Cohoes Savings Institution in her representative capacity. With two claimants demanding the money, the Cohoes Savings Insti-

tution interpleaded and, as stated above, now holds the fund for the successful party in the present action; Margaret Dunnigan, as executrix, being substituted as defendant. The trial has resulted in a judgment in favor of the defendant, and the plaintiff appeals to this court.

Obviously, upon the facts as above set forth, and they are not disputed, the Cohoes Savings Institution was fully justified in turning over the fund represented by Book No. 29,396 upon the presentation of the book by Mary Guilfoyle or Joseph Guilfoyle, for it was directed in the book itself that the bank should "pay to either or the survivor of either," and the presumption is, of course, that, if Mary Guilfoyle presented the book, she did so lawfully; that she had possession of the same rightfully. This presumption is strengthened by the fact that Mary Guilfoyle was first mentioned; and the rule of construction is very ancient which commands that in determining written instruments "the best by all course is first to be named"; and that a statute which referred to "sheriffs and others" could not be construed to extend to justices, for these were of a higher rank (the Sovereigns Prerogative and the Subjects Privilege, p. 62, being the argument of Mr. Littleton at the Command of the House of Commons in 1628), while the book provided that the bank should pay to either of them presently "or to the survivor of either." This clearly contemplated that the fund was at the disposal of Mary Guilfoyle at any time, either before or after the death of Joseph Guilfoyle (Moore v. Fingar, 131 App. Div. 399, 400, 401, 115 N. Y. Supp. 1035), and practically the only issue presented by the plaintiff's action, as against the executrix of the will of his late wife, is as to the ownership of the fund and the rightfulness of the possession of the book by Mary Guilfoyle on the 12th day of May, 1909. There is no force in the contention that this provision in the bank book was intended merely for the survivorship of Mary Guilfoyle; its language gave her a present right to the fund on the presentation of the book; and while Joseph Guilfoyle might have had the account entered as it was, with his own funds, and retained the book in his own possession without any rights accruing to Mary Guilfoyle, there is no such presumption arising from the facts as they appear, and the burden of showing that the book was never delivered to Mary Guilfoyle, or that it was only intended to convey the fund to her in the event of her surviving Joseph Guilfoyle, is clearly upon the plaintiff. In other words, the plaintiff assumes the burden of showing that his late wife was guilty of stealing this bank book, which, upon its face, shows her perfect right to its possession and a perfect right to do all that she has done under its provisions. Clearly a bank book showing a substantial balance payable to "Mary Guilfoyle or Joseph Guilfoyle" and directing payment "to either or the survivor of either" would be presumed to be lawfully in the possession of Mary Guilfoyle, and the weight of the evidence (assuming now that all the evidence offered by the plaintiff was competent) shows that the original account was opened by Mary Guilfoyle and that some at least of the moneys entering into the account belonged to her. If we are right in this, it follows that the plaintiff would have the burden of showing what portion of the fund belonged to him, as the condition of any

recovery, and his testimony is that all of the fund belonged to him, making no effort to establish any part thereof.

Upon the trial, after a number of objections had been urged against the admission of the testimony of the plaintiff, on the ground that he was disqualified under the provisions of section 829 of the Code of Civil Procedure, it was agreed that the evidence should be heard under a general objection to its competency, and that the court should in its final determination pass upon the question of its competency. Under this arrangement the plaintiff was permitted to testify that the account was opened by himself; that he told one of the officers of the Cohoes Savings Institution that he wanted to have the fund fixed so that it would go to his widow in the event of her surviving him; that he was the owner of all of the fund; that his wife had no money of her own and no way of making any money during the time that they lived together, covering a period of about 21 years, and generally that he, as the sole owner of the fund, had merely provided for her survivorship; that he had the bank book, kept it locked in his trunk, and that he kept the key either in his pocket or in a pitcher in his room, and that he missed the key before the death of his wife and complained about the loss; that after his wife's death the key was returned to him by the defendant or his wife's sister; and that he then opened his trunk and for the first time discovered the loss of the bank book. The court first submitted three questions to the jury as to the ownership of the fund, and then made findings of fact and conclusions of law inconsistent with the verdict of the jury, and struck out the material portions of the plaintiff's testimony under the reservation agreed to upon the trial; and the principal question involved on this appeal is as to the correctness of this final ruling upon the question of the competency of the plaintiff as a witness in this action.

The record is rather confusing, but it does not appear to be necessary to go into all of the rulings in detail, for, if the plaintiff was not competent to testify to any of the material questions, the case is without merit, and the judgment should be affirmed. Ignorance of the law is no excuse, and if the plaintiff put his own funds into a position where they could be misappropriated, and under circumstances where he could not testify, he has only himself to blame, and it is no part of the duty of this court to override the established policy of the state to help him out of his difficulty. Section 829 of the Code of Civil Procedure provides that upon "the trial of an action * * * a party or a person interested in the event * * * shall not be examined as a witness in his own behalf or interest * * * against the executor * * * concerning a personal transaction or communication between the witness and the deceased person"; and the courts have uniformly held that this provision is to be applied in its spirit, and that the witness is not to be permitted to do indirectly what he would not be permitted to do directly. On the face of the evidence, there was a personal transaction between Joseph Guilfoyle and Mary Guilfoyle; the bank book shows a deposit of a fund to be payable to "Mary Guilfoyle or Joseph Guilfoyle, or either or to the survivor of either"; and, assuming this deposit to have been made by the husband, the account on its face imports a gift of the fund to her and

that she has such an interest in it as gives her an equal right with him to draw it during their joint lives and vests her with its absolute title in case she survives him. Moore v. Fingar, 131 App. Div. 399, 401, and authorities there cited. Here was a personal transaction between them, the making of a gift, evidenced by a writing in a bank book to the possession of which either was entitled, so far as the documentary evidence discloses; and the plaintiff, in an action against the executrix under the will of his late wife, attempts to testify in relation to that transaction and to give it an entirely different character than that which the law presumes. A transaction which the law holds to have constituted a gift, entitling the wife, equally with the husband, to draw during their joint lives, is attempted to be transformed, by the testimony of the plaintiff, into a mere intention to provide for a survivorship, and a court of equity is asked to hold that the wife, whose lips are sealed in death, was guilty of a fraud, practically of grand larceny, in doing just what the bank book authorized her to do, and which the law, looking only to the fact of the form of the deposit and the relationship of the parties (Moore v. Fingar, supra), authorized. The language of the statute is that the plaintiff "shall not be examined as a witness, in his own behalf or interest, * * * concerning a personal transaction or communication between the witness and the deceased person"; and it seems entirely clear to me that the plaintiff (who has since died, and whose position is now taken by his executor) was entirely incompetent to testify to any matters which related to this personal transaction. Richardson v. Emmett, 170 N. Y. 412, 419, 63 N. E. 440.

The case would be weak even with the plaintiff's testimony, for the bank officials testify to a state of facts directly contrary to that asserted by the plaintiff in reference to the original account, and the court would have been justified in holding that the deposit was made by Mary Guilfoyle, which would raise the presumption that she had possession of the bank book all of the time between the original deposit and the closing of the account, and which would clearly justify her in drawing the fund and opening another account. With the plaintiff's testimony stricken from the record, as I believe it should be, there is no foundation for the plaintiff's contention, and there is no ground on which the judgment may properly be disturbed.

The judgment appealed from should be affirmed, with costs.

(158 App. Div. 342)

MURPHY v. VILLAGE OF FT. EDWARD.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. BRIDGES (§ 37*)—RAILWAY CROSSINGS—"PUBLIC BRIDGE."

Village Law (Consol. Laws 1909, c. 64) § 142, providing that, if at the time that chapter takes effect the board of trustees of a village has supervision and control of a bridge therein, it shall continue to exercise such control, but that in any other case every public bridge within a village shall be under the control of the commissioners of highways of the town, has no application to a structure in the form of a bridge erected by a railroad company over its tracks as a part of its duty to restore the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

highway crossed by its tracks to its original utility; such a structure not being a "public bridge," in the sense in which that expression is used, but a part of the highway as distinguished from the ordinary bridge over a water course, and, under the grade crossing act, the duty of maintaining the roadway on such bridge rests on the village.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 96, 103–105, 109; Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 6, pp. 5775, 5776.]

2. APPEAL AND ERROR (§ 1137*)—REVIEW—ERRORS URGED BY RESPONDENT.

In an action against a village for injuries, defendant, at the close of plaintiff's case, moved to dismiss the complaint upon the ground, among others, that the statutory notice was not filed within the time prescribed by law. The court, without objection or exception, reserved the motion. At the close of defendant's evidence the motion to dismiss was renewed and denied except that the court retained the question of whether the town or the village was liable for the maintenance of the roadway where the accident occurred and submitted the case to the jury subject to the court's opinion on that question. No objection was made or exception taken. A verdict was rendered for plaintiff which the court set aside on the erroneous ground that the town and not the village was liable. Plaintiff alone appealed. *Held* that, defendant having taken no exception or cross-appeal, the court would not go outside the record and affirm the judgment on the ground that the complaint was defective in failing to allege the filing of the statutory notice, since had the court ruled adversely to plaintiff the complaint might have been amended so as to allege a justification for the failure to file such notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4446; Dec. Dig. § 1137.*]

3. MUNICIPAL CORPORATIONS (§§ 812, 816*)—ACTIONS—CONDITIONS PRECEDENT —NOTICE.

Under Village Law (Consol. Laws 1909, c. 64) § 341, providing that no action shall be maintained against a village for personal injuries unless a written, verified statement of the nature of the claim and of the time and place of the injury shall have been filed with the village clerk within 60 days, an infant plaintiff must show the filing of such notice or an excuse sufficient in law for the failure to file it; her infancy in itself not being a sufficient excuse.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1696–1707, 1711–1716, 1718, 1720–1723; Dec. Dig. §§ 812, 816.*]

Appeal from Trial Term, Washington County.

Action by Celia Murphy, an infant, by Mary Ann Murphy, her guardian ad litem, against the Villiage of Ft. Edward. From an order and judgment of dismissal and an order setting aside a verdict for plaintiff (79 Misc. Rep. 296, 140 N. Y. Supp. 885), plaintiff appeals. Order and judgment of dismissal reversed, order setting aside verdict affirmed, and new trial granted.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Rogers & Sawyer, of Hudson Falls (Erskine C. Rogers, of Hudson Falls, of counsel), for appellant.

Wyman S. Bascom, of Ft. Edward (Edgar T. Brackett, of Saratoga Springs, of counsel), for respondent.

WOODWARD, J. This action was brought to recover damages for personal injuries alleged to have been sustained by the plain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tiff by reason of the negligence of the defendant in maintaining the passageway of a bridge over a branch of the Delaware & Hudson Company Railroad. Upon the trial of the action the court reserved its decision on the defendant's motion for a dismissal of the complaint and, upon the jury finding a verdict for the plaintiff, set the verdict aside and directed that judgment be entered dismissing the complaint upon the ground that the village of Ft. Edward did not owe the plaintiff the duty of maintaining the bridge in a reasonably safe condition; that duty belonging to the town of Ft. Edward under the provisions of section 142 of the Village Law (Consol. Laws 1909, c. 64). The plaintiff appeals from the order directing the entry of judgment dismissing the complaint and from the judgment entered upon such order, as well as from the order setting aside the verdict of the jury.

[1] The main question involved in this appeal is the one relating to the duty of caring for this bridge over the tracks of the Delaware & Hudson Railroad. We are clearly of the opinion that the learned trial court has fallen into error in holding that section 142 of the Village Law determines the liability of the defendant. This section provides that:

> If "at the time this chapter takes effect, the board of trustees of a village has the supervision and control of a bridge therein, it shall continue to exercise such control under this chapter. In any other case, every public bridge within a village shall be under the control of the commissioners of highways of the town in which the bridge is wholly or partly situated, or such other officer as may be designated by special law, and the expense of constructing and repairing such bridge and the approaches thereto is a town charge, unless the village assumes the whole or part of such expense."

If the bridge over the Delaware & Hudson Railroad was a "public bridge" in the sense that that expression is used in the Village Law, then there can be no question that the duty of maintaining it rested upon the town rather than the village of Ft. Edward; but it is not such a bridge; it is merely a structure, in the form of a bridge, erected by the railroad company in the discharge of its obligation to restore the highway which it crossed with its tracks to its original utility and in law is a part of the highway as distinguished from the ordinary bridge over a water course. City of Yonkers v. N. Y. C. & H. R. R. R. Co., 165 N. Y. 142, 145, 58 N. E. 877. "The duties of railroad companies in building and maintaining bridges which are rendered necessary by their interference with existing highways," say the court in Bush v. D. L. & W. R. R. Co., 166 N. Y. 210, 217–218, 59 N. E. 838, 841, "are defined and regulated by another statute which declares: 'Every railroad corporation which shall build its road * * * across * * * any highway * * * which the route of its road shall intersect or touch, shall restore * * * the * * * highway * * * thus intersected or touched to its former state, or to such state as not to have unnecessarily impaired its usefulness, and any such highway * * * may be carried by it, under or over its track, as may be found most expedient.' L. 1890, c. 565, § 11. It has been many times held that the statutory duty of restoring a highway appropriated by a railroad company

for its track is a continuing obligation incident to its franchise; that the purpose of the statute was to impose upon the company the duty of maintaining a bridge or highway as well as of restoring it; and that the statutory duty to preserve the usefulness of the highway attaches and remains until it is fully complied with." These bridges carrying any highway over the tracks of a railroad, it will thus be seen, do not change the character of the way; it is still a highway, changed in form to meet the requirements of the railroad, and is in no proper sense a public bridge. "But since 1835," say the court in the case last cited (166 N. Y. 221, 59 N. E. 842), "the liability of railroad companies for injuries occasioned by their neglect to restore and maintain highways crossed by their railroads to their former state so as not to impair their usefulness has never been questioned nor denied. And never until now has it been claimed that the policy of the law relating to bridges or highways of a town had any application or relation to the duties and liabilities of railroad companies imposed by the Railroad Law (Consol. Laws 1910, c. 49). The policy as to each has always been distinct and essentially different from that which has been adopted as to the other."

The bridge here in question was constructed many years ago, and except for the later legislation, known as the Grade Crossing Act, it would unquestionably have been the duty of the railroad company to maintain this portion of the highway in a reasonably safe condition. That duty has, however, been changed by statute, and the municipality, except under conditions not existing in the case now before us, is bound to maintain the roadway. Murphy v. Delaware & Hudson Co., 151 App. Div. 351, 135 N. Y. Supp. 509. In other words, the municipality in which this crossing is located, being charged with the duty of maintaining its highways, is called upon to take care of the roadway of this bridge in the same manner that it would have been bound to take care of the highway if the railroad had not been constructed across it, and the provisions of the Village Law in reference to public bridges have nothing to do with the case.

[2, 3] It seems clear, therefore, that upon the question of law determined by the court the plaintiff is entitled to a reversal of the judgment and order. But it is suggested that there was a fatal defect in the plaintiff's case in that the plaintiff had failed to give the notice required by section 341 of the Village Law, and we are of the opinion that, had this point been insisted upon, it would be fatal to the plaintiff's case. At the close of plaintiff's case counsel for defendant moved to dismiss the complaint upon the ground, among others, that there had been a failure to file the notice within the time prescribed by law, and we will assume that this motion referred to section 341 of the Village Law. The court declined to dismiss the complaint and took defendant's testimony, reserving the motion. To this there was no objection or exception. At the close of defendant's evidence the motion to dismiss the complaint was renewed upon the grounds mentioned above, and this motion was denied "except that the court retains the question of whether or not the town or the village is responsible for the maintenance of this

sidewalk on the bridge, and will take the verdict of the jury subject to the opinion of the court on that question." No objection was made; no exception was taken; so that when the case went to the jury there was a ruling of the court, without objection or exception, that the defendant was not entitled to have the complaint dismissed upon the ground that there had been a failure on the part of the plaintiff to file the notice referred to, and the defendant has not appealed from the order or judgment or made any move whatever to bring that ruling before this court, and it is the province of a court of review to deal only with the questions presented on behalf of one who is aggrieved by the judgment or order appealed from. It is possible, had the court ruled adversely to the plaintiff upon the question of the notice that the complaint might have been amended so as to set forth a justification for a failure to file such notice, and this litigation ought not to be determined without such an opportunity being afforded to the plaintiff. We are of opinion that under the rule set forth in Winter v. City of Niagara Falls, 190 N. Y. 198, 204, 82 N. E. 1101, 123 Am. St. Rep. 540, 13 Ann. Cas. 486, the plaintiff must show either that the notice was filed or an excuse sufficient in law for a failure to do so, and that the mere infancy of the plaintiff is not a sufficient excuse, but that question is not presented upon this appeal. The plaintiff should not be defeated upon a question which she brought before the court in due form simply because we are of the opinion that upon another point, which may be obviated, the pleadings are defective. If the defendant had taken an exception to the ruling of the court, and had made a cross-appeal, the whole matter might be disposed of here, but it would be traveling outside of the record to defeat the plaintiff upon a question in which she is entitled to a reversal, because the defendant may have a fatal objection to the complaint as it now stands.

The order and judgment dismissing the complaint should be reversed, order setting aside verdict affirmed, and a new trial granted, with costs to appellant to abide event. All concur; SMITH, P. J., in memorandum.

SMITH, P. J. (concurring for reversal). I agree with Mr. Justice WOODWARD that upon the defendant rested the duty of keeping the planking upon the bridge in question in repair. The question upon which I entertain considerable doubt is as to the effect of the failure to serve upon the defendant the notice of injury. In Winter v. City of Niagara Falls, 190 N. Y. 198, 82 N. E. 1101, 123 Am. St. Rep. 540, 13 Ann. Cas. 486, where it was held that the requirement of the statute applied as well to an infant as to an adult, attention was called to the fact that the plaintiff in that case was 18 years of age "and, so far as the complaint shows, presumably was able to cause a claim to be filed." In the opinion of Judge Gray it is said:

"To require the presentation of a claim within a specified time is quite a reasonable provision, inasmuch as thereby the municipality is afforded a measure of protection against stale claims or the possible connivance of corrupt officials. It permitted an investigation into the occurrence to be had at

a time when the evidence relating to it might more readily be collected. The provision is not so rigid as to be beyond a construction, which admits of a substantial compliance with its requirement or of an excuse for delay in performance, when caused by the inability of the injured person to comply."

The plaintiff in the case at bar was only five years old and was herself clearly unable to serve notice. While this is not a statute of limitation from the effect of which the plaintiff is relieved by reason of infancy, in my judgment a fair construction of the statute should not forfeit to this infant his right of action because of the failure of his mother or father to properly solve the intricate question of law as to what defendant was liable for the injury caused by this defective bridge.

(158 App. Div. 373)

CURTIS v. HUDSON VALLEY RY. CO.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. RAILROADS (§ 348*)—INJURIES TO PERSONS ON TRACK—ACTIONS—EVIDENCE—SUFFICIENCY.
   In an action for the death of one killed at a railroad crossing, evidence *held* sufficient to sustain a finding that deceased was not guilty of contributory negligence.
   [Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138–1150; Dec. Dig. § 348.*]

2. EVIDENCE (§ 147*)—NEGATIVE EVIDENCE.
   In an action for the death of a traveler killed on a railroad track, evidence of witnesses that they did not hear the whistle of the approaching car, though weak, is competent.
   [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 435–437; Dec. Dig. § 147.*]

3. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.
   In an action for the death of a traveler killed on a railroad track, the admission of evidence that witnesses did not hear the whistle of the approaching car is harmless, if the evidence be too weak to be competent.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.*]

4. APPEAL AND ERROR (§ 1052*)—PERSONS ENTITLED TO ALLEGE ERROR.
   Error in allowing plaintiff to give incompetent evidence on direct examination as to the earnings of deceased was cured, where the same evidence was brought out on cross-examination.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171–4177; Dec. Dig. § 1052.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.
   In an action for the death of a traveler, who was killed while driving his automobile across railroad tracks, the refusal of an instruction based on the hypothesis that the automobile had been stopped within 10 feet of the crossing, and was started when the car was only 30 or 40 feet away, was proper, where it was contrary to the physical facts.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. § 252.*]

   Kellogg, J., dissenting.

Appeal from Trial Term, Saratoga County.

Action by Mary L. N. Curtis, sole executrix of the last will and testament of Pierson C. Curtis, deceased, against the Hudson Valley Rail-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

road Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Lewis E. Carr, of Albany, for appellant.
John B. Holmes, of Troy, for respondent.

SMITH, P. J. [1] This case was before us upon an appeal from a former judgment. That judgment was reversed upon what we deemed to be an erroneous admission of evidence. It is found reported in 147 App. Div. 349, 131 N. Y. Supp. 758. Plaintiff's intestate was driving an automobile across the defendant's track. He was struck by the defendant's car and killed. The case was submitted to the jury upon the negligence of the defendant in failing to give warning of the approach of the car and upon the contributory negligence of plaintiff's intestate. Upon these two questions the evidence does not materially differ from that upon the former trial. That there was a question of fact for the jury upon both of these issues would seem undeniable. Upon the question of defendant's negligence it can hardly be urged that the verdict is against the weight of evidence. Upon the question of the absence of contributory negligence of the plaintiff's intestate, with some hesitation I am inclined to think that the verdict should be sustained. Two juries have so found. Just before reaching the crossing the plaintiff's intestate was informed by his wife that the car from the south had already passed, as was the fact with the regular car due at that time. The car which struck the automobile was an extra car. With this information he was naturally put on his guard rather as against a car from the north. The car from the south which struck the automobile could be seen less than 200 feet from a point 14 feet from the crossing. At this point the plaintiff's intestate slowed down, and according to some evidence stopped. That 200 feet in which the car could be seen from this point would have been passed almost in an instant by the car going from 30 to 40 miles an hour, as was shown to have been the speed of this car. With the attention of the deceased diverted by being told that the regular car from the south had already passed, and with a very short distance at which a car could have been seen approaching even from a point near the crossing, we think the evidence presented as to the care which deceased apparently exercised was sufficient to justify the verdict of the jury. This case is clearly differentiated from those cases where a car could be seen approaching at a sufficient distance so that the traveler upon the highway would be warned in time of the danger of crossing.

[2-4] The evidence of witnesses that they did not hear the whistle of the approaching car was competent, though weak evidence. If too weak to be competent, it was too weak to be harmful. The evidence of plaintiff on direct examination as to the earnings of deceased was of doubtful competency, as not the best evidence; but on cross-examination the defendant brought out the same result, irrespective of the books upon which the evidence upon direct examination was apparently based. We have examined the record as to other errors

claimed to have been committed on the trial, but find none which should invalidate the judgment appealed from.

[5] The refusal of the trial court to charge the sixteenth request to charge, which is made the basis of a dissent herein by my Brother KELLOGG, while perhaps not sufficiently answered by the charge as made, was fully justified in view of the physical impossibility of the coexistence of the facts alleged in the request to charge and the happening of the accident. If the automobile were at a standstill 10 feet from the track, and the car was coming at 40, 30, or 20 miles an hour, not 30 feet from the crossing, that automobile never could have gotten onto the track, so as to have been hit by that car. Moreover, with the highway crossing the trolley road at an angle, the car would have been squarely in front of the deceased, and if within 30 feet would have been right upon him. Any finding that a man with any intelligence, with his automobile at rest, would have proceeded upon that track with the trolley car right upon him, would be so far against reason as to be without the bounds of credibility. If the automobile could have reached the track ahead of the trolley car, which is physically impossible, it would have resulted in certain death, which there is no evidence that the deceased was courting. The judgment and order should be affirmed, with costs.

Judgment and order affirmed, with costs. All concur, except

JOHN M. KELLOGG, J. (dissenting). Some of the evidence indicates that the motor car was practically at a standstill about 10 feet from the crossing, when the trolley car was about 30 feet from the crossing, and that the decedent drove upon the track without looking for the car, which could have been seen, if he had looked.

The court was requested to charge that if the defendant started his car under such circumstances, and when he could have seen the approaching car, if he had looked, it was negligence, preventing a recovery. The court declined, and the appellant excepted. If such were the facts, clearly the plaintiff was not entitled to recover.

It is sought to excuse the refusal to charge upon the ground that the request implied that the motorman, Mrs. Willis, and Mr. Thomas had sworn to that condition. Their evidence clearly indicated it, although perhaps each of them did not make the exact statement; but the request was not refused upon the ground that it embraced erroneous inferences as to what particular witnesses had sworn to, as the court charged in lieu of it, in substance, that if a man of ordinary prudence would have looked under such circumstances, and it would have been apparent to him that he could stop his car, then there was negligence in not stopping it.

It is very doubtful upon the facts whether the plaintiff should recover. The jury might well have understood, from the refusal to charge and from the charge, as made in lieu of it, that a man 10 feet from the track could start his car from practically a standstill upon the track, with a trolley car approaching 30 feet distant, which could have been seen if he had looked, and might still recover, notwithstanding his failure to look.

(158 App. Div. 322)

FISLER v. VAN DEUSEN.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

BOUNDARIES (§ 48*)—ESTABLISHMENT—ESTOPPEL.

Where plaintiff, more than 25 years previously, built a fence under an agreement with the adjoining landowner, and no claim was ever made that the fence was not on the line until suit was brought, four years after the adjoining land had been platted and was being sold in lots, plaintiff is estopped, as against a purchaser of one of the lots without notice, from setting up that the fence is not on the line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232–242; Dec. Dig. § 48.*]

Appeal from Judgment on Report of Referee.

Action by John Fisler against Anna C. Van Deusen. From a judgment for defendant, dismissing the complaint upon the merits, plaintiff appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Horatio G. Glen, of Schenectady, for appellant.

Milton E. De Voe, of Schenectady (R. J. Cooper, of Schenectady, of counsel), for respondent.

WOODWARD, J. The plaintiff brings this action in ejectment to recover a piece of land in the city of Schenectady on the southerly side of Haigh avenue. It appears that previous to the year 1868 one Isaac N. Lindley was the owner of a tract of land in the town of Niskayuna, now a part of the city of Schenectady; that in the year mentioned Lindley sold two parcels out of this tract to one Livingston Ellwood, running back from the old Albany turnpike (now known as State street) easterly 1,188 feet; that Ellwood fenced in this land; that subsequently and on the 5th day of July, 1869, Ellwood sold it to James E. Haigh; and that on the same day Lindley sold to Haigh a piece of land adjoining the Ellwood piece on the north and bounded southerly by the Ellwood tract, westerly by State street, northerly by the Becker property, and easterly by property still owned by Lindley, but which was conveyed to the plaintiff in this action in January, 1879, and has since been occupied by him. The result of these various transactions was that in 1879 John Fisler and James E. Haigh were the owners of adjoining tracts of land, occupied for farming purposes; the boundary line between them being fixed by deeds, but not marked by fences or other permanent monuments. A portion of the line between these two men ran through a pine woodland, filled with underbrush, and in the year 1882 or 1883 these neighbors got together, the immediate occasion being certain trespasses by the cattle of Haigh, and it was agreed between them that Fisler should construct a fence, using the growing trees for posts to carry the wires, for the purpose of preventing the trespasses. There appears to have been some talk to the effect that Fisler did not know where the line was, and that there might be a subsequent adjustment of it; but it appears without dispute that the fence constructed by Fisler at that time continued to exist down to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1904, when Haigh sold to one Alexander Fenwick a strip of land 264 feet wide off from the northerly part of his land, next to the Becker property, and involving the line between the Fisler and Haigh properties, and it is claimed that Fenwick knew that his line did not extend to the wire fence upon the trees between the Haigh and Fisler properties, though Fenwick testified in the action that Haigh told him he was selling him the land up to the wires.

This state of affairs appears to have continued, with no dispute between Fenwick and Fisler as to the boundary between them, up to September, 1908, when Fenwick, who had plotted his purchase in the meantime, conveyed a part of lot No. 70 on his allotment map to Anna C. Van Deusen, the defendant in this action, and which included within its bounds the parcel of land which the plaintiff claims belonged to him under his original deed from Henry Gerling, and which title came through Lindley, the original owner of the entire plot, but which was cut off by the wire fence constructed by the consent of Fisler and Haigh in 1882 or 1883. Fenwick filed a map of his allotment in March, 1904, which allotment shows his lot No. 70, a portion of which, 35 feet front and rear and 103 feet deep, was sold to the defendant in September, 1908, or more than four years later, with no claim on the part of the plaintiff, so far as appears, to extend his possession west of the wire fence, and this action was not commenced until December, 1910. It is probably true that the filing of the Fenwick map was not notice to the plaintiff of claim of title on the part of Fenwick; but it can hardly be doubted that the plaintiff, residing upon the adjoining farm, knew of the laying out of a plot with streets, and to remain silent and permit innocent purchasers to take these lands during a period of four years is hardly calculated to induce courts of justice to seek far for a method of restoring him to his property, assuming that he originally owned the same.

The learned referee before whom the case was tried has found that the plaintiff and Haigh, more than 20 years before the conveyance to Fenwick, entered into an agreement for the construction of a fence between them, and that this constituted a practical location of the line, and this view appears to be sustained by the authorities. Beyond this, however, the plaintiff, knowing, as he must have known, of the transfer of this property to Fenwick, with the visible line of demarcation fixed by the still existing fence in 1904, without making any effort to assert his rights, is hardly in a position to put forward this claim as against those who have acted in good faith in the purchase of this property. The plaintiff by permitting the fence to remain is, as to third parties having no notice of any verbal agreement between the plaintiff and Haigh, fairly estopped to say that the line is different from what it appeared to be to one going upon the premises. There was a fence all the way between the Fisler and Haigh properties; a portion of this fence, it seems to be admitted, was upon the correct line, and the balance was a continuation of that correct portion. An inquiry on the part of Fenwick, at the time of his purchase in 1904, would have established that this fence had been in its present location for more than 20 years, and his vendor testifies that he represented

that he was selling up to this fence. The plaintiff himself constructed this fence. By his own action he has held it out as the practical boundary between these properties, and he is attempting to assert as against the defendant, who takes title from Fenwick, a right to the possession of property which he visibly surrendered to the use and occupation of Haigh way back in 1882 or 1883, and which he has never made any claim to up to the time of the bringing of this action so far as appears from the record. It seems clear that upon well-understood principles the plaintiff is estopped to assert title as against the defendant in this action, and we are of opinion that the judgment appealed from should be affirmed. See Pierson v. Mosher, 30 Barb. 81.

The judgment appealed from should be affirmed, with costs. All concur.

(81 Misc. Rep. 421.)

HAGER et al. v. ARLAND et al.

(Supreme Court, Equity Term, Steuben County. June, 1913.)

1. CANCELLATION OF INSTRUMENTS (§ 4*)—GROUNDS—CHATTEL MORTGAGE—ILLEGALITY.

Where a mortgagee has taken possession of mortgaged chattels, thus depriving the borrower of his property and of the opportunity to establish at law the illegality of the mortgage because tainted with usury, an action in equity will lie to cancel the mortgage.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. § 4.*]

2. TRIAL (§ 387*)—BY COURT—DECISION—PREREQUISITE TO JUDGMENT.

In an action in equity to cancel chattel mortgage, judgment entered before a decision has been filed as required by Code Civ. Proc. § 1022, is premature and will be set aside on motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 903–907; Dec. Dig. § 387.*]

3. TRIAL (§ 387*)—BY COURT—DECISION—SUFFICIENCY.

Notation by the trial court on the requested findings that "the foregoing requested findings are found as above modified as marked," and mere conclusions of law that plaintiffs were entitled to a judgment, did not, in the absence of any specific direction that judgment be entered, constitute the decision required by Code Civ. Proc. § 1022, as a condition precedent to the rendition of a judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 903–907; Dec. Dig. § 387.*]

Action by Frederick D. Hager and others against William W. Arland and others. Motion to set aside judgment for plaintiff. Motion granted.

Darrin & Darrin, of Corning, for plaintiffs.
James O. Sebring, of Corning, for defendants.

SAWYER, J. [1] The case of Reiner v. Galinger, 151 App. Div. 711, 136 N. Y. Supp. 205, follows the well-settled rule that an action in equity to cancel an agreement or obligation tainted with usury will not lie when the rights of the maker can be enforced in an action brought upon the instrument itself in a court of law. But where, as in this action, the lender has taken possession of the property pledged

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as security, and thus avoided bringing the disputed instrument before the court for adjudication, thereby depriving the borrower both of his property and his opportunity to establish at law the illegality of the transaction, the rule is otherwise; to then refuse the aid of the court's equitable powers would be to leave the victim of the usurer without remedy. Berry v. Arland, 153 App. Div. 940, 138 N. Y. Supp. 1107.

The Appellate Division of this department in that case declined to treat Reiner v. Galinger, supra, as an authority under such circumstances and sustained a judgment of a court of equity canceling the chattel mortgage in suit.

Motion for reargument is therefore denied.

[2, 3] This judgment must, however, be vacated, for the reason that no decision has been made and filed as required by section 1022 of the Code of Civil Procedure.

Plaintiffs' submitted requests to find under section 1023 were modified in two or three unimportant particulars, the court's determination noted on the margin of each, and at the foot was indorsed, "The foregoing requested findings are found as above modified as marked," which indorsement was signed by the trial justice. There was no intention upon his part to thereby alter their character and constitute them formal findings of fact and conclusions of law. The indorsement was made simply to call attention to the minor changes, and without thought that thereby the necessity of the usual findings was obviated. They are in form requests only, and while the conclusions of law are that plaintiffs are entitled to a judgment, with costs, they nowhere specifically direct that judgment to be entered. Code Civ. Proc. § 1022.

I am aware the Appellate Division has, under such circumstances, remitted the case to the trial judge in order that findings might be made and filed nunc pro tunc. People v. Dalton, 77 App. Div. 499, 78 N. Y. Supp. 1051. But where the question is raised in the trial court by motion to vacate the judgment as premature the action should take the regular course. Edinger v. McAvoy, 134 App. Div. 869, 119 N. Y. Supp. 327.

Motion to set aside the judgment as irregular and premature granted, with costs.

Motion granted, with costs.

(158 App. Div. 326)

PEOPLE v. JOURNAL CO.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. NEWSPAPERS (§ 5*)—COMPENSATION FOR PUBLICATION—DOUBLE COMPENSATION.

Where a newspaper was designated as a state paper for the publication of laws under the provisions of Laws 1893, c. 248, and also as a county paper for the publication of the same laws under the provisions of Laws 1892, c. 686, it was not entitled to compensation under both laws for one publication of the statutes.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 21–26; Dec. Dig. § 5.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. STATES (§ 119*)—FISCAL MANAGEMENT—LIMITATION ON USE OF FUNDS—GIFTS.

If the statutes were construed so as to allow such double compensation for single service, they would violate Const. art. 8, §§ 9, 10, prohibiting the gift of state money to a private individual or corporation.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. § 119.*]

3. STATUTES (§ 219*)—CONSTRUCTION—EFFECT OF CONSTRUCTION BY PUBLIC OFFICERS.

The fact that public officers had for many years construed the statutes to allow such double compensation, while such interpretation is entitled to weight, is not controlling.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.*]

4. STATES (§ 185*)—CLAIMS AGAINST STATE—EFFECT OF ALLOWANCE BY COMPTROLLER.

The allowance by the Comptroller of a bill against the state for the publication of state laws has the same effect as the audit of a bill against a county by the supervisors or one against the city by the common council, and may be impeached only for fraud or want of jurisdiction.

[Ed. Note.—For other cases, see States, Cent. Dig. § 176; Dec. Dig. § 185.*]

5. STATES (§ 178*)—CLAIMS AGAINST STATE—AUTHORITY TO ALLOW.

An auditing body is without jurisdiction to make an audit of a claim against the state when it is not authorized by any law to make such an audit.

[Ed. Note.—For other cases, see States, Cent. Dig. § 166; Dec. Dig. § 178.*]

6. STATES (§ 185*)—CLAIMS AGAINST STATE—EFFECT OF ALLOWANCE.

Although the determination of an auditing body as to its jurisdiction to audit a claim might be conclusive upon collateral attack where the facts upon which it depended were disputed, the audit of a bill by a State Comptroller for a publication of state laws both as a state and county paper is a nullity where it is uncontradicted that there was in fact only one publication, whether that fact appears on the face of the bill as presented or not.

[Ed. Note.—For other cases, see States, Cent. Dig. § 176; Dec. Dig. § 185.*]

7. STATES (§ 187*)—CLAIMS AGAINST STATE—PAYMENT—RECOVERY OF MONEY ILLEGALLY PAID.

The decision of the Comptroller as to the validity of a claim is not a final determination of its legality, as a judgment of a court would be, and if he authorized the payment of a claim which is illegal his act is a nullity, and the state is entitled to recover the money from the one to whom it had been paid in an action for money had and received.

[Ed. Note.—For other cases, see States, Cent. Dig. § 177; Dec. Dig. § 187.*]

8. STATES (§ 201*)—ACTIONS—LIMITATIONS.

Such an action is within the terms of Code Civ. Proc. § 1973, limiting actions by the state to recover public money illegally received to ten years, and is therefore not within the general six-year statute of limitations.

[Ed. Note.—For other cases, see States, Cent. Dig. § 193; Dec. Dig. § 201.*]

Appeal from Special Term, Albany County.

Action by the People of the State of New York against the Journal Company. From a judgment of the Special Term in favor of the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendant (140 N. Y. Supp. 546), the plaintiff appeals. Reversed, and judgment ordered for plaintiff.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Thomas Carmody, Atty. Gen., for the People.

J. S. Frost, of Albany, for respondent.

SMITH, P. J. This is an action for moneys had and received, and is brought under section 1969 of the Code of Civil Procedure to recover payments claimed to have been illegally made to the respondent for publishing as a county paper the laws of the state of a general nature. It appears that for the years 1895 to 1906, both inclusive, the Albany Evening Journal, a newspaper published by the respondent, was designated as the state paper under chapter 248 of the Laws of 1893 and amendments thereto, and was also for the same period designated by the board of supervisors of Albany county as a county paper pursuant to chapter 686 of the Laws of 1892 and amendments thereto. In each year of said period said newspaper published the Session Laws of the state once only; that is, each law of the state appeared but once and in only one issue of said paper. Thereafter respondent presented bills from time to time for such publication as by a state paper to the proper state authorities and was paid therefor at the rate of 75 cents per folio. Respondent also presented bills to the state for a publication as by a county paper of the Session Laws of a general nature during the same period. The Secretary of State to whom said last-mentioned bills were presented certified to the Comptroller that publication had been duly made as required by law, and the Comptroller thereupon audited said bills for publishing the Session Laws as by a county paper in the total amount of $12,497.10 for said period, which amount was duly paid to the respondent as a result of such audit. Of this entire amount the sum of $896.40 was paid within six years, and $4,423.20 within ten years prior to the beginning of the action. The rate for publishing the laws as a county paper is 30 cents per folio, and there is no proof in the case as to whether in any year bills for publishing as a state or county paper were first audited. The practice of presenting bills covering in part the same publication is of long standing and does not appear to have been questioned by any state official until 1907, when the then second deputy Secretary of State withdrew his certification of a certain bill of respondent's for publishing as a county paper the General Laws of the state in the county of Albany on the ground that he did not know that two charges were to be made for only one publication. Application was then made by this respondent for a writ of mandamus to require the Secretary of State to certify to the Comptroller the bill mentioned; but the proceedings were subsequently discontinued by stipulation, as more than two years had then elapsed since the passage of the Appropriation Act providing funds for the payment of such services. The issues in the present action were tried before the court without a jury and resulted in the granting of an order dismissing the complaint with costs, and from the judgment entered thereon this appeal is taken.

Before discussing the merits of the case, it is fair to the defendant

to state that there is no question here of fraud or bad faith. As before stated, it has been a custom for many years for papers designated as state papers and also designated by counties to publish laws in both political parties, to charge and receive this double compensation for one publication of the General Laws. The defendant in presenting these bills and receiving the money therefor was only following a general custom, and without doubt in full belief of its right to the compensation asked. The questions here for determination are purely questions of law.

[1-3] At the threshold of our inquiry we are met with the question of the legal right of the defendant to compensation under both statutes for one publication only. As the designated state paper, it was required to make publication of the laws at 75 cents a folio. As a designated county paper, it was required to make publication of these laws at 30 cents a folio, payable from the state treasury. Defendant made one publication only and claimed the double compensation. As a matter of first impression this demand of double compensation for single service is not equitable. The defendant was undoubtedly allowed to charge for the publication at 75 cents per folio as a state paper. Where a county board of supervisors designates a paper already designated as a state paper to publish the laws, it will not be presumed that it is intended thereby to compel the state to pay an extra 30 cents *as a gratuity* to the paper. From such a subsequent designation by the county supervisors the natural inference would seem to be that some further service was expected before the paper should become entitled to the additional compensation for a publication under the county designation. To construe the statute otherwise would impinge upon those provisions of the Constitution which prohibit the gift of state moneys to any private corporation or individual. See sections 9 and 10 of article 8 of the state Constitution. The necessary legal inference from their act would seem to be that *in addition* to the publication as a state paper a second publication of the laws should be made by the paper designated. I grant that force should be given to the interpretation given to a statute by public officers for a series of years in case of a statute the interpretation of which is in doubt. But such an interpretation is not controlling and cannot prevail as against the apparent inequity that presents itself in a demand for double compensation for a single publication. The same conclusion would follow whether the paper were first designated as a state paper or under the county law. With this conclusion the question then remains as to the effect to be given to the audit of these bills by the Comptroller, which seems to have been the question upon which the matter was determined by the Special Term.

In the case at bar, upon affidavits showing publication and the designation both as a state paper and as a county paper, these allowances were made both of the 75 cents per folio as for a publication of a state paper and of 30 cents per folio as for a publication under county designation. It is urged by the defendant here, and not without force, that this audit by the Comptroller was a determination, if need be, that the laws were twice published, once under the state designation and again under the county designation, and that, whatever the fact

may be, this adjudication cannot be impeached by showing that only one publication was made.

[4-6] The audit by the Comptroller of the bill in question probably has the same force and effect as the audit by the board of supervisors of a bill against the county, or the audit of a bill by a common council against a city under whose charter the common council is made an auditing board. These audits may be impeached upon two grounds only: First, upon the ground that the bodies were without jurisdiction to act. Secondly, for fraud or collusion. As there was no fraud or collusion in securing the payment of these bills, the only escape for the state from the effect of this audit is by proof that the Comptroller was without jurisdiction to make the audit. It seems to have been assumed by the courts that the attack made in this action is a collateral, not a direct, attack upon the audit of the Comptroller. People v. Sutherland, 207 N. Y. 22, 100 N. E. 440. Upon the question of jurisdiction I read from the decisions that, where the auditing body is not authorized in law to make the audit, it is deemed without jurisdiction to make the same. It has been many times written that, where the illegality appears upon the face of the bill presented, the audit of the bill is a nullity, as the body was without jurisdiction to audit. The illegality of the defendant's bills before the Comptroller did not appear upon their face. From the affidavits it appeared that publication had been made pursuant to the statute for which the compensation was asked. It does not even appear that the Comptroller or Secretary of State, who certified the bill, had any knowledge that only one publication had been made, although the defendant's counsel strenuously urges that both the Comptroller and the Secretary of State will be presumed to have full knowledge of all the facts and that only one publication had in fact been made. It does not seem possible that whether or not the illegality appears upon the face of the bill presented can be determinative of the jurisdiction of the auditing body. If the bill presented represented facts showing jurisdiction to act, this fact cannot give jurisdiction to the auditors to act. Their jurisdiction depends upon the *existence of facts*, and not upon their knowledge thereof, or upon the form of the bill presented. It is probably true that, if the existence of their jurisdiction depend upon disputed facts, their determination of those facts is conclusive upon the collateral attack of the audit. Where, however, as in the case at bar, there is no dispute of fact, but, by concession of the fact that there was one publication only, it appears that the Comptroller had no power or jurisdiction to audit the bill, we are required to declare the audit a nullity.

The conclusions here reached are supported by authority. In People ex rel. McSpedon v. County Treasurer of New York, 4 Abb. Prac. 22, the board of supervisors had made a contract directing that the register's books be repaired under the direction of the committee of the board on county offices. The relators were employed to do the work, and their bill was presented to the board of supervisors for the sum of $2,644.50. This bill was audited and allowed by the board of supervisors. The county treasurer refused to pay the accounts, and mandamus was brought to compel him to pay the same. It appeared

that by section 12 of the Code governing the city and county of New York it was required that all contracts for supplies involving the expenditure of more than $250 could only be let upon public competition. It was there urged that the audit of the account by the board of supervisors was conclusive as to all facts upon which the claim must rest. But it was held, however, that, *as it appeared in the record* that the contracts were not let upon public competition, "the act of the supervisors in auditing and allowing the accounts was a mere nullity," and the relators were denied the writs of mandamus for which they prayed. In People ex rel. Coughlin v. Gleason, 121 N. Y. 631, 25 N. E. 4, the charter of Long Island City required a contract to be let to the lowest responsible bidder giving adequate security. In that case a contract was let by the common council to one who was not the lowest responsible bidder. The claim of the contractors under the contract, however, was audited by the common council which had authority to audit all claims against the city. Upon the mayor's refusal to sign the warrant and upon mandamus to compel him to sign it the court denied the petitioners any relief. It was there urged, as is here urged, that the audit by the common council was conclusive as to all facts necessarily involved and as to the fact that the contract was awarded to the lowest bidder. The court held otherwise. In the opinion of Judge Earl it is said:

"Nothing was added to the validity or legality of relator's claim by the audit and allowance thereof by the common council. The claim being fundamentally illegal, the common council had no jurisdiction to audit or allow it to give it any vitality."

In Village of Ft. Edward v. Fish, 156 N. Y. 374, 50 N. E. 973, this case is cited with approval. In People ex rel. Smith v. Clarke, 174 N. Y. 259, 66 N. E. 819, a bill was presented to the common council of New Rochelle for printing public notices pursuant to a resolution designating the relator's paper therefor. This bill was audited by the auditing committee of the common council, which had authority to audit bills, at the amount claimed by the relator. There being no funds in the city treasury, the warrant was not drawn for its payment. Thereafter, under a changed law, the Comptroller was given power to audit. When the matter was presented to him he refused to audit the bill or direct its payment except for a reduced amount. The court at Special Term granted a peremptory writ of mandamus directing the mayor to sign and deliver to the relator a warrant on the city treasurer for the amount of his claim and directed payment to him. This order was reversed by the Appellate Division and the writ denied upon the ground that the relator's claim was illegal because he had charged more than 50 cents a folio for the publication of the notices in question, and therefore the common council had no legal right to audit the same. The Court of Appeals determined that the audit by the committee of the common council was conclusive, but in the opinion (174 N. Y. 262, 66 N. E. 819) Judge Werner says:

"It is too obvious for discussion, that *if there is evidence in the record* from which it can be fairly said that the auditing committee, in passing upon the relator's claim, allowed more than the legal rate of 50 cents a folio for

the published matter, its action was illegal, and the decision of the learned Appellate Division should be affirmed. 'Boards of audit in allowing accounts are limited to the powers conferred upon them by the statute, and when they transgress their limitations their acts, like those of any other tribunal of limited jurisdiction, are void,' * * * and an audit by them is only conclusive when they act within their jurisdiction."

In none of these cases did the invalidity of the claim appear upon its face. In all of them except in People v. Clarke the facts showing illegality came into the record and were not disputed. In People v. Clarke the court held that if the facts showing want of jurisdiction appeared clearly in the record the audit would have been held illegal. In Board of Supervisors v. Ellis, 59 N. Y. 620, it was held that a board of supervisors had no power to audit and allow accounts not legally chargeable to the county, and such audit was null and void, and that the payment of such audited account by the county was not a voluntary payment, and the moneys paid could be recovered back by the county. In Village of Ft. Edward v. Fish, 156 N. Y. 364, 374, 50 N. E. 973, it was held that the doctrine of voluntary payments did not apply to a municipality but only to individuals who had power to do as they pleased with their property.

[7] Within these authorities it seems to me clear that we must hold that the Comptroller had no jurisdiction to audit this claim. There was no controversy of fact before the Comptroller which he determined. The defendant concedes that one publication only was made. With this fact conceded the defendant was entitled to only one payment. He might elect to take the greater sum, but could not take both. The rule thus held would seem to be reasonable. If as we deem the one publication did not authorize the recovery of compensation under both statutes, defendant ought in justice and equity to return the moneys received to which it was not entitled. If all the facts had appeared before the Comptroller, the right of recovery would be undoubted. To hold that the act of the defendant itself by not disclosing those facts, whether purposely or innocently, has barred the state from its just right of recovery, would be a technical application of the law to defeat justice and would bring the administration of the law into disrepute. While the attack upon the audit may be in a sense collateral, it is also in a sense direct. The determination of the Comptroller should not, and does not, under the authorities cited, have the sanctity of a judgment of a court where the attention of the parties is specifically directed to the facts of the case. The Comptroller of the state is not a court to determine finally the legality of claims against the state. He may be enjoined from auditing a pending bill in an action by the Attorney General. His authority is a limited one to allow only claims for which the state is legally liable. If he transgress that authority, his action is a nullity and gives to claimant no protection. If to this determination is allowed finality as to all facts upon which there is substantial dispute, both within reason and authority the requirement of the law is satisfied, and there is preserved to the state the right to recover moneys taken therefrom without authority of law.

[8] The question is raised as to whether the six years' or ten years' statute of limitations should govern. By section 1973 of the Code of

Civil Procedure the ten years' statute of limitation is specially prescribed in these particular actions. This special provision of law must govern this case, notwithstanding general provisions of law might otherwise create a six-year statute of limitations.

I recommend that the judgment of the Special Term be reversed and judgment be ordered for the plaintiff for the several amounts received by the defendant as representing 30 cents a folio for the publication of the General Laws, within ten years prior to the commencement of the action, with interest from the time of their receipt.

Judgment of the Special Term reversed, with costs; and judgment ordered for plaintiff for the several amounts received by defendant as representing 30 cents a folio for the publication of the General Laws within ten years prior to the commencement of the action, with interest from the time of their receipt, with costs. All concur.

STEBBINS v. MYERS et al.

(Supreme Court, Equity Term, Monroe County. September 27, 1913.)

1. CONTRACTS (§ 164*)—CONSTRUCTION—PREVIOUS CONTRACT.

Where an option contract for the taking of gravel from plaintiff's land expressly superseded and annulled all previous agreements, the previous agreements could not be read with the present one for the purpose of determining its effect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746–748; Dec. Dig. § 164.*]

2. CONTRACTS (§ 217*)—CONSTRUCTION—OPTION CONTRACT.

Where a written contract recited that plaintiff granted to defendants an option to purchase sand or gravel from her land at the rate of 3 cents per cubic yard, defendants agreeing to take not less than $1,000 worth at that rate, and authorized defendants to grade for roads and tracks, and to place and remove tracks and any equipment at or before the termination of the agreement, defendants did not take a vested interest or a perpetual right to remove the sand and gravel from plaintiff's land, but had only the right to remove sand and gravel to the value of $1,000, whereupon plaintiff might revoke the license.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1005–1009; Dec. Dig. § 217.*]

3. CONTRACTS (§ 217*)—REVOCATION—CONDITIONS PRECEDENT.

Where plaintiff entered into a contract giving defendants an option to take sand and gravel from her land at a fixed rate, but not less than $1,000 worth, the contract giving defendants permission to lay and remove tracks, plaintiff's right to revoke the license after the taking of $1,000 worth was not conditioned upon her making defendants good for expenditures in laying tracks and placing equipment upon the land.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1005–1009; Dec. Dig. § 217.*]

Action by Sarah A. Stebbins against John H. Myers and another. Judgment for plaintiff.

John Van Voorhis' Sons, of Rochester, for plaintiff.
Willis K. Gillette, of Rochester, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CLARK, J. The parties to this action on the 15th day of December, 1911, entered into a written agreement whereby the plaintiff, in consideration of $1 paid by defendants, granted to them—

"an option to purchase sand, or gravel, or both, from the lands owned by first party [plaintiff] at the rate of 3 cents per cubic yard, and second parties [defendants] agreed to take not less than $1,000 worth of sand, or gravel, or both, at the aforesaid rate."

It was conceded on the trial that second parties had taken sand and gravel under said agreement from first party's land to an amount exceeding $1,000 in value, and that before the commencement of this action plaintiff had notified defendants to cease taking sand and gravel from her premises, thereby revoking, as claimed by plaintiff, the license above referred to.

[1] It appears that on December 5, 1910, the same parties had entered into an agreement of a similar nature, but which permitted defendants to take gravel only from plaintiff's land, and the learned counsel for defendants urges that these two agreements must be read together. I cannot agree with him in that contention, for in the last agreement, the one dated December 15, 1911, this language was used:

"It is understood and agreed that this agreement or option supersedes and annuls agreement entered into December 5, 1910, by the parties hereto, for the same land and privileges."

It will thus be seen that by the very language of the last agreement between the parties it was plainly stated that that agreement annulled the prior one, so the rights of the parties to this controversy must be determined on the theory that the agreement of December 15, 1911, is the only existing one between them.

[2] It is the contention of plaintiff that this agreement was a mere license, revocable at her will; and defendants contend that they have a vested interest in and legal right to remove the sand and gravel from plaintiff's farm, which cannot be canceled or annulled by plaintiff. The language of the instrument itself shows that it was the intention of the parties that at some time there should be a termination of the agreement; for it says, among other things, that defendants shall have the right—

"to grade for roads and tracks, and to place and remove said tracks and any equipment at or before the termination of this agreement."

It will be observed that by this writing plaintiff did not grant to defendants the sand and gravel on her farm, but merely granted to them an option to purchase sand, or gravel, or both, at a certain rate per cubic yard, and they agreed to take not less than $1,000 worth of such articles at said rate. At most defendants were granted the absolute right to take $1,000 worth of sand and gravel from plaintiff's land, and they agreed to take that much, and plaintiff was bound to let them have it, but after that either party could terminate the agreement, and it is conceded that plaintiff did not terminate it until after defendants had removed more than the quantity of sand they were bound to take and she was bound to let them take. This was not

a grant of all the sand and gravel defendants might desire to take from plaintiff's land, but an option to remove at least $1,000 worth, and when they had removed that much, which defendants concededly did in this case, plaintiff had a right to terminate the agreement, for it was a mere license to remove these materials, and could not be construed as granting to defendants a vested interest in her lands. Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584.

If defendant's theory was to be adopted, it would mean that they could dig all over plaintiff's farm, if they chose, leaving unsightly holes and piles of sand and gravel; and manifestly plaintiff never intended to give to them any such rights or privileges. She undoubtedly granted to defendants the option to purchase at least $1,000 worth of sand and gravel, and to go on her premises and remove it; but, when they had removed material of that value, then she had a right to immediately terminate the license. McIntyre v. Barnard, 1 Sandf. Ch. 52; Shepard v. McCalmont Oil Co., 38 Hun, 37; Cahoon v. Bayaud, 123 N. Y. 298, 25 N. E. 376; Wagner v. Mallory, supra; Genet v. D. & H. Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127; Cronkhite v. Cronkhite, 94 N. Y. 323. The last case cited, Cronkhite v. Cronkhite, was based on an oral agreement; but there was a valuable consideration, and it had been in operation and acted upon by the parties for more than 40 years, but it was held to be merely a license, revocable at the pleasure of the licensor.

[3] It is urged by the learned counsel for defendants that in any event plaintiff could not revoke this agreement, if it was held to be a license, until she had made defendants good for very considerable expenditures it was claimed they had been subjected to in making preparations to remove sand and gravel from plaintiff's property. It must not be forgotten, however, that by the terms of the contract itself they agreed to take at least $1,000 worth of these materials, and, of course, it was necessary for them to place upon the property all the appliances which were necessary to accomplish that result, and it does not appear that they incurred expenditures, excepting such as it was necessary for them to incur to remove the quantity of sand and gravel they were obliged to take. It was the intention of the parties that they should have the right to go on plaintiff's land and take at least $1,000 worth of these materials at an agreed price, and after they had received $1,000 worth plaintiff had the undoubted right to revoke the license. This she undertook to do; but defendants insist that they have a vested interest in all the sand and gravel on her farm.

I do not think the instrument under consideration would warrant any such construction, and defendants not having expended moneys for any permanent improvements, but simply to place upon the lands movable personal property, such as steam shovels, temporary tracks, etc., to enable them to remove the $1,000 worth of materials they bound themselves to take, are hardly in position to insist that plaintiff make them good for such expenditures.

If I am correct in these conclusions, it follows that plaintiff is entitled to the relief demanded in the complaint; and judgment is directed accordingly, with costs to be taxed.

Findings may be submitted.

BABCOCK v. EDSON.

(Chautauqua County Court. September 19, 1913.)

PLEDGES (§ 11*)—DELIVERY OF POSSESSION.

Where a piano company for a loan of $500 executed a written instrument stating that it pledged to the lender two pianos, which were designated therein by numbers, and, at the same time, took the lender into its warehouse, pointed out the pianos, and attached cards, with lender's name thereon, to the pianos, and set them apart as his property, there was a delivery of possession, and hence a valid pledge.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28–35; Dec. Dig. § 11.*]

Action by Willis E. Babcock against Walter H. Edson, Trustee in Bankruptcy. Judgment for plaintiff.

Eleazer Green, for plaintiff.
A. Frank Jenks, of Jamestown, for defendant.

OTTAWAY, J. This action is to recover the possession of two pianos; the complaint alleging that these pianos were pledged by the Hill Piano Company to the plaintiff as security for a loan of $500.

The issue is defined by the pleadings, and the question presented arises upon motion by the plaintiff for judgment upon the pleadings.

The following facts are fairly deducible from the pleadings presented and the argument of counsel upon the motion: In June, 1912, the Hill Piano Company, a domestic corporation engaged in the sale of pianos and other musical instruments at Jamestown, Chautauqua county, N. Y., being in need of money, applied to the plaintiff for a loan of $500, which was procured of the plaintiff, at the same time executing an instrument of which the following is a copy:

"$500.00. Jamestown, N. Y., June 24, 1912.

"Two months after date we promise to pay to Willis E. Babcock or order at office of Hill Piano Company five hundred dollars, for value received, having deposited with said Willis E. Babcock as collateral security, for the payment thereof, pianos one Krell Auto Player No. 42093 and one Braumuller Player No. 14372, which leases or any part or portion thereof, we hereby authorize said Willis E. Babcock to sell without notice, at public or private sale, at the option of said Willis E. Babcock in case of the nonperformance of the above promise, applying the net proceeds to the payment of this note, including interest, accounting to us for the surplus, if any. In case of deficiency, we promise to the said Willis E. Babcock the amount thereof forthwith after such sale, with interest.

"And it is hereby agreed and understood, that if any recourse is to be had to the collaterals, any excess of collaterals upon this note shall be applicable to any other note or claim held by said Willis E. Babcock against us and in case of any exchange of, or addition to, the collaterals above named, the provisions of this note shall extend to such new or additional collaterals.

"Hill Piano Company, by Earl H. Hill, President."

At the same time the Hill Piano Company had in its possession in its wareroom with other musical instruments two player pianos. At the time of the loaning of the money and the execution of the instrument aforesaid, these pianos were pointed out to the plaintiff as the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pianos upon which security was given, and a card was attached to and suspended from each piano by a string upon which was written the words, "Property of Willis E. Babcock," meaning the plaintiff. The pianos were numbered, having the same number as the numbers in the instrument aforesaid, executed by the Hill Piano Company. The pianos were designated and set aside and remained in the warerooms of the Hill Piano Company until and after a general assignment made by the Hill Piano Company to Claire E. Pickard, assignee for the benefit of creditors, who assumed to take possession of them in opposition to the demand and protest of the plaintiff. Thereafter the Hill Piano Company was adjudged a bankrupt, and the defendant was duly appointed trustee in bankruptcy. Thereupon said trustee likewise assumed possession of said pianos contrary to the demand and protest of the plaintiff.

The precise question presented by the parties hereto is whether the acts alleged in the complaint and answer constituted a pledge of these pianos.

The defendant trustee occupies the same position as the bankrupt, and, if the acts at the time of the transaction amounted to a valid pledge as to the Hill Piano Company, said pledge is valid as against the trustee, and the plaintiff is entitled to recover in this action.

The rule is well established that delivery of possession is indispensable to a pledge of personal property, indeed possession is the essence of a pledge. While this is the general rule, frequently there is difficulty in determining in a given case whether possession was in fact passed to the pledgee, as was stated in the case of Ward v. First National Bank, 29 Am. Bankr. Rep. 317, 202 Fed. 613, 120 C. C. A. 659:

"Oftentimes this may be a question of much complexity, its solution depending upon a correct interpretation of conflicting evidence. Delivery of possession may be made symbolically; and, * * * speaking generally, the question of possession may largely depend upon the intention of the parties dealing in good faith and upon the nature and location of the property itself; also, the circumstances of the entire situation may be considered."

This same principle has been enunciated by the courts in many cases and under different circumstances. The circumstances of each case must determine the validity of a pledge.

In the case at bar there seems to be no question as to the good faith of the transaction. The money was actually loaned and advanced by the plaintiff at the request of the Hill Piano Company, relying upon the strength of the security offered.

There can be no question of the intention of the parties to this instrument to create a pledge of the security proposed. The only question presented is whether the acts were sufficient in law to create the condition sought by the parties.

Under all the circumstances of this case the court is of the opinion that the acts alleged in the complaint and answer constituted a valid pledge. The articles pledged were bulky, not easily transported, requiring considerable space for storage, and were of a class not requiring change of position. They were stored in a public wareroom and by the acts of the parties designated as the property of the pledgee, the plaintiff in this case.

Voluminous briefs have been submitted by the attorneys for the respective parties, citing many cases for the consideration of the court in the determination of the question involved in this case.

As was said in Bush v. Export Storage Co. (C. C.) 14 Am. Bankr. Rep. 138, 136 Fed. 918:

The "study of more recent cases discloses what is always recognized—that the law itself, in order to meet the requirements of commerce and our constantly changing industrial and commercial conditions, is progressive and expansive, and constantly, by slow changes, adapting itself to the changed conditions due to progress, and in this way the earlier and more stringent rules are constantly being liberalized and somewhat relaxed. It is now well established, for example, that, in determining the sufficiency of delivery in a pledge, it is necessary to consider the nature of the property, the surrounding circumstances, and the objects of the pledge, and the reasonable convenience of the pledgor and pledgee, and the apparent demands of larger aggregations of capital and large operations in business. It is settled that there need not in all cases be an actual moving property, but only such a delivery as the property is reasonably capable of, and is reasonably suitable under the circumstances. In the case of property of much weight or bulk, moved or transferred with difficulty and expense, a symbolical or constructive delivery has become the rule in almost all cases, instead of an actual delivery; and for much the same reasons the strict necessity of segregation is slowly disappearing, and the validity of substitution is very well settled. It is well settled that, where property is stored in a warehouse, the owner may pledge it by transferring to the pledgee the warehouse receipts—this being a symbolical delivery of the property—and it will give the pledgee such special property in the goods as will entitle him to recover possession."

See, also, Parshall v. Eggert, 54 N. Y. 18; Sexton v. Kessler, 28 Am. Bankr. Rep. 87, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; Clark v. Costello, 79 Hun, 590, 29 N. Y. Supp. 937; First National Bank New Kensington v. Penn. Trust Co., 10 Am. Bankr. Rep. 782, 124 Fed. 968, 60 C. C. A. 100; McCauley v. Hopkins, 35 Hun, 556.

Possession of the pianos in question is awarded to the plaintiff, with costs of this action.

(81 Misc. Rep. 476.)

PEOPLE v. LUNN.

(Herkimer County Court. July, 1913.)

1. CRIMINAL LAW (§ 1205*)—PUNISHMENT—STATUTE.

No sentence can be imposed upon a conviction of violating a city charter which prohibits certain acts but prescribes no punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3268, 3270; Dec. Dig. § 1205.*]

2. CRIMINAL LAW (§ 1206*)—PUNISHMENT—STATUTE—CONSTRUCTION—AS FOR MISDEMEANOR.

A city charter providing that persons guilty of certain prohibited acts shall be punished "as for misdemeanor" prescribes no definite punishment; the quoted words not making the prohibited acts misdemeanors within Penal Law, § 1937 (Consol. Laws 1909, c. 40), which provides for the punishment of a person convicted of a crime declared to be a misdemeanor, but for which no other punishment is specified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271–3277, 3279, 3280; Dec. Dig. § 1206.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

George R. Lunn was convicted of being a disorderly person within the prohibition of Little Falls City Charter, § 145, and appeals. Reversed.

Richard Hurley, of Little Falls, and Frank Cooper and James J. Barry, both of Schenectady, for appellant.

William E. Farrell, Dist. Atty., of Frankfort, S. H. Newberry, City Atty., of Little Falls, and James H. Greene, of Herkimer, for the People.

BELL, J. This is an appeal from a judgment convicting the defendant of a violation of section 145 of the charter of the city of Little Falls, and the sentence imposed by the recorder on November 15, 1912.

[1, 2] Defendant was charged with a willful violation of section 145 of the charter of the city of Little Falls, N. Y., committed in said city on the 15th day of October, 1912, "in that, he did then and there publicly and in a public place alone and with others, not using the public ways of said city to pass, loiter about, standing and obstructing and occupying a park and public place in front of premises not owned or occupied by him and was without any right obstructing the public park to the annoyance and impediment of persons passing and repassing and did refuse after direction of an officer to pass along and disperse from said place," and after a trial was found guilty as charged, and sentenced to pay a fine of $50 and stand committed to the Herkimer county jail until the same was paid, not exceeding one day for each dollar thereof. There was a strike on in the city of Little Falls by a large number of the textile mill employés at the time of the alleged offense.

My inclination would be to affirm the judgment appealed from, for it seems to me that it was very unbecoming for this defendant, mayor of the city of Schenectady, to go, incognito or otherwise, to the sister city of Little Falls, which then had all the trouble its mayor and officers could attend to, and attempt to do something that would increase their trouble.

Section 145 of the charter of the city of Little Falls (Laws of 1895, c. 565) is as follows:

"Sec. 145. Disorderly persons.—In addition to the persons described in section eight hundred and ninety-nine of the Code of Criminal Procedure, the following persons within the city of Little Falls shall be deemed disorderly persons, and may be proceeded against as such under the provisions of the Code of Criminal Procedure, and punished according to the provisions of this act."

Then follows an enumeration of the persons included, followed by the concluding paragraph of the section as follows:

"Every person found guilty of being a disorderly person as aforesaid, and every person guilty of any act or acts making such person a disorderly person as herein declared, on conviction thereof, shall be punished as for misdemeanor."

The conviction of defendant was for being a disorderly person, not for a misdemeanor, or committing an act declared to be a misdemeanor, as claimed by the learned counsel for respondent.

The section says:

"The following persons within the city of Little Falls shall be deemed disorderly persons: * * * Every person found guilty of any act or acts making such person a disorderly person as herein declared, on conviction thereof, shall be punished, etc."

I am of the opinion that it cannot be held that the prohibited acts are declared by the section to be a misdemeanor, or that the person found guilty of doing any of the acts is guilty of a misdemeanor, or that the offense of being a disorderly person is declared to be a misdemeanor.

The words "shall be punished" are analogous to "is punishable," which are used in many sections of the Penal Law.

The words "as for misdemeanor" relate and apply, not to the disorderly person, nor to the prohibited acts, but solely to the punishment; that is, the kind and extent of punishment.

"Shall be punished as for misdemeanor" means the same as shall be punished like that for misdemeanor, or is punishable like that for misdemeanor.

The punishment for misdemeanors is as variable as the kind and number of misdemeanors. There being no uniform punishment for misdemeanors, how can it be determined which misdemeanor was intended?

Section 145 might just as well have said, shall be punished as for crime other than that punishable by death or confinement in state prison.

No specific punishment being prescribed, no punishment can be imposed.

Section 1937 of the Penal Law (Consol. Laws 1909, c. 40, formerly Penal Code, § 15) does not apply; that is applicable only to "a person convicted of a crime declared to be a misdemeanor" for which no other punishment is specifically prescribed, etc.

Section 1940 of the Penal Law (formerly Penal Law, § 689) is as follows:

"Sec. 1940. Punishment for felony when person convicted has been previously convicted of a misdemeanor. A person, who, having been convicted within this state of a misdemeanor, afterwards commits and is convicted of a felony, must be sentenced to imprisonment for the longest term prescribed for the punishment upon a first conviction for the felony."

Is it possible that if a person was convicted under section 145 of lounging and loitering about, standing on the sidewalk in front of premises not owned or occupied by such person, or of any of the other offenses therein named, and then convicted of a felony, that the court must under section 1940 sentence him to imprisonment for the longest term prescribed for the punishment upon a first conviction for the felony? I think not. But the court would be obliged to impose such a sentence if, as claimed by the learned counsel for respondent, the defendant was convicted of a misdemeanor, and that "shall be pun-

ished as for misdemeanor" is equivalent to "shall be guilty of a misdemeanor," notwithstanding section 145 says, "shall be deemed disorderly persons."

In the case of People v. Schermerhorn, 59 Misc. Rep. 146, 112 N. Y. Supp. 222, a like provision of the charter of the city of Kingston was construed (Laws of 1896, c. 747, § 51), and the court held that there was no provision in that charter for the punishment of the prohibited acts, and in that respect it was nugatory, that there was no authority in the recorder to sentence the defendant to imprisonment in the Ulster county jail, and reversed the judgment. I have given the opinion in the Schermerhorn Case much thought and attention and am convinced that the reasoning is sound and the conclusion correct.

The conclusion reached herein is that the charter of the city of Little Falls contains no provision for the punishment of the acts enumerated in section 145, and in that respect is nugatory, and there was no authority to impose said sentence.

The judgment is therefore reversed.

Judgment reversed.

(82 Misc. Rep. 214)

In re KENNEDY.

(Surrogate's Court, New York County. September 19, 1913.)

1. DESCENT AND DISTRIBUTION (§ 71*)—HEIRSHIP—BURDEN OF PROOF.
The burden was upon parties claiming a share in the distribution of an intestate's estate to prove the relationship between intestate and the ancestor through whom they claimed.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229–236; Dec. Dig. § 71.*]

2. EVIDENCE (§§ 291, 297*)—DECLARATIONS—PEDIGREE.
Declarations of a deceased member of the family, and the treatment of a person by members of a family, though a form of hearsay, are admissible in evidence in cases involving pedigree.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1150, 1154; Dec. Dig. §§ 291, 297.*]

3. DESCENT AND DISTRIBUTION (§ 71*)—HEIRSHIP—SUFFICIENCY OF EVIDENCE.
Evidence introduced by the claimants to a share of an intestate's estate *held* to show that claimants' ancestor was a half-brother of the intestate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229–236; Dec. Dig. § 71.*]

4. EVIDENCE (§ 349*)—COPY OF CENSUS RETURN—SUFFICIENCY OF CERTIFICATION.
A copy of a census return for Ireland was sufficiently certified to under the requirements of Code Civ. Proc. § 956, where it was certified to by the assistant keeper of the public records, and bore the seal of the record office of Ireland, and also a certificate of the consul of the United States at Dublin, Ireland, that he had compared the copy with the original and that it was true and authentic.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1384–1387; Dec. Dig. § 349.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. NAMES (§ 18*)—IDENTITY—EVIDENCE.
Identity of names is prima facie evidence of identity of parties.
[Ed. Note.—For other cases, see Names, Cent. Dig. §§ 4, 17; Dec. Dig. § 18.*]

6. BASTARDS (§ 3*)—LEGITIMACY—PRESUMPTION.
Legitimacy is always presumed in law.
[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

7. DESCENT AND DISTRIBUTION (§ 71*)—EVIDENCE—CENSUS RETURN—EFFECT.
An official census return, introduced in a proceeding to establish heirship, is prima facie evidence of the family relationships shown by its context.
[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229–236; Dec. Dig. § 71.*]

Judicial settlement of the account of Patrick J. Kennedy as administrator, etc. Decreed according to opinion.

Kindleberger & Robinson, of New York City, for claimants.
John W. Russell, of New York City, for administrator.

FOWLER, S. The only question for consideration in this proceeding is as to the persons entitled to distribution of the personal property of John F. Kennedy, deceased. It is asserted on the one hand that William Kennedy was a brother of the half blood to the intestate, and the issue of William Kennedy are here claiming to be entitled to share in the distribution of intestate's estate. It is on the other hand denied by the sister of John F. Kennedy and other relations of the whole blood of John F. Kennedy, the intestate, that William Kennedy was a half-brother of intestate, or that his issue should share in the distribution.

[1] The issue of fact is plain enough; it is the proofs which are confusing and confused. In Matter of McGerry, 75 Misc. Rep. 98, 134 N. Y. Supp. 957, the surrogate had occasion to refer to some of the difficulties incident to an issue of this character. In any event the burden of establishing that William Kennedy was the half-brother of John F. Kennedy is on the claimants.

When this matter was here before I held that the claimants had not sustained the burden resting on them. Subsequently the matter was reopened by me on allegations by claimants of further proofs. Since then additional testimony has been taken in behalf of all the parties to the proceeding and the issue is now ripe for adjudication.

[2] Whenever pedigree is directly involved in a proceeding of this kind, "hearsay" is permissible to establish relationship, if it is the declaration of a deceased member of the family or the husband or wife of a member of the family. So the treatment of the claimant by members of a family is some evidence in cases involving pedigree. Hubback on Succession, 429.

[3] The intestate, John F. Kennedy, was born in Ireland, the son of James Kennedy and Ellen Dunn, his wife, of Nenagh, county of Tipperary. The paternity of the issue of this marriage is not disputed by claimants. It is alleged by claimants that James Kennedy, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

father of John F., the intestate, was twice married, first to Mary Page, and that their progenitor, William Kennedy, was the son of the first marriage. This allegation is controverted by counterclaimants, and thus raises the only issue now for determination.

The issue is: Was William Kennedy, the son of James Kennedy, the father of the counterclaimants? Patrick J. Kennedy, the alleged half-brother of William Kennedy, swore on the stand that William was not a half-brother, and not the son of James Kennedy by his first marriage. So Mrs. Holmes, the daughter of James and the alleged half-sister of William, denied on oath that William was her half-brother, and this witness swore that Mary Page was not her father's first wife. This only makes the issue more apparent. Such mere denials of pedigree are not in themselves evidence, except of reputation.

But these are examples of the frequent contradictions apparent in the evidence before me. Yet I cannot think there is deliberate perjury in this case. Both the intestate and William Kennedy were from Nenagh, county Tipperary, where the name Kennedy was not uncommon. In a long-settled neighborhood like Nenagh the ramifications of families are likely to be involved and intricate, and persons of the same surname are generally kindred of some kind. I must acquit, I think, in this matter, the discrepant witnesses of any deliberate intention to impose on justice. I am unable to agree with counsel for counterclaimants that there is deliberate perjury apparent in the record. But the contradictory testimony of witnesses is none the less embarrassing to me in reaching a conclusion.

[4] On the rehearing the claimants offered in evidence a certified copy of the census returns for Ireland in 1851, purporting to show as the head of a family in the parish of Nenagh, county Tipperary, one James Kennedy, then living with Ellen, his second wife. His prior marriage in 1822 is there stated, and among the family sleeping in his house are the children, William, James, John, and Bridget.

[5] Identity of names is sufficient prima facie evidence of identity of the parties, and no proof to the contrary has been offered before me. The names precisely correspond to the names of the admitted children of James, the father of intestate. The son William mentioned in the return was then 15 years of age. He could not have been the son of the second marriage, which is stated as occurring only in 1847. This William must have been the issue of the prior marriage of James, which corresponds to claimant's allegations. This census return, if competent evidence, is of importance as showing at least that their James did have a son William, which is denied by the counterclaimants.

[6] Legitimacy is always presumed in law. But is the certified copy of the Irish census return for 1851 entitled to be received in evidence? It is certified as a copy by the assistant keeper of the public records and bears the seal of the record office of Ireland, and also the certificate of the consul of the United States at Dublin, Ireland, that he has compared the copy with the original and that the same is true and authentic. I am inclined to think that the proof of the copy conforms to section 956 of the Code of Civil Procedure, and that if the

original would be evidential such copy is evidence to the extent of the original public records.

[7] Now as to the original. Books and documents of a public nature containing facts preserved for public reference and inspection are prima facie evidence of their contents, as they are made by disinterested persons in the discharge of a public duty. The person making the entries has no reason to falsify such entries. It seems to me that the original is prima facie evidence to show that James had in the year 1851 a son of a prior marriage then living in his house with his second wife and her children, some of whom are these counterclaimants.

In due course these children of James, or some of them, migrated to New York, and are now before me. Whether the son William, the ancestor of claimants, also migrated, is the next question. That William, the ancestor of claimants, did migrate, is conceded. Whether he was the half-brother of counterclaimants is the great question. Claimants attempt to establish this link in their chain of evidence by the treatment of their William by the intestate John F. Kennedy and those conceded to be of his family. That there was the closest social intercourse between claimants and counterclaimants there is no doubt or dispute. Upon many matters of detail the testimony is most conflicting. It would subserve no good purpose for me to review it all in detail. Giving all the evidence due weight, I am inclined to think that the claimants representing William have now made out their allegation and are entitled to share in the distribution of intestate's estate.

In weighing the evidence I am greatly influenced in this conclusion by the admission of Patrick J. Kennedy, the brother of the whole blood and former administrator of intestate. He admits that claimants, the children of William, "called him uncle," and "that he never called them down for it." Now this was long before the lis mota. These and similar occurrences and circumstances given in evidence induce me to conclude that claimants have now sustained their allegations of kinship and are entitled to succeed and share in the distribution.

Enter decree accordingly.

(81 Misc. Rep. 469.)

In re WAGMAN.

(Surrogate's Court, Saratoga County. June, 1913.)

WILLS (§ 825*)—CONDITIONS OF BEQUEST—FORFEITURE.

Where a will gave to certain persons each one-half of the use and income of all the estate for life upon condition that they pay certain legacies, and where an executor of the estate under the supposed authority of an invalid probate paid such legacies and annuities, failure of the residuary devisees to pay them personally did not forfeit their rights to the residuary estate and leave it unbequeathed, especially where the deceased legatee, whose executor was the only person objecting, appeared at the judicial settlement of such executor's accounts and did not appeal from the decree thereon.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2124–2127; Dec. Dig. § 825.*]

Judicial settlement of the account of Lewis S. Wagman, as executor of the estate of Rachel Wagman, deceased. Decreed according to opinion.

Corliss Sheldon, of Saratoga Springs, for Lewis S. Wagman, executor.

Jesse Stiles, of Saratoga Springs, for John H. Raynor, contestant.

OSTRANDER, S. Rachel Wagman died September 11, 1897, leaving a will, which was recorded in the office of the surrogate of the county of Saratoga on the 14th day of February, 1898, as having been duly proved. This probate was made as against John Wagman, Sarah Wagman Raynor, and Nicholas Wagman upon the strength of a waiver of citation signed by them, but never acknowledged. Upon discovery of this omission the will was again duly admitted to probate on the 13th day of January, 1912. The will named Lewis S. Wagman and Nicholas Wagman as executors, but Lewis alone qualified. The will provided for payment of an annuity of $20 to Laura A. Losee, also a legacy of $200 to be paid to Flora Wagman from the principal of the estate, two years after the death of the testatrix. By the third clause testatrix bequeathed to her sister, Sarah Wagman, afterwards Sarah Wagman Raynor, one-half the use and income of all her estate during her natural life of said Sarah. By the fourth clause testatrix bequeathed one-half of the use and income of all her property unto Lewis S. Wagman during his natural life. By the fifth clause, she provided that this "devise and legacy" to said Sarah and to said Lewis was made "upon the express condition that they pay each of the foregoing legacies." By the sixth clause, she gave, after the death of said Sarah and said Lewis, the rest of her estate to her brothers, Nicholas and John Wagman, further providing that this "devise and legacy" to Nicholas and John was "upon the express condition that they pay each of the foregoing legacies."

Under the supposed authority of the first probate proceedings, Lewis Wagman, executor, proceeded with the administration of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

estate. He paid Laura Losee $20 per year down to the time of this proceeding. He paid Flora Wagman her legacy out of the principal of the estate. He paid Sarah Wagman Raynor the income of one-half of the estate down to the 1st day of July, 1912, and files several vouchers covering the period from Rachel's death down to July 1, 1912, in which Sarah Wagman Raynor receipts to him for divers sums in full for her one-half of the income of said estate up to said several dates; the last being July 1, 1912. Sarah Wagman Raynor died January 20, 1913.

On January 29, 1912, a decree was entered in the Surrogate's Court, after due citation of Sarah Wagman Raynor, judicially settling the account of the executor. Such account included the receipts and disbursements of said Lewis S. Wagman, and his payment of said annuities and income accounts to Laura Losee, Flora Wagman, and also to Lewis S. Wagman and Sarah Wagman Raynor up to April 1, 1911. Said Sarah appeared upon this accounting by attorney and never appealed from the decree.

It is undisputed upon this hearing that John Wagman, Nicholas Wagman, Lewis S. Wagman, and Sarah W. Raynor did not personally pay the legacies to Laura Losee and Flora Wagman, and that John and Nicholas did not personally pay the legacies to Lewis and Sarah. Upon this state of affairs the contestant, Raynor, as executor of Sarah Wagman Raynor, claims that John Wagman and Nicholas Wagman, by reason of their failure to personally pay said legacies, forfeited their right to the residuary estate, and that the residuary estate was therefore left undivided and unbequeathed, and that it thereupon vested in Sarah Wagman Raynor, John Wagman, Nicholas Wagman and Lewis S. Wagman, as heirs at law and next of kin of the deceased, and that Sarah Wagman Raynor became entitled to one-fourth thereof which passed to the contestant.

I do not perceive in what manner the interest of Sarah Wagman Raynor, or her estate, could have been bettered by the payment of these other legacies by John and Nicholas Wagman personally. The only effect of such payment by them would have been: (a) To increase the income payable to her to the extent of one-half of the income on twenty dollars payable annually to Laura Losee; and (b) to increase the amount of the estate which would be finally received by John and Nicholas, and none of which would go to Sarah Wagman Raynor. She received and receipted for all the income of the estate down to July 1, 1912. From that time Rachel's executor seeks to account to her estate for the income down to the time of her death.

No one objects to this account except Mr. Raynor.

If the executors had not paid the $20 annually to Laura Losee out of the corpus of the estate, there would have been one-half of this amount, or $10 annually from which said Sarah would have been entitled to the income. But it does not appear that this $10 could have been invested so as to produce any substantial income above the expenses of its investment, and inasmuch as she was a party to the settlement of the executor's accounts down to the 1st day of April, 1911, by a decree made with her acquiescence, and as she

acknowledged the receipt of all her share of the income down to July, 1912, I think it must be presumed that she assented to and was bound by the amount of income which was paid to her by the executors as being the full amount of her share of the income receivable from the estate. It is patent therefore that the estate of Sarah Wagman Raynor has not suffered, so far as her income is concerned, and, if the exact payments which she contends should be made by John and Nicholas Wagman had been made by them, her estate would be in no more favorable condition than it is at present.

Now as to the claim of forfeiture by reason of the failure of Nicholas and John to personally pay these legacies:

The payment of the legacies out of the estate simply acted to deplete the amount which would be finally received by Nicholas and John from the estate. They acquiesced upon this accounting in those payments, and in effect have paid the legacies with which they were charged. The intent of the will was, I think, that Laura Losee should receive her annuity; that Flora Wagman should receive her legacy; that Lewis and Sarah should each receive the life use of half of the estate; that the balance should be divided between Nicholas and John. These wishes have been substantially complied with, and no forfeiture has been worked of the shares given to John and Nicholas.

The objections of the contestant must therefore be overruled. The executor should pay to the contestant, Raynor, the one-half of the income of the estate from July 1, 1912, to January 20, 1913, and the balance of the estate should be held by the executor for the use of said Lewis, Nicholas, and John in accordance with the provisions of the fourth and sixth paragraphs of the will.

Taxable costs of the contest should be paid by John H. Raynor, personally.

Decreed accordingly.

HEIFERMAN v. GREENHUT CLOAK CO.

(City Court of New York. Trial Term. June, 1913.)

1. MASTER AND SERVANT (§ 47*)—WRONGFUL DISCHARGE OF SERVANT—OFFER OF REINSTATEMENT.
   Where a master's bona fide offer to reinstate an employé, wrongfully discharged, was met by arbitrary demand for the discharge of a certain other employé, the discharged servant was not entitled to damages.
   [Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 47.*]
2. NEW TRIAL (§ 77*)—VERDICT BASED ON SYMPATHY OR PREJUDICE.
   A verdict which must have been based on sympathy or prejudice, and not on the evidence or the charge, cannot stand.
   [Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 157–161; Dec. Dig. § 77.*]

Action by Frank Heiferman against the Greenhut Cloak Company. Verdict for plaintiff, and defendant moves for new trial. Motion granted.

Charles Tolleris, of New York City, for plaintiff.
Henry B. Singer, of New York City, for defendant.

FINELITE, J. This action is brought to recover damages for an alleged wrongful discharge.

The plaintiff and defendant entered into articles of agreement, dated the 18th day of July, 1911, wherein the defendant agreed to employ the plaintiff as a designer and general superintendent in the cloak and suit business that the defendant was trading in and manufacturing, for a period of one year from October 15, 1911, till the 15th of October, 1912, at a yearly salary of $7,000, payable in weekly installments of $134.62.

The plaintiff entered the employ of the defendant at his place of business in the city of Cleveland, in the state of Ohio, and remained in said employment until about the 2d day of December, 1911, and on said day the plaintiff contends that the defendant, without just cause or legal ground therefor, discharged the plaintiff of and from said employment, and since then has refused and still refuses to continue plaintiff in said employment, or to pay him the salary and compensation provided for in said agreement.

The answer of the defendant denies the discharge and alleges affirmatively by way of defense that the plaintiff voluntarily abandoned the employment, and further alleges, upon information and belief, that subsequent to the 2d day of December, 1911, and on and between the 4th day of December, 1911, and the 12th day of December, 1911, the defendant on a number of occasions offered to take back the plaintiff in his employ, pursuant to the terms of the agreement, and that the said plaintiff refused to re-enter the employ of the defendant and to continue in the employ of the defendant under and pursuant to the terms of said agreement.

The plaintiff admitted that from the date of the alleged discharge down to the trial of the action he had earned the sum of $4,873.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The jury awarded the plaintiff a verdict for the sum of $2,000, being the difference between the amount earned and the stipulated salary.

The defendant immediately moved to set aside the verdict upon the grounds enumerated in section 999 of the Code, which motion was entertained by the court.

The alleged discharge, as contended by the plaintiff, was to the effect: That, while said plaintiff was in the performance of his duties as such designer, an altercation was had between him and Mr. Greenhut, the president of defendant's corporation, wherein said plaintiff was instructed by said Greenhut to try to finish up as many samples as possible on that day of a certain design that he was then working on. That this was on Saturday, December 2, 1911. That thereupon Mr. Greenhut went to his luncheon, and so did the plaintiff. That on his return from luncheon Mr. Greenhut was in the sample room and he was "hollering at the tailors," and that as the plaintiff came in he asked Mr. Greenhut, "What is the matter, what is wrong?" and:

"He started hollering at me, saying: 'What kind of management is this? You take one of my most expensive tailors sewing on buttons, when a girl at $6 a week can do that.'" That "I told Mr. Greenhut that the girls upstairs had gone, and you asked me to finish up the garments; what else can I do? I think that is the best I can do. You told me to finish up the garments. He says: 'I don't want that kind of management; I won't stand for it.' Then he started to holler at me, and he insulted me, and, of course, I answered back. He says, 'I don't want that kind of management, and I don't want that to happen again.' Of course, I answered him back in the same kind of words; I don't remember exactly what I answered him. He says, 'If I would not want to dirty my hands on you, I would box your ears.' When he said that, of course, I answered him back. I told him his place is not to interfere, and if he wants I should finish out the garments he should leave me alone. He then said: 'I can't use you. Get out of here. Get out!' That is all. He told me: 'I can't use you. Get out. Get out. I did not sell the place to you.' He says, 'Get out,' and I went, and I did not go back that afternoon."

The plaintiff claimed, on direct examination, that he was discharged on Saturday, December 2d, and that he returned to the city of New York on Sunday morning, December 3d. On this he was questioned:

"Q. When did you get back? A. Sunday morning.

"Q. When did Mr. Pollak see you? (Pollak was the vice-president of defendant's company.) A. I believe Monday or Tuesday.

"Q. Monday, wasn't it? A. Yes, sir; Monday."

It appears from the evidence that when Mr. Greenhut discovered that the plaintiff had left the city of Cleveland he immediately telegraphed on to the vice president of the said corporation, who was then stopping in the city of New York, to immediately call upon the plaintiff and have him return to Cleveland and continue his work under said agreement, on which said plaintiff was interrogated as follows:

"Q. And where did he meet you? A. In my house; no, I think in Levy & Reif's.

"Q. He asked you to come back, didn't he? A. Yes; he asked me to come back.

"Q. And you said you would let him know, didn't you? A. I told him I was going to let him know.

"Q. That was only two days after you had left? A. Yes.

"Q. And he came back to your house, didn't he? A. Yes.
"Q. And he spoke to your wife, didn't he? A. Yes, sir.
"Q. And he asked you there to come back, didn't he? A. Yes.
"Q. You believe that Mr. Pollak was a gentleman, don't you? A. I believe he is a gentleman.
"Q. And you believe he was sincere when he asked you to come back, didn't you? A. Yes.
"Q. He really meant it? A. Yes, sir.
"Q. And you told him what? A. I told him if they will discharge Mr. Kerstein and will live up to the contract I will go back.
"Q. What right did you have to ask to have another man discharged who was under contract? (Objection. The word 'right' was changed to the word 'reason' by the court.) A. I made a contract with Mr. Greenhut I would be the only designer there.
"Q. Well, look at your contract and tell me whether that says that you are to be the only designer. A. General Superintendent (see minutes, page 42).
"The Court: Is there anything in the contract whereby plaintiff was to be the only designer? (Plaintiff's counsel answers 'No.' See minutes, page 45.) * * *
"Q. In any event your answer was that you would not come back unless Kerstein was discharged? A. Yes, sir.
"Q. Any question at that time about paying your expenses—did they offer to do that? A. They didn't say anything about expenses.
"Q. There was no question at that time about any loss of salary, because it was the very next day? A. It was not mentioned.
"Q. They were sincerely anxious to get you back, and you refused to go back unless Kerstein was discharged? A. Yes. (See minutes, p. 46.) * * *
"Q. Mr. Pollak saw you again after that, didn't he? A. Yes, sir.
"Q. When was that? A. The following day, I believe (Thursday).
"Q. And he again asked you to come back, didn't he? A. Yes.
"Q. And you refused? A. Refused, and told him if he will send away Mr. Kerstein I will go back.
"Q. What did he tell you about Kerstein? A. He said they could not send away Kerstein because he had a two-year contract—it is impossible. (See minutes, p. 51.)
"Q. Did you receive this letter about the 6th of December? A. Yes, sir.
"Q. Now, following that letter, you and your lawyer had some interviews with Mr. Singer (defendant's attorney)? A. Yes, sir.
"Q. He asked you to come back? A. Yes, sir.
"Q. And you refused unless they discharged Kerstein? A. Yes, sir.
"Q. They told you they were under contract with Kerstein, did they not? A. Yes.
"Q. And that they could not discharge him without breaking their contract? A. Yes, sir.
"Q. You got back to New York on December 2d? A. Yes, sir.
"Q. And you continued these conferences right through the week of December 2d? A. Since I received that letter from Mr. Singer.
"Q. And the designers who are good designers make their contracts along in May or June? A. May to October.
"Q. And you make your contracts, if you are good people, for the entire year? A. Yes, sir.
"Q. And along about November and early part of December is just about the important part of the year, isn't it, for a designer? A. Yes, sir.
"Q. That is the time salesmen have to go on the road? A. Yes.
"Q. Time to make samples? And if the salesmen are delayed for a week or two, it may make a vast difference, isn't that right? A. Yes, sir.
"Q. You continued these stalls from December—from December 2 until December 11, did you not, when your lawyer received a certain letter, of which I show you the original? A. Yes, sir.
"Q. That was nine days after? A. Yes, sir; that was it. (See minutes, p. 52.) * * *

"Q. Didn't you say at the last trial that both Mr. Greenhut and Mr. Pollak were gentlemen, and that they treated you like gentlemen? A. Gentlemen, positively, and I don't say they are not gentlemen.

"Q. And they did treat you like gentlemen? A. Yes, they had to treat me.

"Q. Not what they had to do; didn't you say they treated you like a gentleman? A. Yes, they treated me.

"Q. Didn't you testify that Mr. Greenhut went so far as to invite you to dine with him at the clubs? A. Yes.

"Q. And on Thursday, before you left on that Saturday, you were at dinner with Mr. Greenhut at that same club? A. Yes.

"Q. And that he was trying to make it pleasant for you? A. Yes, sir.

"Q. And that he was introducing you all around to all the people? A. Yes, sir. (See minutes, p. 35.) * * *"

It further appeared from the cross-examination of the plaintiff that from the arrival of said plaintiff at Cleveland, Ohio, he resided in a furnished room, and that at no time was his trunk unpacked, and that he had a wife and family residing in the city of New York.

[1] The only question to be decided here is: Was the offer genuine and bona fide for the re-employment of the plaintiff on the very day after the alleged discharge? It is not disputed from the facts herein that the offer was followed up by Mr. Pollak visiting the plaintiff's home, where the plaintiff and his wife were requested to come along with him to Cleveland, and that the only objection then made by the plaintiff was that he was unable to get along with Kerstein. He insisted, as a condition of his return, that Kerstein should first be discharged from the employment of the defendants. At the time that the offer for the re-employment was made to the plaintiff, he had not then suffered any loss, and, on his failure to accept the re-employment, was it not his duty to immediately return to the defendant and re-enter his employ? The rule is well stated by Sutherland on Damages (volume 3, § 693) as follows:

"But an offer to continue in the same employment, under the terms of the original contract, if nothing has occurred to make *it degrading for the employé to do so*, or he will *not suffer loss or injury thereby, must be accepted.* If it is refused, he cannot recover for such time as he thereafter remains unemployed."

It is contended on behalf of the plaintiff that he was willing to return to Cleveland, to be re-employed by the defendant, under and pursuant to said contract, if the said defendant would pay him the expenses then incurred, which were, i. e., the railway fare from Cleveland to New York, and also his railway fare from New York to Cleveland, and that by reason of the defendant refusing this offer he was justified then, under the circumstances, to consider that he was discharged from the defendant's employ, and that he thereafter sought other employment to diminish the damages for the breach of said contract. Although it was his duty, under the law, to seek other employment to diminish the damages, the court cannot overlook the offer made by the defendant immediately upon the alleged discharge of the plaintiff, to return to his original employment, and on his failure to return to Cleveland and accept his original employment, it has been held that the only damages that plaintiff could recover would be nominal. From research made, I find that the authorities are few covering

this proposition, but it has been held in other jurisdictions that, where A. engaged B. to work for him for 12 months, at $50 a month, and at the end of the month discharged him, offering $50 for that month in full settlement, which was refused. On the same or next day A. requested B. to return to the store and work, which B. refused to do. Held, that this refusal barred B.'s recovering more than $50. Birdsong v. Ellis, 62 Miss. 418.

The case of Kuno v. Fitzgerald Bros. Brewing Co., 65 App. Div. 612, 72 N. Y. Supp. 742, is analogous to the question here discussed, in reference to the request of the plaintiff herein that he would return to his employment after the discharge of Mr. Kerstein; in said case last cited, where an employé persistently refused to continue his employment unless certain unauthorized expenses were acceded to, and wherein a statement of the manager that he was through with his employé's services did not amount to a breach of the contract by the employer, the same having already been broken by the employé; and on page 613 of 65 App. Div., and page 744 of 72 N. Y. Supp., Ingraham, J., writing for the court, quoting the trial court's charge, states:

"The question submitted by the court to the jury was: 'What is the fact? Was it the breach of the defendant, or did he discontinue his services, for the reason I have stated, because of the nonpayment of the expenses, etc.? If the latter, then your verdict should be for the defendant. If the defendant was guilty of a breach of contract, and the plaintiff was ready and willing at all times to fulfill the contract on his part, then he is entitled to a verdict, and the measure of damages is as I have indicated to you already.'

"Thus the court eliminated from the consideration of the jury the only breach of the contract alleged in the complaint, and upon which the plaintiff based his right to a recovery by holding that a correct construction of the contract did not require that the defendant should furnish the plaintiff with these expenses, and that refusal of the defendant to furnish the expenses was not a breach of any contract they had made. But the plaintiff obtained a recovery because of a breach of a contract which was not alleged, and which a review of the evidence shows was not proved.

"Plaintiff admitted in his testimony, confirming by his letters and telegrams to defendant, that he had demanded of the defendant that he should be paid these expenses; that the plaintiff had refused to waive his demand for them, and had refused to continue in the employment, unless that demand was acceded to. It was offered in support, after the plaintiff had persistently refused to go on with the employment unless the defendant agreed to pay him for these expenses, that defendant's manager told him, 'We are through with you.' And certainly, in view of the plaintiff's persistent refusal to continue in the defendant's employ unless this demand, which was entirely unjustified, was acceded to, such a statement cannot be considered a breach of the agreement of employment by the defendant. I think it quite clear that, upon the plaintiff's own evidence, he was guilty of a breach of his contract, by demanding to be paid these expenses, to which, under the contract, he was not entitled, and refusing to proceed under the contract unless the claim was allowed."

The court further states that from the evidence as presented the plaintiff was not entitled to recovery, and the complaint should have been dismissed. The case was thereupon reversed and a new trial ordered.

Bigelow v. American Forsythe Powder Mfg. Co., 39 Hun, 599, seems to be in point. Davis, P. J., states as follows:

"I think, notwithstanding what has taken place between the parties, the plaintiff having found no other employment, was bound to be called upon after the alleged breach to perform any services within the employment called for by defendant's contract. He claims for the *entire year's services*, because by the contract he was employed for a year, and was required by the rule governing such cases to take employment when opportunity offered, *practically for the benefit* of the defendant, and to give credit on his admissions for the amount he should earn. It was the right, therefore, for the defendant to call upon him to serve in the same line of business as the original employment, or to provide employment for him, and his refusal to take such service without any good reason should operate to diminish his damages."

The request of the plaintiff to discharge Kerstein as a condition for him to return to the employment of the defendant under his said contract appears to be arbitrary and capricious, and the refusal to re-enter into his employ upon such condition cannot be construed as a legal ground for a breach of the contract of employment.

The court, in its charge to the jury, stated:

"That it appeared from the evidence that the defendant employed quite a number of salesmen and had a large plant for the manufacturing of cloaks and suits, and had the right to employ as many designers as it found it was necessary for the benefit of its business."

The excuse offered by the plaintiff and his insistence on the discharge of Kerstein were not in good faith, and the verdict rendered by the jury was not in accordance with the court's charge, to which no exception was taken, nor was it in accordance with the evidence adduced upon the trial.

It is only in such cases where a plaintiff would be excused from returning to employment under an offer of re-employment, wherein it might degrade and humiliate the employé, or where an employé must associate in the performance of his work with persons of habitually immoral character or loose manners, which would be a sufficient ground upon discharge from employment to maintain action to recover for the amount due, less the amount earned. Levin v. Standard Fashion Co., 16 Daly, 404, 11 N. Y. Supp. 706, and cases there cited.

This is the only instance that the court could find from research made excusing an employé from entering upon re-employment under a contract existing between the parties.

The court has examined the cases Pindar v. Jenkins, 128 App. Div. 711, 113 N. Y. Supp. 589, and Ruland v. Waukesha Water Co., 52 App. Div. 280, 65 N. Y. Supp. 87, but fails to see where they are applicable to the question involved here.

[2] The court can come to but one conclusion, and that is that the verdict of the jury thus rendered in favor of the plaintiff must have been reached by bias, prejudice, or sympathy for the plaintiff and not in accordance with the evidence or the court's charge, and a verdict thus rendered cannot stand, and the motion to vacate the same and ordering a new trial is therefore granted.

Settle order on one day's notice.

(158 App. Div. 367.)

SPALLHOLZ v. SHELDON.

(Supreme Court, Appellate Division, Third Department. September 26, 1913.)

EXECUTORS AND ADMINISTRATORS (§ 516*) — ACCOUNTING — ILLEGAL COMMISSIONS.

In a proceeding to charge an executor, whose account had been allowed and approved, with moneys alleged to be illegally appropriated by him as commissions, judgment for defendant *held* sustained by the evidence.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2199–2207, 2220–2232; Dec. Dig. § 516.*]

Kellogg and Woodward, JJ., dissenting.

Appeal from Trial Term, Washington County.

Action by Lizzie M. F. Spallholz against Mark L. Sheldon, individually and as executor of James C. Ferguson, deceased. From a judgment for defendant, after a trial by the court without a jury, plaintiff appeals. Affirmed.

See, also, 148 App. Div. 573, 132 N. Y. Supp. 560.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Visscher, Whalen & Austin, of Albany, for appellant.

James Gibson, Jr., of Salem (William J. Roche, of Troy, of counsel), for respondent.

HOWARD, J. On January 31, 1891, James C. Ferguson died leaving an estate of $23,274.40. He made some other small bequests, but left the bulk of his property to his only child, Lizzie M. Ferguson. He appointed the defendant, Mark L. Sheldon, the executor of his will. Yearly, after assuming his duties, the executor rendered an account to the surrogate. At each of these annual accountings certain erroneous commissions and allowances were made to the executor, the aggregate of which is $1,102.53. When the plaintiff arrived at the age of 14 years, upon her petition, the defendant rendered his final account, February 24, 1899, and was discharged. In March, 1909, the plaintiff discovered that the defendant had been allowed, and had taken and appropriated to his own use, these unlawful commissions and allowances. Thereafter, and before the beginning of this action, she demanded of the defendant restitution of this money improperly and unlawfully taken out of her estate by the surrogate and awarded to the defendant. The defendant refuses to return it.

Statutes of limitations run against actions in equity as they do against actions at law. Gilmore v. Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554. This law is well settled, and therefore, unless there is some way of escape, this action is barred both by the six and the ten year statute of limitations. If the acts of the defendant in taking these unlawful commissions, costs, and allowances do not constitute "constructive fraud," the statute of limitations has run against the claim. The plaintiff recognizes this, and therefore her first effort is to endeavor to convince the court that the acts complained

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of do constitute "constructive fraud," and thus come within the provisions of subdivision 5, § 382, of the Code. All attempts to establish actual or positive fraud have been abandoned.

A careful examination of the best definitions of "constructive fraud" does not warrant or permit us to pronounce the acts of the executor in this case "constructive fraud."

"Legal or constructive fraud includes such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law. Thus, for instance, contracts against some general public policy or fixed artificial policy of the law; cases arising from some peculiar confidential or fiduciary relation between the parties, where advantage is taken of that relation by the person in whom the trust or confidence is reposed, or by third persons." Bouvier's Law Dictionary, vol. 1, p. 843.

"'Constructive frauds' are acts, statements, or omissions which operate as virtual frauds on individuals, or which, if generally permitted, would be prejudicial to the public welfare, and yet may have been unconnected with any selfish or evil design." Anderson's Dictionary of Law, p. 475.

"Constructive fraud may be described as an act done or omitted, not with an actual design to perpetrate positive fraud or injury upon other persons, but which, nevertheless, amounts to positive fraud, or is construed as a fraud by the court because of its detrimental effect upon public interests and public or private confidence." Eaton on Equity, p. 287.

Definitions might be multiplied, but this is not necessary, for the authorities and text-books agree substantially upon this misnomer. From these definitions it will be observed that there must be some *act* or *omission* on the part of the person accused, or *breach of duty,* as other definitions say, in order that he be guilty of "constructive fraud." In this case the defendant did nothing that he ought not to have done; he omitted nothing that he should have done. There was no "breach of duty," for it was his right, if not his duty, in the absence of actual knowledge that the court was wrong, to take what the court gave him, no more and no less. He did exactly this. In fact, he obeyed absolutely and innocently the decrees of the court. He supposed he was right; he never entertained a different thought. He took no advantage of his fiduciary relations. His moral delinquency attached years after he was out of office, years after the fiduciary relations ceased. While these relations existed, he was unconscious that an unlawful profit was accruing to him. It is clear that no act and no omission of his produced this profit. The blunder of the court, not the act of the executor, produced it; and a blunder of the courts has never been held to make any litigant guilty of fraud. A search through the books will fail to disclose any instance or definition which will permit the facts existing here to be denominated "constructive fraud." Actual fraud was copiously alleged in the complaint; but there was no attempt to prove it, and we must take the record as we find it. The trial justice was right in refusing to find that there was "constructive fraud."

But, even if we extend the definition of "constructive fraud" so as to include the situation here, the question then arises: Does the word "fraud," as used in subdivision 5, § 382, of the Code, include "constructive fraud," or refer only to positive fraud? It is conceded

that the alleged cause of action is barred by the statute of limitations unless it is preserved by this subdivision. It can only be preserved under this subdivision if the word "fraud," used therein, embraces "constructive fraud," as well as actual fraud. So far as there have been any adjudications upon this question, the cases all hold that it is actual fraud against which the statute does not run until its discovery, and that the statute commences to run against "constructive fraud" as soon as the act or omission constituting it occurs. Just why the courts have pronounced this doctrine is not very well reasoned out, but that it is well recognized as the law seems to be established by the following cases: Chorrmann v. Bachmann, 119 App. Div. 146, 104 N. Y. Supp. 151; Lammer v. Stoddard, 103 N. Y. 672, 9 N. E. 328; Price v. Mulford, 107 N. Y. 303, 14 N. E. 298; Finnegan v. McGuffog, 139 App. Div. 899, 123 N. Y. Supp. 539; Finnegan v. McGuffog, 203 N. Y. 342, 96 N. E. 1015.

We discover, therefore, first, that equity actions, like actions at law, are barred by statutes of limitations; second, that the defendant herein was not guilty of "constructive fraud"; third, that, even if his acts or omissions do amount to "constructive fraud," the statute has, nevertheless, run against the cause of action arising out of such acts or omissions—subdivision 5 of section 382 having no application.

It follows that the judgment of the trial court must be affirmed. This should be without costs.

SMITH, P. J., concurs. LYON, J., concurs in memorandum. KELLOGG, J., dissents in memorandum, in which WOODWARD, J., concurs.

LYON, J. (concurring). Unquestionably the defendant has received and retained moneys of the plaintiff, to which he was not entitled, and I concur in the affirmance of the judgment appealed from for the reason only that I think that the plaintiff's remedy is not through an action in equity in this court, but by an application to the Surrogate's Court to vacate or modify the decrees of that court settling the accounts of the defendant as such executor.

I think that a surrogate has the right to entertain such an application in case of fraud or mistake, and, upon proper proofs being made, to vacate, modify, or set aside the erroneous decrees. Code Civ. Proc. § 2481, subd. 6; Matter of Regan, 167 N. Y. 338, 343, 60 N. E. 658; Costello v. Costello, 152 App. Div. 288, 137 N. Y. Supp. 132; Matter of Malone, 150 App. Div. 31, 134 N. Y. Supp. 496; Matter of Peck, 131 App. Div. 81, 115 N. Y. Supp. 239; Matter of Flynn, 136 N. Y. 291, 32 N. E. 767; Matter of Hodgman, 82 Hun, 419, 31 N. Y. Supp. 263.

JOHN M. KELLOGG, J. (dissenting). The executor was allowed excessive commissions, but I think the decree of the surrogate is final upon that subject. It was a matter of computation, fairly within the jurisdiction of the surrogate. The executor was allowed various sums amounting to $1,065 for counsel fee, or by way of counsel fee and allowances, for caring for and managing the securities of the estate,

although he had no counsel, and although excessive commissions were allowed each year. Upon one accounting he did have counsel, and in addition the counsel was allowed $25, the propriety of which payment is not questioned. The commissions generally are a full compensation for the care and management of the securities of the estate and for transacting its business, and cover all services which the surrogate is permitted to allow to the executor as such. He may allow counsel fees, but that is to reimburse him for fees paid counsel, and in some cases not necessary to consider here certain other allowances may be made. But in a case of this kind the surrogate was absolutely without jurisdiction to grant to the executor any counsel fee or allowances of that nature. The executor and the surrogate both are presumed to know the law, and both are presumed to know that no allowances could be made the executor for these items. But they were made, and we are to assume that the surrogate had some foundation for his action.

It appears that the executor asked the allowances. The guardian ad litem consented, and they were allowed. Evidently by the request for the allowances the surrogate may have been led to believe that some services by counsel had been performed for which these allowances were to reimburse the executor. But such was not the fact. Unless the surrogate intended deliberately to violate the law, and grant the infant's money to the executor without any authority, we must assume that in some way he was overreached by the executor. When an executor obtains an allowance in his account for charges clearly unwarrantable, and which the surrogate had no jurisdiction to allow, it is, I think, a fraud within the meaning of subdivision 5 of section 382 of the Code of Civil Procedure, in which case the statute of limitations begins to run at the time of the discovery of the fraud. I do not think the infant was chargeable with knowledge of the provisions of these decrees. She had the right to assume that the executor, the surrogate, and the guardian ad litem had performed their duty, and until she had actual knowledge of the fraud the statute did not run against her.

I think the plaintiff is entitled to relief as to the allowances for costs and counsel fee, except as to the $25 paid the attorney.

(158 App. Div. 352)

TROY WASTE MFG. CO. v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

CARRIERS (§ 197*)—TRANSPORTATION OF GOODS—REFUSAL TO DELIVER—LIABILITY.

Plaintiff delivered goods to defendant for transportation over its railroad lines and the lines of certain connecting carriers under a contract which provided that property not removed by the party entitled to receive it within 48 hours after notice of its arrival had been duly sent or given might be kept in the car, depot, place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to the carrier's responsibility as a warehouseman only, or might be at the carrier's option removed to and stored in a public warehouse at the owner's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cost and risk and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage, and that the owner or consignee should pay the freight and all other lawful charges accruing on the property and, if required, pay them before delivery. The consignee refused to accept the goods, and after they had been held for some time at the point of destination plaintiff directed their return to it. Upon their return defendant refused to deliver them to plaintiff without payment of a charge made by the carrier at the point of destination for the detention of the car during the time they were held there. *Held* that, by refusing to deliver them, defendant converted the goods and was liable for their value, less the freight charges for their return.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891–900; Dec. Dig. § 197.*]

Kellogg and Lyon, JJ., dissenting.

Appeal from Rensselaer County Court.

Action by the Troy Waste Manufacturing Company against the New York Central & Hudson River Railroad Company for conversion. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Visscher, Whalen & Austin, of Albany (William L. Visscher, of Albany, of counsel), for appellant.

Thomas S. Fagan, of Troy, for respondent.

WOODWARD, J. The complaint alleges that the plaintiff is a domestic corporation engaged in business in the city of Troy; that the defendant is a domestic railroad corporation engaged in domestic and interstate commerce; and that on the 28th day of February, 1910, the plaintiff caused to be shipped by the defendant to Covington, Ky., 24 bales of gunny bagging, containing 20,402 pounds, and prepaid the freight thereon, amounting to $34.68; that said merchandise was rejected by the consignee at Covington, Ky., and that thereupon and immediately directions and orders were given to the defendant by both the consignee and this plaintiff to reship and return said merchandise to Troy, N. Y.; that said merchandise was reshipped and returned and conveyed by the defendant to Troy, N. Y., and the plaintiff was notified that said merchandise had been reshipped and was at a depot of the defendant at Green Island; that the plaintiff then and thereupon offered to pay to the defendant the freight charges from Covington, Ky., to the city of Troy, N. Y., amounting to $41.82, and demanded of said defendant that said merchandise be delivered to this plaintiff, but the defendant unlawfully refused to accept said freight charges and unlawfully refused to deliver said merchandise to plaintiff and unlawfully refused to allow and permit plaintiff to take said merchandise from its depot and station at Green Island aforesaid, all to the damage of this plaintiff of $174.44. It is then alleged that the plaintiff is the owner of the merchandise and is entitled to the immediate possession of the same; that the defendant unlawfully and illegally retains possession of the same, and unlawfully and illegally refuses to deliver the same to the plaintiff, and in like manner refuses

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to permit the plaintiff to take the same, although the plaintiff has duly demanded of the defendant that it deliver same to the plaintiff and allow and permit the plaintiff to take the same after paying the freight charges thereon from Covington to Troy; and that the defendant has thereby and by reason thereof converted the same to its own use, to the damage of this plaintiff. The value of the gunny bagging is alleged to be $216.26, and the plaintiff claims damage for this amount, less the sum of $41.82, conceded to be due to the defendant for freight charges upon the goods.

The defendant's answer admits the corporate capacity of the defendant and the fact of its carrying on the business of a common carrier. It likewise admits that on or about the 28th day of February it received certain property at its Green Island depot consigned to Overman & Schrader Company, Covington, Ky.; that said merchandise was duly transported to destination over the lines of defendant and its connecting carriers and upon arrival at destination was tendered to the consignee, and that the said consignee thereafter refused to accept the same; that thereafter, in pursuance of orders from the plaintiff so to do, the said property was returned to the defendant at Troy, N. Y. It also admits that the plaintiff paid the charges for the transportation of the said property from Green Island to Covington, Ky., and on the return of said property offered to pay defendant the transportation charges from Covington to Troy, amounting to $41.82, and demanded delivery of said property upon payment of said freight charges. After denying knowledge or information as to the value of the property, the answer "upon information and belief denies the allegations of the complaint and each and every of them not hereinbefore controverted or admitted."

The evidence submitted upon the trial of the action clearly established the facts alleged in the complaint which were thus denied, so that it cannot be fairly questioned that the plaintiff established the cause of action alleged, and the only questions arising upon this appeal relate to the defendant's "second and separate defense, and for a counterclaim to the alleged cause of action set forth in the complaint." This alleged counterclaim realleges the formal matters set forth in its answer and "further alleges that the said property was received and transported by it under and pursuant to the terms of a written contract, a copy of which is hereto annexed, marked Exhibit A, and made a part of this answer, which contained, among others, the following provisions (no such exhibit is found in the record, with the exception of the excerpts, which are quoted from the alleged contract, and which appear to have been curtailed):

"Sec. 5. 'Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.' * * *"

"Sec. 8. 'The owner or consignee shall pay the freight and all other law-

ful charges accruing on said property, and if required, shall pay the same before delivery. If, upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.'"

This so-called counterclaim then alleges that Covington is not upon the line of the defendant's railroad but is upon the line of the Chesapeake & Ohio Railway Company; that the defendant duly transported the said property over its road and delivered the same to its connecting carrier on the route to destination; that, after the arrival of said property at destination, the Chesapeake & Ohio Railway Company duly notified consignee of the arrival thereof; that 38 days, exclusive of Sundays and holidays, elapsed between the date of the said notice of arrival to consignee of said property and the receipt of orders from the plaintiff to return the said property to Troy, N. Y.; that the charges for the detention of said car containing the said property for said 38 days, as provided in the tariffs of said Chesapeake & Ohio Railway Company, duly published and filed with the Interstate Commerce Commission, amounted to the sum of $38; that upon the return of said property to Troy, N. Y., the defendant offered to deliver the same to the plaintiff herein upon the payment of the freight charges from Covington, Ky., to Troy, N. Y., amounting to $41.82, plus $38 demurrage charges, but that the plaintiff refused to pay the said charges; that in accordance with defendant's tariffs, duly published and filed with the Interstate Commerce Commission, there have accrued upon said car load of property demurrage charges at the rate of $1 per day, exclusive of Sundays and holidays, since the 30th day of June, 1910, to and including the date of the commencement of this action, viz., June 3, 1911, amounting in all to $279. The defendant then demands judgment for this sum, with the freight charges and demurrage added.

The judgment dismisses the counterclaim and gives the plaintiff the relief demanded in the complaint; the defendant appealing from the judgment.

Having before us only the portion of the alleged written contract set out in the answer, it may be assumed that the provisions quoted are most favorable to the defendant's counterclaim, and it is worth while to look into the pleadings to see if there is a counterclaim pleaded. The provision of section 5 of this alleged contract is that if the property is not removed within 48 hours by the party entitled to receive it, after notice of its arrival has been duly sent, it "may be kept in car, depot or place of delivery of carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as a warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage," and here the language of the contract is cut off, though evidently continuing. Obviously the first provision quoted of the contract had relation to the obligations of the consignee in respect to the goods, and assumes the same are to be received by the consignee, and merely stipulates for a

delivery other than a personal delivery to the consignee. It provides in place of the common-law contract that the common carrier is bound not only safely to convey but safely to deliver a parcel which he has undertaken to carry, at the place to which it is directed, to the consignee personally (Fisk v. Newton, 1 Denio, 45, 47, 43 Am. Dec. 649); that delivery may be made to the carrier as a warehouseman; and that the consignee will pay the expenses of such a delivery. But the charge against the person receiving the goods is "a reasonable charge for storage," and the liability of the carrier is stipulated to be merely that of a warehouseman, so that if the consignee had received the goods in question, in the manner in which it was stipulated he might receive them, the charges would have been limited to reasonable charges for storage. As a warehouseman the defendant's connecting carrier might have a lien upon the goods for their storage during any delay that the consignee might occasion, but just how the defendant, as the initial carrier, could have any lien upon the goods in question for the use of a car in which it is inferentially averred that the goods were stored for a period of 38 days, and which was subsequently used in reshipping the goods to the plaintiff, is not quite clear. There is no provision in the contract, so far as it relates to the carrier in the capacity of a warehouseman, which pretends to give the defendant a lien for these charges; it simply provides that upon a delivery, such as is provided for, the goods shall be "subject to a reasonable charge for storage." In the absence of agreement or statute, the lien upon goods for the storage charges extends only to cases of those engaged in the business of public warehousemen, and not to mere volunteers, or to cases of private storage (30 Am. & Eng. Encyc. of Law, 63); and it has been uniformly held in this state that the common-law lien given warehousemen does not extend to cases of private storage. Merritt v. Peirano, 10 App. Div. 563, 565, 42 N. Y. Supp. 97, 99, and authorities there cited, affirmed on opinion below 167 N. Y. 541, 60 N. E. 1116. In the case cited it was said:

"The lien of warehousemen is now governed by statute (chapter 526, Laws of 1885), which gives a lien only to a warehouseman or a person lawfully engaged exclusively in the business of storing goods, wares, and merchandise for hire. This statutory provision would seem to deny a lien to persons storing goods who did not come within the terms of the statute."

See Alton v. New York Taxicab Co., 66 Misc. Rep. 191, 192, 121 N. Y. Supp. 271.

That the first clause of section 5, quoted above, does not pretend to give a lien to the defendant must be obvious when we read the further provision that at the option of the carrier the goods may be "removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage," etc. Here is a contractual provision for a lien, but the lien runs to the warehouseman and not to the defendant; it is a provision for relieving the carrier of all responsibility upon delivering the goods to a public warehouseman, who shall have a lien for the cost to the owner of removing the goods, for the freight and other lawful charges, including a reason-

able charge for storage. There is no suggestion that the defendant has any statutory rights or franchises which would enable it to carry on the business of a warehouseman, and the contract set out in the pleadings does not provide for a lien upon the goods for the storage, so far as section 5 is concerned, and, unless there is some other provision of the contract to help out the defendant's contention, it follows that the judgment cannot be disturbed.

Section 8 of the alleged contract is set forth in the counterclaim, but this does not pretend to give the defendant a lien. It provides that the "owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery." Concededly the plaintiff had paid the freight upon this shipment from Troy to Covington, and it does not appear that there were any other lawful charges against the property, and the contract, as we have already pointed out, merely provided methods of substituted delivery, of which the defendant might avail itself. It is not alleged that it delivered the goods to a warehouseman; the only inference to be drawn is that it left the goods in the car in which they were originally shipped; and the defendant's connecting carrier offered them to the consignee under conditions which undoubtedly relieved it of the obligations of a common carrier but which did not, either under the alleged contract or under any provision of law to which our attention is called, operate to give a warehouseman's lien either to the defendant directly or to its connecting carrier. The rule is well established that:

"When goods are safely conveyed to the *place* of destination, and the consignee is dead, absent, or refuses to receive, or is not known and cannot after due efforts are made be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business, at the place of delivery, for and on account of the owner. When so delivered, the storehouse keeper becomes the bailee and agent of the owner in respect to such goods." Fisk v. Newton, 1 Denio, 43, 47, 43 Am. Dec. 649; North Penn. Railroad v. Commercial Bank, 123 U. S. 727, 734, 8 Sup. Ct. 266, 31 L. Ed. 287.

The contract, as set out in the pleadings, evidently modified this rule, so that the defendant, or its connecting carrier, could set the car apart and store the goods therein, relieved of the responsibilities of a common carrier. When this was done the relations between the plaintiff and defendant, under the terms of the contract so far as we may determine from what is before us, changed. The goods were delivered by the initial carrier (the defendant) to its connecting carrier and by the latter transported to the place of destination, and the consignee was notified and the car was set apart and upon the private switch of the consignee, where it remained for several days before the consignee rejected the goods. After 48 hours from the time that notice was given, the delivery was complete within the contract; the contract of the common carrier was at an end; and the connecting carrier merely held the goods subject to the condition that "the party entitled to receive" the same should be liable for "a reasonable charge for storage and to carrier's responsibility as warehouseman only."

So far as the defendant is concerned, therefore, the goods were in

Covington, Ky., where they were lawfully in the possession of the defendant's connecting carrier as bailee and agent of the owner, the plaintiff in this action; and the plaintiff owed to the Chesapeake & Ohio Railway Company, such connecting carrier, a "reasonable charge for storage," but, so far as appears, without any provision for a lien upon the goods for that amount, as there is nothing to show that the Chesapeake & Ohio Railway Company has any authority to act as a warehouseman, or that there was any intention of giving such corporation a lien upon the plaintiff's goods. Moreover, it is not claimed that the Chesapeake & Ohio Railway Company ever assigned any claim for these charges to the defendant. With the plaintiff's goods in Covington, in the hands of its bailee and agent, the plaintiff sent an order for the return of these goods, and the Chesapeake & Ohio Railway Company, as a common carrier, became the initial carrier. In point of law an entirely new transaction was undertaken, as much as though the railroad company had exercised its option and delivered the goods to a public warehouseman and the latter had, as the bailee and agent of the plaintiff, offered the goods for transportation to the city of Troy, and the only lien which the common carrier could impose upon this shipment was such as grew out of the contract for transportation from Covington to Troy. This lien the plaintiff offered to discharge by tendering the amount of the freight charges, and the defendant, by refusing to deliver the goods, has unquestionably made itself liable for the value of the same, less the amount of freight charges. Whether the Chesapeake & Ohio Railway Company was bound to deliver the goods as bailee and agent of the plaintiff to itself as the initial carrier, it is not necessary to decide here. It did deliver the goods to the defendant as a connecting carrier entirely independent of the original contract under which the plaintiff forwarded the goods to Covington, and the defendant took the consignment into its charge the same as though it were an original shipment. It had no power or authority to make the collection of storage charges in Covington, accruing before the relation of carrier began, a condition of the delivery of the goods to the plaintiff; that was a matter between the party furnishing the storage and the plaintiff; and the fact that the defendant may have paid such charge in the regular course of business did not give it a lien upon the plaintiff's goods for that amount. It is not claimed that it had any such power under any statute, and the contract, as we have seen, does not pretend to give a lien where the carrier, or its connecting carrier, elects to store the goods itself in lieu of a personal delivery to the consignee. The contract provision is a privilege relieving it of its strict common-law obligations as a common carrier, and it cannot be stretched into an agreement for a lien upon the property, although the person for whose benefit the storage is made may be liable for the reasonable charges.

If we are right in this position, and if the plaintiff was entitled to the delivery of its goods upon the payment of the freight charges from Covington to Troy, it follows, of course, that the subsequent claim for demurrage, arising from the failure of the plaintiff to take the goods and pay the demand of the defendant for the $38 storage charges, is without merit and gives the defendant no rights. It might be, of

course, that the defendant, as the assignee of a "reasonable charge for storage," could have interposed such claim as a counterclaim in the present action, but it does not allege any such condition; it stands upon the proposition that it had a right to demand the payment of demurrage charges as a condition of the delivery of the goods, and its claim for the substantial part of its alleged counterclaim is based upon demurrage said to have accrued after the plaintiff had refused to pay the charge of $38 for demurrage while the goods were stored in Covington, and which can have no basis unless the defendant was justified in holding the goods pending the payment of such charge. Demurrage contemplates payment for the use of cars or vessels while being discharged of their freight, and not for their use as warehouses under a contract for a substituted delivery. "Demurrage, in the proper sense of the term," says the American & English Encyclopedia of Law (volume 9, 221), "is an allowance or compensation for the delay or detention of a vessel, expressly provided for in a charter-party or bill of lading"; and the same authority says that under some circumstances the shipper or consignee of goods over a railroad may become liable in damages under an express or implied contract for the detention of cars or other property belonging to the company, and the term "demurrage" is commonly applied to these damages.

In Crommelin v. New York & Harlem R. R. Co., 43* N. Y. 90, the defendant had transported certain marble belonging to the plaintiff and to be delivered to him in New York. The marble arrived at its destination on the 11th day of October, 1860. The defendant proved that prior to this time it had given notice to the plaintiff that his freights must be removed within 48 hours after their arrival or that $1 a day for each car detained would be charged for such detention, and further proved that this was the general custom of the company. It was also proved that written notice was given the plaintiff of the arrival of the marble, calling attention to the demurrage charge which would be demanded for delay. The cars remained upon the track until the 18th of October, when the plaintiff paid the freight and demanded the marble. The defendant refused delivery except upon the payment of $1 per day for each car detained beyond the first 48 hours, and this the plaintiff refused to pay, bringing an action in replevin. The court say:

"The legal question here is: Had the defendants a lien upon the marble for the delay in taking it, which justified their refusal to deliver it. That the defendants had a lien for the freight of the marble is not denied. The plaintiff conceded it and paid the amount before demanding the marble. The lien of an innkeeper or of a common carrier is well established. So the principle is well established generally that every bailee who bestows labor, care, or skill upon an article intrusted to his possession may retain the article until the amount due to him for such care, labor, or skill shall be paid. The watch repairer, the blacksmith, and the tailor are the instances usually cited by way of illustration. On the other hand, A., being stable keeper or an agister of cattle, has no such lien. He must deliver the horses or the cattle to the owner upon demand and seek his remedy upon his contract. * * * The character of a warehouseman, or any liability for its protection or storage, after 48 hours, was expressly disclaimed by the defendants in their notice of October 12th. It was never removed from the cars but remained upon them in the public highway until after the plaintiff had demanded its

delivery to him. The defendants insist that by the goods being left upon their cars, and by the delay of the plaintiff to remove them within 48 hours after their arrival, injury, inconvenience, and expense was suffered by them. This is quite probable. It constitutes, however, a claim in the nature of demurrage and does not fall within the principles of those transactions, which gives a lien upon the goods. It is a breach of contract simply, for which, as in case of a contract in reference to pilotage or port charges, the party must seek his redress in the ordinary manner."

The case last above cited does not appear to have been questioned in the later decisions, and it certainly presents as strong a case for the assertion of a lien as that in the matter now before us, where the contract was clearly for a modification of the common-law obligation of the carrier in respect to the delivery of the goods at Covington; and the defendant having no lawful right to detain the plaintiff's goods, after a tender of the freight, and the claim for reasonable storage charges not having been presented as such by the pleadings, we see no escape from the conclusion that the counterclaim was properly disallowed.

The judgment appealed from should be affirmed, with costs. All concur, SMITH, P. J., in result, except

JOHN M. KELLOGG, J. (dissenting). By the bill of lading under which the defendant at Green Island, N. Y., received the car load of gunny bagging from the plaintiff for shipment to Covington, Ky., the defendant was to deliver it to the connecting carrier on the route to its destination, and it was agreed as to each carrier over any of the routes that. if the property was not taken by the consignee within 48 hours (holidays excepted) after notice of its arrival, it might be stored and the storage charges and freight should be a lien thereon, and that a reasonable charge might be made for use of tracks, or for detention of car, after the car has been held 48 hours (exclusive of holidays) for loading or unloading, which charge is to be added to all other charges thereunder, and the property may be held subject to the lien thereon, and that the freight and all other lawful charges accruing upon the property, if required, shall be paid before delivery.

The car arrived at the Covington yards of the Chesapeake & Ohio Railway Company March 16th, and notice to the consignee of the arrival was given the 17th, although the car was not actually upon the siding of the consignee ready for unloading until the morning of the 21st. On the 22d the Chesapeake & Ohio Railway Company's agent told the shipping and receiving clerk of the consignee that he better unload the car and save demurrage. He replied he did not know whether they would accept it or not. The reply was:

"If you don't, give us notice."

On the 24th the consignee notified the consignor by wire, and confirmed it by letter the following day, that it would not receive the bagging but would return it, and a correspondence ensued; the plaintiff seeking to induce the consignee to accept the property. April 1st formal notice of the rejection of the bagging was given by the consignee to the Chesapeake & Ohio Railway Company, which notice also stated:

"And will thank you to return same at the expense of the shipper over the same routing as received."

But the consignee had no authority to charge the expense of the return to the plaintiff, and evidently the return would not be made on such a notice. April 20th the plaintiff delivered to defendant an indemnity agreement requesting it to stop the bagging for it before delivery to the consignee and have it returned, in consideration of which it agreed to indemnify defendant and save it harmless from any suit, legal proceedings, loss, damage, expense, counsel fee, costs, and charges arising from or caused by its attempting to comply with the request. It concluded:

"The full meaning and intent of this agreement being that you are to act as agent in this transaction."

Pursuant to that agreement, at defendant's request, the Chesapeake & Ohio Railway Company, on the 18th day of June, shipped the goods over its line and the defendant's line to the plaintiff at Green Island, N. Y., with charges thereon of $38 for demurrage of the car, and required payment thereof before the delivery to the plaintiff. The defendant duly notified the plaintiff of the arrival of the car and that the freight charges were $41.82 and demurrage charges of $38, and asked payment before delivery. The plaintiff offered to pay the freight but refused to pay anything on account of demurrage. In response to the defendant's request that the Chesapeake & Ohio Railway Company permit a delivery of the goods without a payment of the demurrage charges, it notified the defendant that it could not legally authorize the delivery without payment but would recommend to the Car Service Association a refund of that portion which should be refunded, and asked if a delivery could not be effected in that way. This suggestion was communicated to the plaintiff, but it preferred to sell its bagging to the defendant rather than to make this reasonable adjustment and brought this action. If the plaintiff had paid the demurrage, it might have obtained a refund of any excess charges through the Car Service Association or by application to the Interstate Commerce Commission.

The defendant might well have rested its case upon the indemnity agreement. As plaintiff's agent it was justified in accepting a conditional delivery of the property and agreeing that an absolute delivery to the plaintiff should not be given until the $38 demurrage was paid. The plaintiff cannot repudiate the acts of its agent and recover the property or its value without payment of the charges. Independent of that agreement, the defendant was well within its rights in refusing delivery until the demurrage was paid. A common carrier must accept property delivered to it by a connecting carrier in the usual course of business and forward it towards its destination, and must receive it upon the usual terms on which such shipments are made. If charges connected with the transportation follow the property, if required it must collect them before delivery to the consignee. The shipment of the property, the possession by the defendant, and its authority to de-

liver it to the consignee are subject to such condition. The terminal carrier cannot know whether the charges are reasonable or not. It is enough for its protection that the charges purport to be connected with the shipment, and such as in the ordinary course of business might properly exist. It cannot refuse to receive freight because it is not satisfied that the charges against it are in all respects legal. It must accept the freight and continue the transportation with reasonable despatch. Holding the property until it is satisfied that it can safely take its chances as to the validity of each item charged against it, as a condition of delivery, would be unreasonable. Defendant had no choice whether or not it would receive the property subject to the charges stated, and it therefore is not in any manner responsible for their validity and cannot be made liable for a conversion of the bagging by a refusal to deliver before payment of the charges.

If the plaintiff's position is right, the defendant would be liable if it refused to receive the property subject to the collection of the charges, and would be liable if it refused to deliver the property without payment of the charges. We need not therefore inquire whether or not the demurrage charges of $38 were valid in all respects. It was the duty of the defendant to refuse to deliver until payment unless the connecting carrier otherwise directed. A carrier in interstate commerce has a lien for the freight and any charges attending the transportation. Wabash Railroad Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397.

The Chesapeake & Ohio Railroad Company had the right to charge demurrage and hold the freight until payment thereof according to its rules, which were filed with the Interstate Commerce Commission, and it would be illegal for it not to collect proper demurrage as a condition of delivery; it must observe its rules and treat all shippers alike.

The plaintiff knew the bagging was rejected. It also knew that the consignee was not paying the return freight and that it had given no directions which made it liable therefor. It therefore knew that the bagging remained at Covington subject to its order. It elected not to ask a return but was evidently trying to induce the consignee to reconsider its position. Notice by the railway company to it of the rejection would have given it no additional information. It had knowledge of all the facts. Under the circumstances, therefore, a notice by the company was unnecessary and would have been without effect.

The car was not placed for delivery on the siding of the consignee until March 21st, and demurrage should therefore have been computed from the 22d or 23d. The evidence indicates that it was computed from the 18th. It is clear that the railroad company was entitled to charge demurrage. Apparently the charge is about $4 or $5 too much. But the plaintiff will not lose the money if it pays the charge. A tribunal exists which will informally hear its complaint and grant relief.

The defendant has acted strictly within its rights and no cause of action has been shown. The plaintiff, by refusing to receive the freight after due notice, according to the defendant's rules on file with the Interstate Commerce Commission, is liable for demurrage at

Green Island. The defendant has established its counterclaim and is entitled to judgment thereon.

The judgment should therefore be reversed, with costs, and the defendant should have judgment for its counterclaim, with interest, and costs at the trial term.

LYON, J., concurs in the dissent.

(81 Misc. Rep. 453.)

O'NEILL v. CITY OF NEW YORK.

(Supreme Court, Trial Term, Kings County. June, 1913.)

1. MUNICIPAL CORPORATIONS (§ 192*)—OFFICERS—COMPENSATION DURING SUSPENSION.

Where the chief inspector of the bureau of buildings in the city of New York was suspended from office, pending preparation of charges of an offense constituting not only a violation of the city charter, but also a misdemeanor, and where he was not allowed to perform his duties until he was voluntarily restored to duty without being found guilty, he was entitled to his salary for the time he was suspended, though his reinstatement was not procured by mandamus.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 530–532; Dec. Dig. § 192.*]

2. MUNICIPAL CORPORATIONS (§ 192*)—OFFICERS—TRIAL ON CHARGES—DECISION OF BUREAU PRESIDENT.

Where charges preferred against the chief inspector of the bureau of buildings in the city of New York were referred to the superintendent of buildings appointed to try the same, a decision of the borough president that the inspector be fined a sum equivalent to the salary due him for the time of his suspension was without legal effect, though the superintendent, without making any finding of his own, notified the inspector of such decision.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 530–532; Dec. Dig. § 192.*]

Action by Martin H. O'Neill against the City of New York for reinstatement in office. Judgment for plaintiff.

John J. Kean, of Brooklyn, for plaintiff.

Archibald R. Watson, Corp. Counsel, of New York City (James D. Bell and Charles J. Druhan, both of Brooklyn, of counsel), for defendant.

KELLY, J. [1] Upon the agreed statement of facts, I think the plaintiff is entitled to judgment. He was suspended from his office as chief inspector in the bureau of buildings on July 15, 1909, "pending the preparation of charges," which charges he was informed would be "submitted at the earliest possible moment." He was paid his full salary for July, but after July 31st and until December 22d, his salary was withheld. He was not furnished with a copy of the charges against him until November 26, 1909, a lapse of four months, despite continuous application for same. He was not allowed to perform his duties until December 22, 1909. On December 22d, he was "restored to duty." He never was found guilty of the charges preferred against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

him by any one. The superintendent of buildings, in his notice to plaintiff under date of December 22d, does not in any way intimate that he (the superintendent) has adjudged the plaintiff guilty of the charges against him, and the superintendent was the tribunal appointed to determine this question. On the contrary, the superintendent restores the plaintiff to his office and directs him to report for duty at the usual hour. All this is inconsistent with any finding or determination that plaintiff had been in any way derelict in the performance of his duties. The charge made against him, if true, constituted not only a violation of the charter, but was a misdemeanor as well. It was malum per se under section 1533 of the charter (Laws 1901, c. 466). It seems to me that the action of the superintendent in restoring the plaintiff to his office was virtually an acquittal, an exoneration of the plaintiff. It cannot be that the superintendent would restore to duty a man guilty of the acts charged against the plaintiff.

[2] But, it is said, the letter of the superintendent dated December 22, 1909, notifies the plaintiff that the borough president after carefully reviewing the evidence in the case has reached a decision that the plaintiff be fined a sum equivalent to the salary due him. The inevitable answer is that the borough president had no duty to review the evidence, or reach any decision, or to fine the plaintiff. The authority and the duty and the responsibility for all these things are with the superintendent of buildings. The superintendent carefully omits any statement that he has made any finding against the plaintiff, nor is it claimed that he made any such finding. Nor does the borough president suggest that he has convicted the plaintiff of anything. True the borough president is reported to have decided that plaintiff should be fined—but fined for what? Surely not because the commissioners of accounts stated back in July that plaintiff had done wrong, but omitted to frame or present charges until November 20th, and then failed to sustain them. This might warrant fining the commissioners, but what possible ground does it afford for fining the plaintiff?

The learned corporation counsel suggests that plaintiff should have procured reinstatement by mandamus. This is not a prerequisite. The superintendent restored plaintiff to his office voluntarily. And on the argument suggestion was made that the facts may have been suspicious, although not rising to the standard of proof. There is no warrant for the last suggestion. There is no intimation that there was any proof whatever. The reinstatement of the plaintiff negatives this suggestion in the strongest possible way. And "suspicion" or charges made without foundation should not be made a basis of fining a man five months' salary. There is no such procedure laid out in the charter.

Judgment for plaintiff.

(158 App. Div. 348)

In re SHAUL'S WILL.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. WILLS (§ 55*)—PROBATE PROCEEDINGS—BURDEN OF PROOF—TESTAMENTARY CAPACITY.

While on the probate of a will the law requires evidence of testamentary capacity, yet the presumption of sanity is so strong that where both subscribing witnesses, one of whom was a trustworthy attorney of excellent standing in his profession and the other a reputable citizen in the community in which he resided, both testified that the testatrix was of sound mind and memory, this made out a prima facie case casting on the contestant the burden of showing incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–158, 161; Dec. Dig. § 55.*]

2. WILLS (§ 55*)—PROBATE PROCEEDINGS—SUFFICIENCY OF EVIDENCE—TESTAMENTARY CAPACITY.

Evidence on the probate of a will offered to show testamentary incapacity *held* insufficient to overcome the prima facie case made by the testimony of the two subscribing witnesses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–158, 161; Dec. Dig. § 55.*]

3. WILLS (§ 155*)—VALIDITY—"UNDUE INFLUENCE"—WHAT CONSTITUTES.

"Undue influence" may be exercised by physical coercion or by threats of personal harm and duress, by which a person is compelled against his will to make a testamentary disposition of his property, or it may consist of procuring a will by working upon the fears or hopes of a weak-minded person, by artful or cunning contrivances, by constant pressure, persuasion, and effort, so that, while the testator willingly and intelligently executes a will, it is really the will of another induced by the overpowering influence exercised upon a weak or impaired mind, but a will which is the result of affection or gratitude or resulting from persuasion which a friend or relative may legitimately use, is not procured by undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375–381; Dec. Dig. § 155.*

For other definitions, see Words and Phrases, vol. 8, pp. 7166–7172.]

4. WILLS (§ 163*)—PROBATE PROCEEDINGS—BURDEN OF PROOF—UNDUE INFLUENCE.

Undue influence consisting of physical coercion or threats of personal harm or duress can never be presumed, but must be shown by evidence legitimately proving the facts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388–402; Dec. Dig. § 163.*]

5. WILLS (§ 163*)—PROBATE PROCEEDINGS—BURDEN OF PROOF—UNDUE INFLUENCE.

That a will was procured by working upon the fears or hopes of a weak-minded person by artful or cunning contrivances or by constant persuasion and effort, so that the will of the testator was overpowered and subjected to the will of another, will not generally be presumed, but must be proved like any other fact by the one alleging it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388–402; Dec. Dig. § 163.*]

6. WILLS (§ 155*) — SUFFICIENCY OF EVIDENCE — UNDUE INFLUENCE — UNNATURAL WILL.

Where the only near relative of a testatrix was her mother, who, at the time, was, to the knowledge of the testatrix, possessed of considerable property and in such a weak, feeble condition that she could not long

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

survive the testatrix, and as a matter of fact did survive her only 22 days, her only other relatives being uncles, aunts, and cousins who had no very strong claim upon her bounty, a will, leaving all of her property to a neighbor who assisted in caring for her and her mother in their own home and later in her home, was not so unnatural as to require the application of the rule that a will giving the property to strangers should be closely scrutinized.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375–381; Dec. Dig. § 155.*]

7. WILLS (§ 166*) — PROBATE PROCEEDINGS — EVIDENCE — WEIGHT AND SUFFICIENCY.

In determining the validity of a will, statements of the testatrix as to the future disposition of her property were of slight importance, since such statements are often made to please and gratify the person to whom they are addressed or for some other ulterior purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

8. WILLS (§ 166*)—PROBATE—SUFFICIENCY OF EVIDENCE—UNDUE INFLUENCE.

Evidence showing that the sole legatee under a will was a neighbor of the testatrix, who assisted her and her mother with their work and helped to nurse and care for them in their own home and later in her home, was not sufficient to show the exercise of undue influence, since it merely showed an opportunity to exercise such influence and a quasi confidential relation which is not sufficient.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

Kellogg and Woodward, JJ., dissenting.

Appeal from Surrogate's Court, Otsego County.

Proceeding for the probate of the will of Martha Shaul, deceased. From a decree admitting the will to probate, the contestant appeals. Affirmed.

The following is the opinion of Willis, Surrogate:

Martha Shaul died September 1, 1910, a resident of the town of Springfield, Otsego county, N. Y. She was 52 years of age at the time of her death and had never been married. She left as her nearest relative a mother, Sally Shaul, together with uncles and aunts on her mother's and father's side, and cousins, children of predeceased brothers and sisters of her mother and father. Her mother at the time of the decedent's death was in the neighborhood of 75 years of age, in very feeble health, and died September 23, 1910, possessed of considerable property. The petition in this matter states that the property of the decedent consisted of personal property of the value of about $4,000. The paper which is offered for probate herein is dated and purports to have been executed on the 24th day of August, 1910. It appears from the evidence that the paper was drawn and executed on the said date at the residence of said decedent and her mother in the town of Springfield, Otsego county, N. Y. Objections to the probate of said will have been filed by Otis H. Deck as administrator of the estate of Sally Shaul, now deceased (she being the mother of said Martha Shaul), and also as an heir at law and next of kin of the said Martha Shaul. The principal grounds of the objections are that the decedent was not at the time of the making of said alleged will of sound mind and memory and capable of making a will, and that the said instrument was not her free act and deed, but that the execution of the same was procured and obtained by undue influence. There seems to be no serious question as to a compliance with the statutory requirements at the time of the formal execution of said paper.

[1] Although every person is presumed to be of sound mind and memory, yet the law requires evidence of that fact as requisite to the probate of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

will. The presumption of sanity is so strong, however, that the only burden on the proponent is to produce the subscribing witnesses and obtain their general opinion as to the mental capacity of the testator at the time of the execution of the will. If such subscribing witnesses express an opinion to the effect that at the time of the execution of the will the testator was of sound mind and memory, it is usually regarded as sufficient to cast upon the contestants the burden of showing the incapacity of the testator at the time of the execution of the will. It appears that this paper was drawn by one of the witnesses, who is a trustworthy attorney and of excellent standing in his profession, who also witnessed the will, together with one Myron Van Horne, a reputable citizen in the community in which he resides. The evidence of these two witnesses as to the facts and circumstances in connection with the drafting and execution of this paper and their statements of their opinions as to the mental capacity of said decedent at the time of the execution of said paper are, it seems to me, sufficient, so far at least as the question of mental capacity is concerned, to make out a prima facie case for the proponent, and to cast the burden on the contestant of showing the alleged mental incapacity of said decedent.

[2] There has been offered both on behalf of the proponent as well as on behalf of the contestant a large mass of testimony bearing upon the question of the mental capacity of the decedent at the time of the execution of this paper. In view of the extensiveness of this line of testimony, I shall not attempt to allude to it in detail in this opinion. Numerous witnesses were produced by the contestant who testified to acts, declarations, etc., of the decedent extending over a period of several months prior to her death which they characterized as irrational. This evidence was supplemented by some medical testimony. On the other hand, numerous witnesses were produced and sworn on behalf of the proponent who testified to acts, declarations, etc., of the decedent extending over a period of several months prior to her death which they characterized as rational. The medical evidence produced by the contestant, aside from the distinctly opinion evidence of said medical witness, shows among other things that the decedent's condition was such during the few months just preceding September 1, 1910, that she was much better and stronger mentally and physically upon some days than upon others during that time. It appears that no physician sworn in the case saw her upon the day of the execution of the paper in question. The subscribing witnesses declare her to be of sound mind, etc., on that day. Dr. Kilts testified, among other things, that in his opinion the said decedent from the 1st of August, 1910, did not have sufficient mental capacity to understand and appreciate about her property and affairs and concerns, and did not have sufficient mental capacity to appreciate her obligations to her relatives as the natural objects of her bounty, and did not have mental capacity enough to appreciate and understand about the disposition and regulation of her property; and that from July, 1910, she was insane. Considering this opinion medical testimony in connection with all the other evidence, I do not think, however, that I ought to make such a determination in this case. Therefore, after a very careful perusal and consideration of said testimony as to acts, declarations, etc., of the decedent, the medical testimony and the testimony of the subscribing witnesses, I have come to the conclusion that the contestant has failed to meet the burden imposed upon him as above stated, and that from the evidence it must be held that the said decedent was, at the time of the execution of said paper, of sound mind and memory, and competent to make a will.

[3-5] As to the other ground of objection, which is based upon the claim of undue influence, I feel that upon the whole evidence in the case I should find in favor of the proponent. "Undue influence" may be exercised by physical coercion or by threats of personal harm and duress, by which a person is compelled, really against his will, to make a testamentary disposition of his property. This kind of undue influence can never be presumed. It must be shown by evidence legitimately proving the facts. Marx v. McGlynn, 88 N. Y. 357. I am unable to find any evidence in this case of any undue influence along the lines above suggested. As also stated in the case above cited, there is another kind of undue influence more common than that above referred to, and that is where the mind and will of the testator has been overpowered and

subjected to the will of another, so that, while the testator willingly and intelligently executes a will, yet it is really the will of another, induced by the overpowering influence exercised upon a weak or impaired mind. Such a will may be procured by working upon the fears or the hopes of a weak-minded person; by artful and cunning contrivances; by constant pressure, persuasion, and effort, so that the mind of the testator is not left free to act intelligently and understandingly. It is not sufficient, however, for the purpose of establishing undue influence, to show that the will is the result of affection or gratitude, or the persuasion which a friend or relative may legitimately use; but the influence must be such as to overpower and subject the will of the testator, thus producing a disposition of property which the testator would not have made if left freely to act his own pleasure, and this kind of influence will not generally be presumed, but must be proved like any other fact by him who alleges it. I am unable to see where there is any evidence in this case which brings it even within this rule as to undue influence, which is laid down so clearly in the case above cited, and it seems from said case that the facts showing undue influence under the rule as last laid down must be proven by the person alleging undue influence. The evidence in this case shows that the physical condition of the mother of this decedent became such in the early part of July, 1910, that the decedent with whom her mother resided, was unable to properly care for her said mother. It also appears that the said decedent was not at that time in robust health. Arrangements were made whereby on July 10, 1910, one Eunice Edick, a married woman living in the vicinity of the decedent, went to the home of the decedent and assisted generally in the housework and the care and attendance of the decedent's mother as well as the decedent from that time until August 27, or 28, 1910, when the said decedent and her mother moved to the home of said Eunice Edick and there remained until the death of the decedent on September 1, 1910. It appears that the said Eunice Edick remained continuously at the home of the decedent from July 10, 1910, until August 27 or 28, 1910. It also appears that from on or about July 15, 1910, until August 27 or 28, 1910, the husband of said Eunice Edick came to the decedent's home and remained there during the night. There is nothing in this case to show but what the said Eunice Edick had been very sympathetic and thoughtful in her care and attendance upon the deceased and her aged mother. Nor is there any evidence to show that the said Eunice Edick either by artful or cunning contrivance or by pressure or persuasion or effort, attempted to have said decedent make her will in her favor. There was perhaps the opportunity for such contrivance, pressure, persuasion, and effort, but, as it is stated in the Matter of Murphy, 41 App. Div. 157, 58 N. Y. Supp. 453: "Mere opportunity will not suffice. Undue influence must be established affirmatively by circumstances, by acts, and in such a way that the court can see clearly that the will of another has overborne that of a testator."

[6] The rule that a will giving the decedent's property to strangers should be closely scrutinized has but very little application, it seems to me, in this case. The decedent's nearest relative was her mother, who at the time of the making the will was, to the knowledge of the decedent, possessed of considerable property, and in such a weak, feeble condition that she could certainly not long survive, and as a matter of fact, her mother did die 22 days subsequent to the death of the decedent. Aside from her mother, the decedent's nearest relatives were uncles and aunts on her mother's and father's side, and cousins, children of predeceased brothers and sisters of her father and mother. These uncles and aunts and cousins had no very strong claim upon the bounty of this decedent. Under all the circumstances in this case, and in view of the condition of her mother, both physically and financially, I do not think that I should go so far as to hold that the will was unnatural in its provisions and inconsistent with the duties and obligations of this testatrix to her family. The decedent was disposing of her own property, and if she was of sound mind she had the right to dispose of it as she saw fit, providing that she was free from undue influence, and that said disposition was her own voluntary act.

[7] There was some evidence on the part of the contestant as to previous statements made by the decedent as to future disposition of her property.

Such statements are often of very slight importance, made as they oftentimes are to please and gratify the person to whom they are addressed, or for some other ulterior purpose. I am unable to find that there is sufficient evidence along this line in this case to show a fixed determination or intention on the part of the decedent as to the disposition of her property prior to the execution of the paper in question.

I do not think that this case comes within the line of cases mentioned in Marx v. McGlynn in which the law indulges in the presumption that undue influence has been used, such as where a patient makes a will in favor of his physician, a client in favor of his lawyer, a ward in favor of his guardian, or a person in favor of his priest or religious adviser, or where other close confidential relationships exist. There is no evidence in this case of any confidential relationship existing between this decedent and said Eunice Edick, other than what may be inferred from the fact that she was at the home of the decedent during the period above stated in the capacity of a servant. It is apparent that she thus went to the home of the decedent at the time when the decedent was in great need of assistance in her home, and that in thus going to the home of the decedent said Eunice Edick seriously inconvenienced herself and her family, consisting of her husband and children. This relationship and association between the decedent and said Eunice Edick came about as a result of the circumstances existing at the time that Mrs. Edick went to the home of the decedent to care for her and her mother. It was apparently absolutely necessary at that time that the decedent should have some help in her home, and there is no evidence that Mrs. Edick in any way forced herself upon the decedent. There is nothing in the case showing that any of the relatives of the decedent were coming to her assistance and relief at this time. If this decedent, being therefore of sound mind at the time of the execution of this paper, and not under any undue influence, thus gave her property to said Eunice Edick realizing that her mother would never need it, and out of appreciation for what Mrs. Edick was doing for her and her mother, it was her undisputed right to do so. I think that this will should be admitted to probate.

The terms of the decree and the questions as to costs will be settled at a term of the Otsego County Surrogate's Court to be held at the Surrogate's office in the village of Cooperstown, Otsego county, N. Y., on the 5th day of February, 1912.

Decreed accordingly.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Snyder, Cristman & Earl, of Herkimer, for appellant.

Byard & Van Horne, of Cooperstown, for respondent.

HOWARD, J. Martha Shaul died September 1, 1910. Before she died and on August 24, 1910, she is said to have executed a will. The will was prepared by Orange L. Van Horne, a lawyer of Otsego county and the district attorney of that county. At the time of the alleged execution of the will the decedent and her mother, aged 75 years, lived alone. The mother was an invalid; the decedent was in ill health. They called in a married neighbor woman, one Eunice Edick, to assist them with their work and help nurse and care for them. She was paid for this work. The decedent was a maiden lady; she had never married. She had no children and left surviving her only uncles, aunts, and cousins. She had not been very intimate or friendly with most of these. Just before she died she and her mother went to the house of Eunice Edick to live. In her will she left all her property to Mrs. Edick. The will is contested by those relatives who would inherit if there were no will. The Surrogate has decided in favor of the validity

of the will, and an appeal from his decree brings the case into this court.

[8] There are only two questions for our consideration, namely: Was there undue influence? Did the decedent possess testamentary capacity? As to the first question there is absolutely no proof in the case of the exercise of undue influence. There was opportunity, and there was a quasiconfidential relation. This is all that can be said; this is not enough. Mrs. Edick was a married woman, a neighbor, a friend. She did as neighbor women frequently do under such circumstances; she took such care of the two invalid women as she could and did the housework. She took pay for her services. Finally, being pressed by her own domestic duties, she took the two old women to her own house and cared for them there till they died. These acts, so far as the proof goes, comprise the "head and front of her offending." No will was ever invalidated for such reasons—no will ever should be.

As to the testamentary capacity the contestant produced quite an array of experts and interested relatives and some others. From it all, as one reads the testimony, it would seem at times as though the woman were a complete imbecile in the last stages of senile dementia; and then, again, out of the mouths of the same witnesses, perhaps, she would appear to display a cunning and business capacity quite uncommon. But the Surrogate saw all these witnesses; he heard them testify; he knows them all. He decided against them, and his careful analysis of the facts in his able opinion shows that he was fully warranted in so doing.

Despite the attack upon Mr. Van Horne, I have no doubt that the Surrogate was influenced greatly by his testimony. I have been so influenced in the conclusion which I have reached. It would have been better, perhaps, had Mr. Van Horne employed other counsel to conduct this litigation and acted himself only in the capacity of witness; but notwithstanding his indiscretion, if it was indiscreet, in acting both as witness and lawyer, I attach great importance to his testimony. He is not one of those familiar legal characters whose shady reputation always arouses suspicion. On the other hand, Mr. Van Horne is a young man apparently of high standing in his community; he is a lawyer of excellent reputation; he is the district attorney of his county. He argues cases before us and we have had an opportunity to observe him. He seems to me to be clean and able and straightforward; I think we should hesitate to repudiate him.

Every will case must stand upon its own peculiar circumstances; but in this case I do not think we should strain a point to take this money away from Mrs. Edick, the only person who displayed any human compassion towards the deceased, and give it to unworthy relatives. Courts can have but little respect for the claims of distant relatives who remain wholly unconcerned about the comfort and affairs of their kinsmen while they are alive but pounce like vultures upon their estates when they are dead. Neither should the law encourage their claims—at least, not to the jeopardy of those who merit gratitude and reward at the hands of the deceased.

I recommend that the decree be sustained on the opinion of the Surrogate. All concur, except KELLOGG, J., dissenting in opinion in which WOODWARD, J., concurs.

JOHN M. KELLOGG, J. The learned Surrogate did not give sufficient attention to the fact that when the will was made the testatrix was entirely under the control of the residuary legatee. Ordinarily an attorney, a physician, or a nurse who obtains a will in his favor is called upon to show that the will is not the will of the beneficiary but that of the alleged testator. The mere formal execution of such a will is not sufficient. All the physicians, three in number, swear that the testatrix was incompetent. She was about 52 years of age and resided upon the old homestead with her father and mother. The father died April 20, 1910; the mother was very feeble, 75 years of age, and required constant care. After the father's death she was melancholy and in a failing condition. The beneficiary came to the homestead as nurse July 10th, the will was made August 20th, and on August 27th the beneficiary removed the decedent and her mother from the old homestead to her house. Decedent died there September 1st. The mother died September 23d. No particular relations are shown between the beneficiary and the decedent except that the beneficiary was in the family as nurse for a few days prior to the making of the will and performed her duty to the satisfaction of the employer. But she was paid for doing that, and such service is no good reason in itself why she should be sole beneficiary under the will.

The attorney who drew the will witnessed it and appeared in Surrogate's Court and in this court in its defense, and therefore has an interest in the litigation. He swears that Mrs. Shaul gave him the directions for making the will, but that he received the directions and made the will in the presence of the beneficiary. He did not see the mother, who was in the house. Other relatives lived in the vicinity. As he entered the house he spoke to one of the relatives who was at work upon the farm. He does not seem to have exercised the care that would naturally be expected under all the circumstances of this will. The family physician could very properly have been called as a witness. Aside from the confidential relations between the alleged testatrix and the beneficiary, there is grave question as to the competency of the testatrix. Her feebleness of mind and body, in connection with the relations existing, throws a great doubt upon the validity of the will. The fact that she permitted herself and her mother to be removed from the old homestead by the nurse so shortly after the death of the father and husband is quite strong evidence that the mind of the nurse was the controlling mind.

The decree of the Surrogate should be reversed as against the evidence, and a new trial before a jury directed, with costs to the appellant to abide the event.

(158 App. Div. 377)

SPRAKER v. PLATT et al.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. JOINT-STOCK COMPANIES (§ 1*)—NATURE AND STATUS.
An unincorporated joint-stock association, organized before Laws 1854, c. 245, authorizing the formation of joint-stock companies, went into effect, is a valid legal entity under the common law, with the right to extend its existence as it sees fit; it exists by virtue of its articles of association and not by statute.
[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. JOINT-STOCK COMPANIES (§ 4*)—ELECTIONS—VALIDITY OF ARTICLES—ELECTION OF DIRECTORS BY BOARD OF DIRECTORS.
The articles of a joint-stock company, providing for the election of directors to fill vacancies by the board of directors, and authorizing an election by the stockholders for directors only upon petition therefor signed by the holders of two-thirds of the stock, intended to secure stability in the management of its affairs, are valid though they make the board a self-perpetuating body.
[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. § 4; Dec. Dig. § 4.*]

3. JOINT-STOCK COMPANIES (§ 16*)—ELECTION OF DIRECTORS—PROXIES.
A holder of shares in a joint-stock company has the right to empower, by proxy or otherwise, another shareholder, though the latter may be a director, to cast his vote at an election to fill a vacancy in the board of directors, and no statutory authority is necessary therefor.
[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. § 16; Dec. Dig. § 16.*]

4. JOINT-STOCK COMPANIES (§ 16*)—ELECTION OF DIRECTORS—CALLING ELECTION.
Where the articles of a joint-stock company provide that vacancies in the board of directors shall be filled by the board except when the holders of two-thirds of the stock shall petition for a stockholders' election, the election by the board of two directors having interests antagonistic to the company, in violation of the articles, is not ground for ordering an election of a new board by the stockholders, though it may justify a decree declaring the election void.
[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. § 16; Dec. Dig. § 16.*]

5. JOINT-STOCK COMPANIES (§ 10*)—MEMBERS—NOTICE OF PROVISIONS OF ARTICLES—BINDING EFFECT.
Where the certificate issued to a purchaser of stock in a joint-stock company recites that by its acceptance the holder becomes a member subject to the terms of the articles and amendments thereto, such purchaser and the shares so purchased are subject to the provisions of the articles as fully as though he were one of the original subscribers to the articles.
[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. § 10; Dec. Dig. § 10.*]

6. JOINT-STOCK COMPANIES (§ 4*)—ARTICLES—CONSTRUCTION.
The articles of association of a joint-stock company are to be read in the light of the conditions existing at the time they were made.
[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. § 4; Dec. Dig. § 4.*]
Kellogg, J., dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, Montgomery County.

Suit by Benjamin F. Spraker against Thomas C. Platt as president of the United States Express Company and others for an injunction, an accounting, and other relief. From a judgment for plaintiff, defendants appeal. Reversed, and complaint dismissed upon the merits.

See, also, 142 App. Div. 924, 126 N. Y. Supp. 1147.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Stetson, Jennings & Russell, of New York City, for appellant Stetson.

O'Brien, Boardman & Platt, of New York City (Morgan J. O'Brien and George W. Field, both of New York City, of counsel), for other appellants.

Andrew J. Nellis, of Albany, for respondent.

LYON, J. The question involved upon this appeal is as to the right of the court to direct the holding of a meeting of the shareholders of the United States Express Company, a joint-stock association, for the purpose of electing a board of directors.

The United States Express Company was organized in this state, under the common law, April 22, 1854, for the purpose of prosecuting a general express forwarding business in this and foreign countries. Its original capital stock was $500,000 divided into shares of $100 each. The five organizing members contributed the full capital stock and constituted its first board of directors. The articles of association, among other things, provided that the organization should continue for ten years from May 1, 1854, but might be dissolved at any time by a unanimous resolution of the board of directors; that the board of directors might at any time increase or decrease the number of shares of the capital stock; that such shares should be represented by certificates which should be assignable in the usual form; that each share should be subject to assessments for damages, losses, or expenses which might accrue in the prosecution of its business, which fact should be specified in the certificates representing the shares, and in the event of the failure of any member to pay any assessment for losses, damages, or expenses accruing in the course of the business of the company, which the directors were authorized to impose upon each and every shareholder, so many of the shares of the member as might be requisite to pay his assessment might be forfeited and sold; that such certificates should contain an agreement constituting every assignee thereof a member of the association, subject to all the liabilities and entitled to all the benefits of any other member thereof accruing after the date of the assignment as completely as though the shareholder had signed the original articles of association; that the board of directors should have the power to declare dividends out of the net earnings of the company as they might deem expedient; and that in case of the death of any shareholder the survivors should have the right to purchase and take the shares of the deceased sharehold-

er at the actual value thereof at the time of his decease, unless the heirs of such deceased shareholder should be of age and legally competent to act and should elect to retain and hold such shares in conformity with said articles of association. Such articles of association further provided that the board of directors should elect by ballot from their own body a president, vice president, and secretary, who should hold their offices for one year and until others should be chosen in their places, and that the board of directors should appoint a treasurer and such other officers, agents, and servants as they might deem requisite, and should prescribe their duties. Other provisions of said articles of association were as follows:

"Article 4. The property, business and good will of the joint-stock company hereby constituted shall be vested in, controlled and managed by a board of five directors, each of whom shall be the owner and holder in his own right of at least one hundred shares therein, to be chosen by the shareholders, as is herein provided; and Danford N. Barney, Elijah P. Williams, James McKaye, Ashbel H. Barney and Thomas M. Janes shall constitute the first board of directors, and they are hereby chosen and appointed each and every of them such directors to hold their offices for and until others shall be chosen in their stead, as is herein provided. It being however hereby expressly understood and agreed that in case of a vacancy occurring in said board by death, resignation or otherwise, prior to a call for an election by the stockholders, the same may be filled by said board of directors, who may elect by ballot any stockholder eligible under the provisions herein contained.

"Article 5. Whenever any number of shareholders in said association, being the owners and holders of two-thirds in amount of the shares of said company, shall unite in a written request for an election of one or more directors and shall present the said written request for an election to the secretary, it shall be the duty of said secretary to call a meeting of the shareholders for the purposes of such election by a notice of at least sixty days, stating the time and place of said meeting. The manner of serving said notices shall be prescribed by the board of directors, who shall also appoint proper inspectors of such elections and prescribe all other needful rules and regulations appertaining thereto. Said elections shall be by ballot and each shareholder shall be entitled, either in person or by proxy, to as many votes as he owns shares in said association."

"Article 8. The directors of the joint-stock company and association hereby constituted, or a majority of them, shall and they hereby are authorized and empowered to direct, manage and control the whole property, business and affairs thereof, and to do or cause to be done and transacted all and every the matters and things specified or referred to in articles sixth and seventh of these presents, and further to do and execute all and every authority, power and thing within the general scope, intent and purpose of this association which might or could be legally done by the whole of the joint associates or copartners, if present and acting. But it is hereby expressly understood and agreed that no director herein named, or that may hereafter be elected, shall be concerned or interested in any business or thing detrimental to the interests of said company, or in opposition thereto, and especially shall no director use or employ the money, credit or name of said company otherwise than in its legitimate business and affairs."

"Said directors shall also have power and they are hereby expressly authorized, from time to time, whenever in their judgment, it may be for the best interests of said company, to change, alter and fix the number of persons that shall constitute the board of directors of said company, and in case of an increase thereof or otherwise, to fill the vacancy thereby created, in the manner hereinbefore specified; provided, however, that no such change or alteration shall be valid unless made by a vote or written consent of at least two-thirds of the whole number of existing directors."

By an amendment of the articles of association made in November, 1859, the board of directors was authorized by the unanimous vote of the shareholders to extend the term of existence of the association from time to time as they might deem for the best interest of the association. Pursuant to such amendment such term of existence has been three times extended; the last extension to expire May 1, 1924, each continuance of the company being made subject to all the provisions and agreements contained in the original articles of association, and the amendments and additions thereto. No meeting of shareholders has been held since October, 1862, at which time a board of directors was elected. The number of directors has been increased from five to seven, and the capital stock of the association from $500,000 to $10,000,000; the last increase having taken place in August, 1887.

This action was commenced May 13, 1909.

The complaint, which is very voluminous, makes many charges, all upon information and belief, against the defendants of mismanagement, waste, and fraud, and charges that the directors of the United States Express Company fraudulently conspired with the Adams Express Company and the American Express Company, and with the presidents of those companies, to the great injury of the United States Express Company, and to the great advantage of the other express companies. The relief demanded in the complaint is that the alleged conspiracy be declared unlawful, and that the parties thereto enjoined from carrying out the same; that the defendants be required to account for all moneys of the United States Express Company improperly received by them or lost through their mismanagement; that the defendants be required to call and hold a meeting for the election of directors; and that, in the event of the failure of the plaintiff to obtain a decree directing such election, a receiver be appointed and the company dissolved; and that during the pendency of the action a preliminary injunction be granted restraining the defendants from dissolving the United States Express Company, and from purchasing or permitting to be voted the shares of stock held by the Adams Express Company and the American Express Company.

The answers deny the commission by the defendants of any improper acts whatever and allege that bringing the action was the result of a conspiracy upon the part of the plaintiff and others, carried on by means of threats and false statements, to force the directors to pay to the shareholders a larger dividend than in the judgment of the directors ought to be paid, and thereby to create a false and fictitious value of the shares of stock, and enable the plaintiff and others to dispose of their holdings of shares at greatly increased prices, and to manipulate the stock market.

Upon the trial at Special Term the court in its decision found that the directors chosen at the shareholders' meeting in 1862 had long since ceased to be directors of the association, and that all vacancies occurring in the board of directors since that time by death, resignation, or otherwise have been filled by the board of directors, so that the board is now composed wholly of members elected by the board;

that on April 18, 1901, Levi C. Weir and James C. Fargo, who were presidents respectively of the Adams Express Company and the American Express Company, competitors at many points of the United States Express Company, and who had acquired large holdings of stock of the United States Express Company, sufficient with that owned by the directors and their friends and business associates to constitute more than one-third of the whole number of shares of the company, were upon their application elected, together with defendant Stetson, directors of the United States Express Company; that their presence in the directorate had benefited the United States Express Company; that the business had greatly improved and its assets greatly increased since their election; that the annual earnings of the United States Express Company from operations had increased from $10,300,000 in 1890 to $16,800,000 in 1909; that the assets of the company in excess of liabilities had increased from $5,500,000 in 1900 to $11,200,000 in 1909, and that in the meantime dividends had been declared of $3,400,000; that the mileage had increased from 26,500 miles to 32,500 miles; that during those years the number of offices at which the United States Express Company was competing with the Adams and American Express Companies had greatly increased; that "the presence of defendants Weir, Fargo, and Stetson upon the board of the United States Express Company had been for that company an unmixed good."

Regarding allegations of the complaint the court found:

"Many charges are made in the complaint against the directors of the United States Express Company involving mismanagement, waste, fraud, corruption, extravagance, and unfaithfulness. No proof whatever has been given to substantiate said charges.

"There has been no cessation of effort by the officers and directors to retain and increase the business done by the United States Express Company in competition with the Adams and American Companies.

"There has been and is no mismanagement and no waste on the part of the defendants or any of them in their conduct of the affairs of the United States Express Company.

"No conspiracy exists, or has ever existed, among the persons defendant, or any of them, whereby the defendant United States Express Company was to be or was defrauded in favor of its rivals, the Adams and American Companies. There has been and is no conspiracy to divert the assets of the United States Express Company to its rivals, or to any person or company whomsoever. Neither business nor contracts nor any other assets of the United States Express Company were ever diverted by the defendants, or any of them, or with their knowledge or consent, to the Adams and American Companies or to any company or person whatsoever. There is no evidence of mismanagement, waste, or fraud, on the part of the defendants, or any of them. There is no evidence that the United States Express Company has lost any assets or business through the conduct of any of the business.

"By reason of the business management and control of the business of the United States Express Company by defendants the plaintiff has not sustained any pecuniary loss or damage, but, on the contrary, as appears from the testimony, he has received and is still continuing to receive large returns, remuneration and profit from the capital that he has invested therein."

The court, among other things, found at the request of the defendants:

"There has been and is no mismanagement and no waste on the part of the defendants or any of them in their conduct of the affairs of the United States Express Company.

"No conspiracy has existed, or does exist, among the defendants, or any of them, whereby the control of the United States Express Company was to be given, or was given over, to the defendants Weir, Fargo, and Stetson, or any of them, or to the defendants American Express Company and the Adams Express Company, or either of them.

"There has been no cessation of effort by the officers and directors to retain and increase the business done by the United States Express Company in competition with the Adams and American companies.

"There has been no cessation of effort on the part of the officers and directors, or any of them, in doing all that they could to make the United States Express Company prosperous and to increase its business and earnings."

The evidence fully sustained such findings of the trial court. The court also found that the plaintiff had no adequate remedy at law.

The court held as conclusions of law that the United States Express Company was a joint-stock association, its shareholders amenable to chapter 245 of the Laws of 1854 and the statutes amendatory thereof and supplementary thereto; that the resolution by the then acting directors of the United States Express Company to elect Levi C. Weir and James C. Fargo directors was in direct violation of the intent and meaning of the articles of agreement of said association that no director should be concerned with or interested in any business in opposition to the business and interests of the United States Express Company, and that neither was eligible to be elected a director thereof; that the plaintiff was entitled to a decree of this court directing the proper officers of the United States Express Company to give due notice of and to hold a meeting of the shareholders of the United States Express Company for the purpose of electing seven directors upon the board of directors of that company; that the defendants, who were officers of the Adams and American Express Companies, were entitled to judgment against the plaintiff dismissing the complaint upon the merits; and that the plaintiff was entitled to recover costs of the action against the individuals constituting the board of directors. Exceptions were duly filed by the unsuccessful defendants, and from the judgment entered upon such decision this appeal has been taken.

[1] We apprehend it will not be contended that the plaintiff was entitled to the decree granted upon the ground of mismanagement, waste, fraud, or conspiracy upon the part of the directors, and as justifying such belief we have referred at some length to the findings upon these charges. From the opinion of the learned trial court it appears that its decision was based upon the ground that the articles of association were unwarranted under the common law, and that chapter 245 of the Laws of 1854 furnished the exclusive source of the power governing the associates in making their articles of association, and hence, that, as such articles of the associates could not confer greater powers than were given by such act, the plaintiff as matter of law was entitled to a decree directing the calling of a shareholders' meeting, and the election of a full board of directors. With this conclusion we cannot agree. The cases of Duvergier v. Felloes, 5 Bing-

ham, 565, and Blundell v. Winsor, 8 Simons, 601, cited in the opinion below, cannot be considered as of any weight in view of the later decisions. Matter of Ashton, 27 Beavan, 474, affirmed 4 De G. & J. 319; Harrison v. Heathorn et al., 6 Mann & Granger, 81, 137; Lindley on Company Law (6th Ed.) p. 183.

In Phillips v. Blatchford, 137 Mass. 510, Justice Holmes writing the opinion says, referring to partnerships with transferable shares, and citing the above English cases:

"The grounds upon which they were formerly said to be illegal in England, apart from statute, have been abandoned in modern times."

The court at Special Term has quoted at some length from the opinion in People ex rel. Platt v. Wemple, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303, which related to the imposition of a tax on the corporate franchise or business of the United States Express Company, as indicating that it was not the articles of association but the statutes of the state which made it a valid and effective entity. The question there at issue was whether the company was taxable under the provisions of chapter 542 of the Laws of 1880, entitled "An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations," and the amendments to said act, and the question as to whether the organization was illegal at common law was not up for decision; but the court said, after citing the cases of Duvergier v. Felloes and Blundell v. Winsor, supra:

"It is not necessary, however, to assert in what cases such a combination of individuals would now be deemed illegal at common law, for the statutes of the state render the arrangement possible, and in our opinion the association in question is within their purview."

The court then entered into a discussion as to the effect of the articles of agreement having been executed immediately prior to the time when the act of 1854 went into effect, and alluded to the fact that the extended existence of the company began in 1864 when the law was in full force, and concluded that the company was subject to the imposition of the tax.

The United States Express Company is the creature of contract and exists by virtue of its articles of association and not by statute. As was said in Matter of Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476:

"A joint-stock company has never appealed to the sovereignty of the state for the right to exist, but by articles of association, which take the place of the charter of a corporation, the associates have been content to do business subject to the individual liabilities of partners. * * * The principal feature of the joint-stock association is the right of perpetual succession. In this respect it is like a corporation, and enjoys all the advantages flowing from such a privilege. * * * It is competent for private individuals to create a joint-stock association, issue shares of stock, and in that form dispose of property by last will and testament. The associates by contract have created the same situation as to shares of stock that a corporation secures by charter. * * * As to the nature of the shares of stock issued by a joint-stock association, the same general principles of law are to be invoked that apply to a corporation."

"The joint-stock association is not of statutory origin, as is the corporation, but the creature of the common law." Hibbs v. Brown, 190 N. Y. 167, 192, 82 N. E. 1108, 1117.

"Even if, unlike a partnership which it really is, it can be said to exist as an artificial being, it owes its existence not to the state but to the contract of its members, and may therefore be said to exist wherever it does business or owns property. In that sense its analogy to a corporation is to one organized under the laws of two or more states." Matter of Willmer, 153 App. Div. 804, 806, 138 N. Y. Supp. 649, 651.

"The articles of association of an unincorporated joint-stock company bear the same relation to it that the charter bears to an incorporated company. They regulate the duties of the officers and the duties and obligations of the members of such a company among themselves; they specify the capital, limit the duration, and define the business of the company." Bray v. Farwell, 81 N. Y. 600, 608.

We are of the opinion that the articles of association were fully warranted under the common law; that the United States Express Company was thereby constituted a legal entity with the right of existence to such time as it might see fit to extend the same; and that the five shares held and owned by respondent are subject to the provisions of the articles of association as fully as though he were one of the original shareholders.

[2] Relative to the contention of the respondent that the provisions of the articles of association requiring the affirmative action of the shareholders owning and holding two-thirds of the stock in order to obtain the holding of a meeting for the election of directors are illegal, we are referred to no authority to that effect. Upon the other hand, this court only recently held that a provision of a certificate of incorporation of a business corporation, wholly depriving the preferred stockholders of the right to vote for directors, was valid. People ex rel. Browne v. Koenig, 133 App. Div. 756, 118 N. Y. Supp. 136.

[3] That the shareholders may devolve the sole management of the affairs of the association upon the board of directors is provided by the Joint-Stock Association Law (Consol. Laws, c. 29, § 3); but we find no provision of law prescribing the manner in which the directors shall be chosen, nor limiting the right of a voluntary association to itself prescribe the method of choosing directors, nor fixing a definite term of office; neither are we referred to any authority to the effect that it was unlawful for the associates to provide in the articles of association that, in the event of a vacancy occurring in the board of directors, the same should be filled by the remaining directors. It would seem that one shareholder would have the right, by proxy or otherwise, to empower another shareholder, although he might be a director, to cast the vote of the former at an election to fill a vacancy in the board of directors. The provision in question was apparently adopted in order to secure stability in the management of the affairs of the association, harmonious action upon the part of its board of directors, and to avoid the necessity of an election by the shareholders whenever a vacancy might occur in the board of directors. In order further to assure stability in management, a mere majority of shares was deprived of the right of choos-

ing directors, which might result in frequent changes in the policy of administration; but in order to correct abuses which might arise in the management of the affairs of the association, or dissatisfaction with the action of the board in filling vacancies, the power of displacing directors was vested in the owners and holders of two-thirds of the shares through a meeting of shareholders which should be called at their request.

It may also be observed that, under the original division of shares, this provision prevented each of the two largest shareholders, even though he might have acquired the ownership of all the remaining shares, from ousting the other from the position of associate in the management of the affairs of the company. No statutory authority was necessary to give each associate the right to say who should act for him in filling a vacant directorship. This was a right which of itself belonged to every shareholder. The fact that the right given to the board of directors to fill vacant directorships created the board a self-perpetuating body did not render illegal the article relating thereto. The Banking Law (Consol. Laws, c. 2, § 137), relating to the election of trustees of savings banks to fill vacancies, is very similar. That section provides that:

"A vacancy in the board shall be filled by the board, as soon as practicable, at a regular meeting, after the vacancy occurs."

The only violations of the articles of association found by the trial court were the election of Fargo and Weir as directors. However, the court also found that both the Adams and American Express Companies disposed of their holdings of stock, and that defendant Fargo resigned as a director, in February preceding the commencement of the action, and that defendant Weir resigned as a director in July, 1909, long before the trial of the action, and that the presence of each upon the board was an unmixed good as before stated, and that, "by reason of the business management and control of the business of the United States Express Company by the defendant, the plaintiff has not sustained any pecuniary loss or damage, but, on the contrary, as appears from the testimony, he has received and is still continuing to receive large returns, remuneration, and profit from the capital that he has invested therein."

[4] Assuming that neither Fargo nor Weir was eligible to election as a director, the action of the board of directors in that regard did not, under the established facts, warrant the granting of a decree ordering an election of a new board of directors, although it may have justified a decree declaring such elections void. But the learned trial court did not base its decision upon that ground, but rather upon the broad ground that the articles of association were unwarranted under the common law, and not justified by statute.

The Joint-Stock Association Law (Consol. Laws, c. 29, § 3) provides, and prior to the last extension of the existence of the express company provided, that the articles of association of a joint-stock association may "contain any other provision for the management of its affairs not inconsistent with law." We are of the opinion that the provisions of the articles of association, the legality of which is

questioned, were not inconsistent with law nor contrary to public policy, but were valid and effective provisions.

"The association is the creature of contract, and not of the state, and whatever the contract contains which is not of itself unlawful constitutes a part of the law of its being." Francis v. Taylor, 31 Misc. Rep. 187, 65 N. Y. Supp. 28, affirmed 52 App. Div. 631, 65 N. Y. Supp. 1133.

[5] Nor can the respondent claim to have purchased the five shares, which constitute his holdings, in ignorance of the provisions of the articles of association, and of the fact that thereby he became a party to such articles. The certificate issued to him in February, 1907, reads as follows:

"United States Express Company.

"This certifies that Benjamin F. Spraker is entitled to five shares in the United States Express Company, transferable only on the books of said company on surrender of this certificate. And it is hereby further certified that this scrip is issued and delivered to the said Benjamin F. Spraker on the express condition that such transfer may be objected to by the board of directors, in which case they shall purchase said shares for the company at market value; and that by the acceptance thereof he becomes a member of said company on the terms and conditions set forth in the original articles of association and several amendments thereto, in pursuance whereof the number of shares in said company is one hundred thousand, valued at one hundred dollars each; that each is subject to assessment, and the holder thereof liable for all losses, expenses, or other indebtedness of said company; that each and every assignee of any share therein from and after the date of the assignment becomes a member of said company on the terms and conditions of the original holder; and that the term thereof is 20 years from the first day of May, 1904."

From the record it appears that shareholders representing only a minority of the shares signed requests that a meeting be called for the purpose of electing a board of directors, and that none of these requests was ever presented or offered to be submitted to the company or to its secretary.

[6] The articles of association are clear, devoid of ambiguity, and require no construction by the court, and are to be read in the light of the conditions which existed at the time they were made. So far as appears they were entered into understandingly by all the five associates, and it is not for the court to now make a new contract for them.

The judgment appealed from must be reversed, and the complaint dismissed upon the merits. All concur, except KELLOGG, J., dissenting in opinion.

JOHN M. KELLOGG, J. (dissenting). Five men signed and filed articles of association, forming the United States Express Company, as a joint-stock corporation, April 24, 1854, having capital stock of $500,000, divided into shares of $100 each. The subscribers took all the stock. The association was to continue for ten years from May 1st following, unless sooner dissolved by law or by the directors. It was provided by the articles that the entire management of the business was vested in the directors, and that the association should continue notwithstanding the death or the transfer of the stock of any of

the stockholders; that no shareholder, other than one directly authorized by the board of directors, could use or sign the name of the company under any circumstances or pretext whatsoever; and that the directors might increase or diminish the number of directors, might increase the capital stock, might levy assessments upon the stockholders to meet liabilities, and, by an amendment of the articles, the directors might from time to time extend the lifetime of the association. The stockholders thus became liable for the debts incurred by the association in the same manner as if they were partners, but they had surrendered all control of the business and of the money they had invested therein to the directors. Without power to act, the stockholders yet were interested: (1) In the profits which might be paid to them from time to time by action of the board of directors; (2) in a distribution of the assets, if the directors should choose to liquidate the business; (3) in the enhancement and depreciation in value of the stock by the conduct of the business by the directors; and (4) in escaping personal liability on account of the acts of the directors. They were therefore vitally interested in the personnel of the directors who should control their business and determine the time for which such control should continue. The association, in fact, was a copartnership, with many of the characteristics of a corporation. In so far as the relations of a stockholder to the association itself are concerned, aside from the liability for debts, it is difficult to draw any substantial distinction between an association and a stock corporation.

The only question, however, of interest here, is whether a majority of the stockholders may elect the directors, or whether the directors may for all time designate their successors.

The articles of association were evidently intended to conform to chapter 245 of the Laws of 1854 passed April 15th. That statute provided that, where the property of a joint-stock association is represented by shares of stock, it may be lawful to provide in the articles that the death of a stockholder or the assignment of his stock shall not work a dissolution of the association, and that the association shall not be dissolved except by judgment of a court for fraud in its management, or for other good cause to such court shown, or in pursuance of its articles of association, and "that the shareholders may devolve upon three or more of the partners the sole management of their business." The agreement provides at article 4 that the property, business, and good will of the company "shall be vested in, controlled and managed by a board of five directors, each of whom shall be the owners and holders in his own right of at least one hundred shares therein, to be chosen by the shareholders, as is herein provided. And Danford N. Barney, Elijah P. Williams, James McKaye, Ashbel H. Barney and Thomas M. Janes shall constitute the first board of directors and they are hereby chosen and appointed, each and every of them, such directors, to hold their offices for and until others shall be chosen in their stead, as herein provided. It being, however, expressly understood and agreed that in case of a vacancy occurring in said board by death, resignation or otherwise, prior to a call for an election by the stockholders, the same may be filled by said board of directors, who

may elect by ballot any stockholder eligible under the provision herein contained."

Article 5 provides that, when two-thirds in amount of the shareholders unite in a written request for an election of one or more directors, the secretary shall call a meeting of stockholders for that purpose, by 60 days' notice, stating the time and place of the meeting.

Article 8 authorizes the board of directors to change, alter, and fix the number of directors, and in case of an increase thereof, or otherwise, to fill the vacancy thereby created in the manner thereinbefore specified.

In the year 1862 there was an election of directors; no other election by stockholders has ever been held. The original directors selected by the articles have passed from the association, and none of the directors elected in 1862 is now in service. None of the present directors was chosen by the stockholders, but all were appointed from time to time by the board of directors.

The articles provide that the five original directors shall serve until their successors are chosen in their stead. This does not necessarily mean that they are to continue directors indefinitely, unless they are recalled by a two-thirds vote of the stockholders, at a special meeting called for that purpose, but is consistent with the idea that some other provision will define their term of office and in what manner the stockholders shall perform their duty and exercise their right of electing directors; but we find no such provision, in express terms written, which was omitted either by design or by oversight. It may not have been a very material provision at the time in the minds of the associates, inasmuch as they owned the entire stock and all were upon the board. Perhaps they were satisfied that the four had the power to remove the other director, if they thought he should be removed. We must assume, however, that the articles intended to comply with the provisions of the law which contemplated that directors should be chosen by the stockholders. That was either their intention, or else the articles were written by a shrewd lawyer, who by using the language of the statute showed an intent to comply with the law, and then, by subsequent provisions, attempted to annul the effect of such compliance by, in effect, providing that the majority of the stockholders should never elect a director, if the board of directors chose to exercise that right themselves.

We cannot assume that the articles were intended as a joke or to overreach the public with whom the stock might be marketed. We must consider that they were fairly made and fairly intended to carry out the provision of law, and that it was within the contemplation of all the parties that a director who was to serve for a term must be selected by the stockholders, and that the provision for filling a vacancy was intended only to authorize the board to appoint some one to act as director until an election by the stockholders could be conveniently had. The right to fill a vacancy is limited to a vacancy occurring prior to a call for an election by the stockholders. If a call had been made for an election, a vacancy was not to be filled; but, if it occurred when no election was in immediate prospect, then it should be filled. The question of interest is: For how long a time

should the vacancy be filled? Evidently until there was a regular meeting for the election of directors, or until the board of directors found it convenient to call one, within a reasonable time. I do not think the provision means that no election of directors and no meeting of the stockholders for any purpose are to take place until two-thirds of the stockholders petition for such meeting. The directors were the sole agents and managers for the stockholders, and it is evident that it was contemplated that there should be regular meetings of the stockholders, or that the directors should from time to time call meetings, to submit the acts of the board to their consideration and for such directions with reference to the business as the owners might choose to give and for any business that might properly come before them. This meeting to be called by two-thirds of the stockholders was evidently intended as a special meeting for the recall of a director or for an election which in the opinion of the stockholders was necessary, in the absence of a regular meeting in the near future and on account of the neglect of the directors to call such meeting. Clearly, the directors who had the sole control of the business had power to provide for regular meetings of the stockholders and for such other meetings from time to time as the requirements of the business made necessary and desirable. The directors, by failing to provide for regular meetings and by omitting their duty to call a meeting for the election of directors, could not thereby deprive the stockholders of their right to elect and exercise that right themselves.

If the appellant is right in his contention, it follows that a board of directors who own one-third of the stock and one share more can keep the company alive perpetually, and they and the persons whom they elect and to whom they transfer their stock can absolutely control against the wishes of the other two-thirds. If the articles of association had provided that the directors should be appointed from time to time by the board of directors and that that right should remain so long as the directors were able to control one-third of the stock and one share in addition, it would clearly be in violation of the provision that the directors are to be chosen by the stockholders.

Undoubtedly the right to form a joint-stock association is a common-law right, but that right has from time to time been modified by statute, and perhaps the statutes have given to such an association a control over the property and rights of the stockholder which otherwise might not be permissible. The provision giving the stockholders the right to devolve upon three or more of the partners the sole management of the business in my judgment means that, unless the stockholders themselves are directly carrying on the business, it shall be carried on by a board of directors selected by them. It is not optional with the associates to disregard the statute and make other provisions in the articles which take from the associates the right to participate in the control of the business.

This statutory provision is a limitation upon the right of the stockholder to participate in his own business, and is also a limitation upon the association which prevents the election of directors except by the stockholders. Aside from this statutory provision, if it were possible

to provide in such articles that the time of the duration of the association should rest entirely at the will of the directors and that the directors, so long as they controlled one-third and one share in addition of the stock, should elect the directors perpetually notwithstanding the wishes of the majority, the provision is so unusual, so much in conflict with the rights of property of the stockholder and with the rights of stockholders in corporations (which relation, perhaps, furnishes the closest resemblance to a stockholder in such an association), that it would require expression in language which admitted of no other reasonable construction.

We are not discussing the right of the five original stockholders to agree among themselves as to the particular manner in which they should carry on their business. We stand 62 years after that event, when the affairs of the company are controlled by persons then unknown, and probably to a great extent not then in existence.

The affairs of the association have changed materially since its inception. It now has $10,000,000 of capital, seven directors, and an extensive business, evidently many times beyond the contemplation of the original stockholders. Instead of being a small association, controlled by the five men owning it, it has assumed great magnitude in its capitalization, business, and the territory which it serves. Its stock has been placed upon the Stock Exchange for sale in the same manner and substantially upon the same conditions as the stock of a corporation. The public dealing in this stock undoubtedly is dealing in it on the assumption that it is in its nature substantially that of a corporation. They evidently do not purchase it with the understanding that it is practically disfranchised; that in fact it has no real voting power. The voting power of a stock is an element of value, and the small block of stock controlled by the directors is of a greater value than that of their associates who form the great majority of the stockholders, if such minority carries with it the control of the association, and thereby its offices and salaries.

Our government and institutions rest upon the expressed will of the majority, and the statutory provision referred to recognizes the fact that this association should be controlled by the majority of its stockholders. After the articles adopted the provision of the statute that the stockholders should elect the directors, if there is language qualifying that declaration, it should be treated as surplusage and disregarded. In my judgment, the articles were intended to be in conformity with the statutory provision, and the associates inadvertently omitted to state the actual term of the directors and when and how the stockholders should elect them. This was not a serious oversight, for the board of directors have the absolute control, under the law, of the affairs of the association, and have ample power at any time to call the stockholders together for the election of directors, or the consideration of any business affecting the association. The articles of association make it the duty of the board to prescribe such general rules for the government of their own proceedings as they deem for the best interests. The government of their proceedings is the government of the proceedings of the association. It was within

their power and it was their duty to call meetings of the stockholders from time to time for the election of directors, with the right to themselves, if they deemed it important, to fill a vacancy; but such appointment would continue only until the election of a director within a reasonable time. The directors have not performed the duty of calling a meeting for an election of directors within a reasonable time after vacancies have occurred.

We do not decide, because the question is not before us, for how long a time a director is elected. We simply decide that it is the duty of the directors to call a meeting of the stockholders forthwith for the election of an entire board of directors.

We have not overlooked the fact that the statute of 1854 under which the association was organized was repealed by chapter 235 of the Laws of 1894, being superseded by the revision that year of the law upon that subject. In place of the provision cited we find that the articles may "(2) prescribe the number of its directors, not less than three, to have the sole management of its affairs, (3) contain any other provision for the management of its affairs not inconsistent with law." The Consolidated Laws substantially preserve this revision. I do not think this change in the statute affects the construction of the articles of association.

The fact that the stockholders owned the association; that it would be unreasonable to commit their affairs to the control of a minority interest; that our government and institutions rest upon the express will of the majority; and that the power of a minority of the stockholders to perpetuate the association and their control in it, excluding the majority—is so antagonistic to the rights of property and so in violation of the practice among corporations and other associations of individuals that we may fairly assume that, if the provisions we are considering in this article have the meaning claimed for them by the appellant, they would be inconsistent with law.

The order appealed from is therefore affirmed, with costs.

(158 App. Div. 398)

LONG SAULT DEVELOPMENT CO. v. KENNEDY, State Treasurer.

PEOPLE ex rel. BALL v. SAME.

(Supreme Court, Appellate Division, Third Department. September 10, 1913.)

1. MANDAMUS (§ 10*)—PERSONS ENTITLED TO RELIEF—INJURY BY NEGLECT OF DUTY.

A company incorporated under Laws 1907, c. 355, to develop water power from a navigable stream, for which purpose it must get the consent of the federal government, is injured by the refusal of the State Treasurer to accept money it is required to pay to the state under that act, so that the company can mandamus the Treasurer to accept the money, where the refusal was based upon the ground that the statute was unconstitutional; since such a refusal constituted a cloud upon the company's franchise which would prejudice its efforts to gain the consent of the federal government.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. § 10.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MANDAMUS (§ 71*)—ACTS OF PUBLIC OFFICER—MINISTERIAL ACT.
The performance of a ministerial act will be enforced by mandamus.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 133; Dec. Dig. § 71.*]

3. MANDAMUS (§ 23*)—PERSONS ENTITLED TO RELIEF—TAXPAYER.
A taxpayer may maintain mandamus to compel the State Treasurer to collect the amount due from a corporation incorporated under Laws 1907, c. 355.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 55–58; Dec. Dig. § 23.*]

4. CONSTITUTIONAL LAW (§ 46*)—PROCEEDINGS RAISING QUESTION—CONSTITUTIONALITY OF STATUTE.
The constitutionality of an act incorporating a company is directly raised in mandamus to compel the State Treasurer to receive the money required to be paid by that act; since the writ will not lie to compel the officer to act under an unconstitutional statute.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43–45; Dec. Dig. § 46.*]

5. STATUTES (§ 79*)—SPECIAL LAWS—GRANT OF PRIVILEGES—WATER POWER SITE.
Laws 1907, c. 355, incorporating a water power company, and granting to it the right to construct a dam and develop power at a certain point on the St. Lawrence river, is not contrary to Const. art. 3, § 18, prohibiting private or local bills granting an exclusive privilege; since the exclusiveness thereby prohibited is one created by the nature of the grant and not one which results from the nature of the property or right granted.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 84, 85; Dec. Dig. § 79.*]

6. WOODS AND FORESTS (§ 8*)—FOREST PRESERVES—CONVEYANCE BY STATES—CONSTITUTIONAL PROVISIONS.
Laws 1907, c. 355, incorporating a water power company and granting to the corporation the land under the water of a stream, does not violate Const. art. 7, § 7, prohibiting the conveyance of the forest preserves, which, under Laws 1893, c. 332, § 100, include all lands owned by the state in the county in which the dam site was located, when no state lands adjoin the stream at that point, and it will not be presumed that the Legislature intended to include state lands under a stream not adjoining a forest as forest preserves.
[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

7. STATUTES (§ 113*)—TITLE OF ACT—ACT CREATING CORPORATION.
Under the title of the act creating a private corporation, Laws 1907, c. 355, which mentioned the authority of the company to construct and maintain a dam, canals, and bridge at a certain point, the company may be authorized to collect tolls for travel over the bridge, and also to acquire the state lands under the water without violating Const. art. 3, § 16, providing that no private bill shall have more than one subject which shall be embraced in its title.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 141–144; Dec. Dig. § 113.*]

8. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY—CORPORATE POWERS.
Even if those powers are not embraced in the title, they are not necessary to the operations of the company and may be separated from the other powers, so that the whole act will not be unconstitutional.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. § 64.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

9. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY—CORPORATE POWERS.
If the Legislature cannot convey to a private corporation title to the land under a navigable stream, the provision of Laws 1907, c. 355, granting to the water power corporation thereby created title to the lands under the water, is separable and does not render the entire act unconstitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. § 64.*]

10. EMINENT DOMAIN (§ 53*) — CONSTITUTIONAL EXERCISE OF POWER — CONSTRUCTION.
Laws 1913, c. 452, which repealed Laws 1907, c. 355, which incorporated a water power company, for the expressed reason that the act of 1907 was unconstitutional, but which repealing act provided that the enumeration of the grounds for repeal should not impair or limit the full force of the repeal, and Laws 1913, c. 453, which provided that the board of claims should determine claims presented against the state by the company on account of the repeal of its charter, when construed together, constituted a condemnation of the franchise of the corporation and a provision for the payment of any vested rights acquired by the water power company, if any.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 131–134; Dec. Dig. § 53.*]

11. EMINENT DOMAIN (§ 71*) — COMPENSATION — SUFFICIENCY OF STATUTORY PROVISIONS.
The provision of Laws 1913, c. 453, giving the board of claims jurisdiction to determine claims presented by a water power company on account of the repeal of its franchise is a sufficient provision for compensation for the condemnation of the franchise.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 180–187; Dec. Dig. § 71.*]

12. EMINENT DOMAIN (§ 13*)—PUBLIC USE.
The law of eminent domain can be invoked to take private property only for a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51–53; Dec. Dig. § 13.*]

13. EMINENT DOMAIN (§ 67*)—DETERMINATION OF PUBLIC USE—LEGISLATIVE DECLARATIONS.
Where a statute condemning the franchise of a corporation states that it is to be taken for a public use, that declaration is sufficient, in the absence of proof to the contrary, to sustain a judgment that the purpose was, in fact, a public one.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165–167; Dec. Dig. § 67.*]

14. EMINENT DOMAIN (§ 67*)—DETERMINATION OF PUBLIC USE—IMPLIED LEGISLATIVE DECLARATION.
Courts will give great weight to the legislative declaration that a certain use is public, implied from giving the right of eminent domain for such purpose.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165–167; Dec. Dig. § 67.*]

15. EMINENT DOMAIN (§ 66*)—PUBLIC USE—CONDEMNATION BY STATE.
The use for which property is to be condemned will be scrutinized less closely when it is to be vested in the state than when it is to be vested in a private corporation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165–167; Dec. Dig. § 66.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

16. EMINENT DOMAIN (§ 67*)—STATUTORY EXERCISE OF POWER—PRESUMPTIONS —PUBLIC USE.
Where the Legislature repeals a special act creating a corporation by an act which condemns the franchise of that corporation, it will be presumed that it had in view a public use, unless a contrary purpose be affirmatively expressed or implied.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165–167; Dec. Dig. § 67.*]

17. EVIDENCE (§§ 33, 48*)—JUDICIAL NOTICE—ACTS OF LEGISLATIVE AND EXECUTIVE DETERMINATION.
In determining the use for which the franchise of a corporation is to be condemned, the court can take judicial notice of the acts of the legislative and executive departments of the state government at the time of passing the act of condemnation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 47, 70; Dec. Dig. §§ 33, 48.*]

18. EMINENT DOMAIN (§ 13*)—STATUTORY EXERCISE OF POWER—PURPOSE.
The purpose for which the franchises of a water power company were condemned by Laws 1913, cc. 452 and 453, construed in the light of the acts of the Governor to the Legislature in regard thereto, was for the conservation and future development of the water power by the state itself.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51–53; Dec. Dig. § 13.*]

19. EMINENT DOMAIN (§ 35*)—"PUBLIC USE"—GENERATION OF POWER BY STATE.
The generation of electricity from water power by the state to be furnished to the public upon equal terms is a public use for which private property may be condemned.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 80; Dec. Dig. § 35.*

For other definitions, see Words and Phrases, vol. 6, pp. 5825–5837; vol. 8, p. 7774.]

20. STATUTES (§ 21*)—NUMBER OF VOTES REQUIRED—APPROPRIATIONS.
Laws 1913, c. 452, appropriating money to repay to the corporation, whose franchises were thereby condemned for a public use, the money which had been paid by that corporation into the state treasury, is an appropriation for a public use, and not within the provisions of Const. art. 3, § 20, requiring the assent of two-thirds of the members of the Legislature to a bill appropriating money for a private use.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 18–27; Dec. Dig. § 21.*]

Kellogg and Howard, JJ., dissenting.

Appeal from Special Term, Albany County.

Applications by the People of the State of New York, on relation of G. Wilson Ball, and by the Long Sault Development Company, for a writ of mandamus against John J. Kennedy, as State Treasurer. From orders dismissing the applications, the relator and the applicant appeal. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Strong & Cadwalader, of New York City (Henry W. Taft, of New York City, of counsel), for appellant Long Sault Development Co.

Clarence C. Ferris, of New York City (Henry W. Taft, of New York City, of counsel), for appellant G. Wilson Ball.

Thomas Carmody, Atty. Gen., for respondents.

SMITH, P. J. The orders appealed from denied writs of mandamus to compel the State Treasurer to accept from the Long Sault Development Company $25,000 tendered him pursuant to the provisions of chapter 355 of the Laws of 1907, which was a special act incorporating said company. The first application was by the company, and, immediately upon the refusal of the writ asked for, a similar application was made by a taxpayer, which was also refused. The act of incorporation was entitled:

"An act to incorporate the Long Sault Development Company, and to authorize said company to construct and maintain dams, canals, power houses and locks at and near Long Sault Island, for the purpose of improving the navigation of the St. Lawrence river and developing power from the waters thereof, and to construct and maintain a bridge, and carry on the manufacture of commodities."

The act conferred upon the company general corporate powers and a special right to erect dams and power houses and to use the waters of the St. Lawrence river in the vicinity mentioned for the purpose of generating power. The act provided for the payment of certain fixed sums to the state amounting to $15,000 for the year 1910 and $20,000 for the year 1911. After 1911 the company was required to pay certain rates estimated upon the average amounts of horse power generated during the year, or, if such a rate should amount to less than $25,000, then this sum should be due and payable for such year. The company has expended large sums in surveys, in obtaining land, and in preliminary development work, but has never constructed any dams or generated any power. On or about January 21, 1913, the company tendered to the State Treasurer the sum of $25,000 in payment for the amount due by it to the state for the year 1912. This sum the State Treasurer declined to accept, and the two mandamus proceedings were thereupon instituted. The grounds of the refusal of the State Treasurer were, as stated by him at the time, that he had been advised by the Attorney General that the statute under which the payment was assumed to be made was "unconstitutional and void." After these appeals had been taken, and while they were still pending, two bills were passed by the Legislature, being chapters 452 and 453 of the Laws of 1913, and which became laws with the approval of the Governor May 8, 1913. The first act repeals the act incorporating the Long Sault Development Company and provides the sum of $36,320 for the purpose of repaying to said company all sums paid by it to the state, and the second act confers jurisdiction upon the board of claims to hear and audit any claims presented by the said company against the state by reason of the repeal of its charter. The various provisions of these different acts will be considered at length later.

[1-3] The Attorney General insists that mandamus will not lie inasmuch as the petitioner and relator have suffered no legal damages; that the refusal of the State Treasurer to accept the sum mentioned indicated at the most merely a policy of the state to question the legal status of the appellant company, but could not affect its right if any under its charter, inasmuch as a valid tender had been made. Appellant's charter conveyed water rights only as far as the Canadian boundary line in the St. Lawrence river and also contemplated co-operation on the Canadian side with a Canadian corporation. As no dam could be erected in the river on the American side without the consent of the federal government, the state franchise granted by the original incorporating act was practically worthless without such consent. Section 9 of the act required the company to begin the work of constructing the dam within one year after Congress should authorize such construction, and the company at the time of the instituting of these proceedings was still endeavoring to obtain the consent of Congress to its project but had not succeeded. It is thus evident that the act of the State Treasurer in all probability would operate as a very considerable obstacle to the company's success with the federal government, as Congress would not be apt to consider favorably the claims of the corporation operating under a state charter which the state authorities declined to recognize as constitutional. The act of the state official constituted a cloud upon the title of the company's franchise, and the mandamus proceedings brought by the company were in effect to remove this cloud, although primarily to compel an official to perform a ministerial act. We see no reason why mandamus will not lie to effect such results. The performance of a ministerial duty by a public officer may be enforced by mandamus. People ex rel. Harris v. Commissioners, 149 N. Y. 26, 31, 43 N. E. 418. It has been held that a tax officer may be compelled by mandamus to accept certain sums in payment of the arrears of taxes, although the statute of limitations has run against such payments, as there is no presumption of payment by lapse of time, and the owner therefore has the right to have this lien or cloud on his title removed. People ex rel. Townshend v. Cady, 50 N. Y. Super. Ct. 399, affirmed in 99 N. Y. 620. If the appellant company were not entitled to mandamus, it would seem that the appellant relator was entitled as a taxpayer to compel a state officer both to do his duty and to collect all sums due to the state.

[4] But mandamus cannot be granted to compel an officer to act under a law that is unconstitutional, and the constitutionality of the act incorporating this company is thus directly raised by these proceedings. The Attorney General in December, 1912, pursuant to a request by the Senate, submitted to it an opinion as to the constitutionality of the special act incorporating this company, in which he declared it unconstitutional on four grounds. On January 13, 1913, the Governor sent a message to the Legislature urging the repeal of said act for the same reasons, and these several grounds are repeated in practically the same language in the act repealing the special act. These grounds are as follows:

[5] First: That the act—

"contravenes section 18 of article 3 of the state Constitution, which provides that the Legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever."

In Matter of Union Ferry Co., 98 N. Y. 139, where an act enabled the company to acquire by condemnation an additional ferry slip in the East River, Judge Rapallo, in writing the opinion of the court upholding the constitutionality of the act, says at pages 153, 154:

"The exclusiveness prohibited is one which is created by the terms of the grant, not that which results from the nature of the property or right granted."

So in the case at bar the only exclusiveness in the act is that created by the nature of the property or right granted. Obviously it would be as difficult to grant to several corporations the right to build a dam at a certain point and to develop water power thereby as to grant to several the right to build a ferry slip at a certain point. Judge Rapallo's reasoning and the long-continued custom of the state in granting bridge and ferry and dam privileges seem clearly opposed to respondent's arguments on this point.

[6] Second:

"It violates section 7 of article 7 of the state Constitution, which provides that the lands of the state now owned or hereafter acquired, constituting the Forest Preserve, as now fixed by law, shall be forever kept as wild forest lands and shall not be leased, sold or exchanged, or taken by any corporation, public or private."

The incorporating act provides that the bed of the St. Lawrence river to be occupied by the works to be constructed by the appellant company shall, after the federal government has authorized such construction, and upon the application by said company, be conveyed to it upon the payment of the sum of $10,000 to the state. The state now claims that the bed of the river thus to be conveyed is included within the Forest Preserve as defined by section 100 of chapter 332 of the Laws of 1893. The land which the state is authorized to convey to the appellant company lies under the waters of the river and between the uplands and the international boundary line. At the location of the proposed works there is no wild forest land whatever. The uplands are cultivated and have been for a number of years. There are no extensive forests in the vicinity and no state lands for a number of miles back from the river. Said section 100 specifies all lands owned by the state within certain counties, with certain exceptions, as being a part of the Forest Preserve; but we do not think that the intent was thereby to include lands lying under the water in the St. Lawrence river which are separated by many miles from the lands above water owned by the state in this county. The constitutional provision refers to the lands of the Forest Preserve as "wild forest lands," and, while this description might include lands under water owned by the state adjoining such "wild forest lands," it would hardly seem to include other lands under water at a distance from any forests whatever.

[7, 8] Third:

"The act in question is a private bill and embraces more than one subject, and is therefore in violation of article 3, § 16, of the state Constitution, which provides that no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in its title."

The title of the act hereinbefore quoted, although it mentions the construction of a bridge, does not refer to any right to collect tolls for passage thereover, which right, however, is given by section 3 of the act. But we think that the reference to a bridge in the title gives sufficient notice of the contents of the bill so as not to mislead any one examining the title. The right to collect tolls would naturally follow the right to construct a bridge, not a railroad bridge, and is so incidental thereto as not fairly to constitute a different "subject" so that it must be expressed in the title to conform to the Constitution. The same line of reasoning would apply to the right given to become the owner of state lands under water. This right has been frequently given in connection with franchises for dams in this state, although some private dams have been built upon state lands and so seems incidental to the subject of the construction of the dam rather than a distinct subject by itself. But if otherwise there seems to be no reason why the parts of the act referred to may not be stricken out and the remainder of the act be held constitutional. In Matter of New York & Long Island Bridge Co., 148 N. Y. 540, at pages 553, 554, 42 N. E. 1088, at pages 1091, 1092, Judge Bartlett in delivering the opinion of the court says:

"The general principle of construction is well settled that where an act deals with a subject not expressed in its title, and the void provisions are separable from those that are lawful, and that which remains is capable of being executed, and stands complete in itself, it may be treated as constitutional."

The special features of the present act which are objected to as not being properly expressed in the title are not absolutely necessary, as we view it, to the operations of the appellant company, and so may, if necessary, be eliminated and the balance of the act be held constitutional.

[9] Fourth:

"The act is invalid as being in excess of the powers of the Legislature, in that it provides for the alienation by the state to the Long Sault Development Company of title to the lands in the bed of the St. Lawrence river. * * *"

As to whether the state can convey to a private corporation for private uses its title to the bed of a navigable stream which it holds by a sovereign right would seem to be a matter of considerable doubt. It may be noted, however, that this has been done by the state at least several times in recent years in connection with various power projects by private corporations, so that possibly it is now too late to question the existence of such a right however much the policy may be criticised. Moreover, the title of the incorporating act states as a purpose the "improving of navigation of the St. Lawrence river," and, as this would be the effect of the building of the dam and lock proposed, it might possibly be held that this incidental pub-

lic purpose is sufficient to validate the ceding of state lands under water. Hazen v. Essex Co., 12 Cush. (Mass.) 475, 477, 478. If, however, this feature of the act should be held unconstitutional, we think that the remainder of the act may still be upheld. This reasoning would also uphold the balance of the act if our holding upon the second ground as to the Forest Preserve is questioned. See Matter of Village of Middletown, 82 N. Y. 196, 202; People v. Kenney, 96 N. Y. 294, 302, 303.

[10] Assuming then that the act of incorporation in question was at least in its main features constitutional and that mandamus was a proper remedy of both the appellant company and the relator, the question then arises as to what, if any, change has been created by the repealing act. In discussing this question it will be further assumed that, while the Legislature under its reserved power has the right to dissolve the corporation, it has not the right to confiscate its franchises. This was determined in People v. O'Brien et al., 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684. Under its sovereign right to condemn all property within its borders for the public use, it may condemn appellants' franchises theretofore given if it conforms to the constitutional requirement by paying just compensation. This act purports to repeal the original act of incorporation upon the four grounds hereinbefore mentioned, but also states in section 4:

"The enumeration in this act of the grounds for such repeal shall not be deemed to qualify or impair the full force and effect of the repeal."

[11-13] If therefore the act can be sustained upon any grounds whatever, it must be held valid, as every presumption is in favor of the constitutionality of every declaration of legislative intent. We are of opinion that the repealing act, together with the accompanying act passed upon the same date, constitutes in effect an attempted condemnation of the special franchise granted to the appellant company by the special act of incorporation. The Legislature has in effect said that, if the original act of incorporation be unconstitutional, we have given nothing, or take back what was thus illegally granted; if, on the other hand, that act was constitutional and gave to the company thereby formed some vested rights, we nevertheless take back what we then gave you and will pay you your damages to be adjusted by the Court of Claims. The state has in this adopted the same procedure as is adopted in condemnation of all land or property for canal purposes. The compensation is provided for sufficiently to meet constitutional demands. In general the law of eminent domain can be invoked to take private property only for a public use. If this legislation which we thus construe as amounting to condemnation proceedings by special acts had stated therein as its purpose that this franchise was to be taken for a public use, such a statement of purpose would probably have been sufficient upon which to base a judicial determination, in the absence of proof to the contrary, that the purpose was in fact a public one and the right of eminent domain properly invoked. Hazen v. Essex Co., 12 Cush. (Mass.) 475, 477; United States v. Gettysburg Electric Ry., 160 U.

S. 668, 680, 16 Sup. Ct. 427, 40 L. Ed. 576; Walker v. Shasta Power Co., 160 Fed. 856, 859, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725; Jacobs v. Water Supply Co., 220 Pa. 388, 393, 69 Atl. 870, 21 L. R. A. (N. S.) 410; Sexauer v. Star Milling Co., 173 Ind. 342, 347, 90 N. E. 474, 26 L. R. A. (N. S.) 609. See, also, Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 375, 386, 15 N. E. 429; Ulmer v. Railroad Co., 98 Me. 579, 591, 57 Atl. 1001, 66 L. R. A. 387.

[14] But it has also been held that when the Legislature, by giving the right of eminent domain in a particular instance, thus impliedly declares that the purpose for which condemnation is to be sought is a public one, the courts will give great weight to such a legislative declaration. Dietrich v. Murdock et al., 42 Mo. 279, 283, 284; Town of Rensselaer v. Leopold, 106 Ind. 29, 32, 5 N. E. 761; Tanner v. Treasury T. M. & R. Co., 35 Colo. 593, 597, 83 Pac. 464, 4 L. R. A. (N. S.) 106; Westport Stone Co. v. Thomas, 175 Ind. 319, 321, 322, 325, 94 N. E. 406, 35 L. R. A. (N. S.) 646. See, also, 22 L. R. A. (N. S.) 173, note. In the case of an act repealing for abuse the charter of a company incorporated by special act, where the preamble of the repealing act was defective and omitted important facts, it was held that every presumption was in favor of the constitutionality of the repealing act, and that accordingly the court would "presume the existence of every fact upon which the validity of the law depends." Erie & North-East R. R. v. Casey, 26 Pa. 287, 303, 317, 318, 323. See, also, a similar Massachusetts case of the revocation of a charter by the Legislature by special act, where the court said:

"We are bound to presume that the contingency, upon which the right to exercise it depended, has happened." Crease v. Babcock, 23 Pick. 334, 344 (34 Am. Dec. 61).

[15] A further principle seems well established, and this is that:

"The use will be scrutinized less closely when the property is vested in the state or some public agency, than when it is vested in a private corporation." Lewis on Eminent Domain (3d Ed.) p. 499.

See, also, United States v. Gettysburg Electric Railway, cited supra, 160 U. S. at page 680, 16 Sup. Ct. 427, 40 L. Ed. 576. The note on page 173 of 22 L. R. A. (N. S.) reads as follows:

"If the state itself requires for its own use private property, and essays, through public officers, to take it for itself, the courts decline to consider any question but that of compensation to the owner."

It has also been held that:

"The question whether the exercise of the right of eminent domain is to be denied or withheld is not to be tested solely by the description of the objects and purposes set forth in the articles of incorporation. It may be governed by evidence aliunde showing the actual purpose in view." Walker v. Shasta Power Co., cited supra, 160 Fed. at page 860, 87 C. C. A. at page 664, 19 L. R. A. (N. S.) 725, citing Matter of Niagara Falls & Whirlpool Railroad Co., cited supra.

[16-18] Within the foregoing principles and authorities we think that the Legislature, in enacting the repealing act here construed as an attempted condemnation by the state of a special franchise already

granted by special act, must be presumed to have had in view a public purpose, and that such presumption must prevail so as to validate the act of repeal unless a contrary purpose be affirmatively expressed or shown. We lack any affirmative proof in the record as to just what particular public use or uses the Legislature had in mind upon this occasion, but obviously there are a number of possible public uses that would justify the state in seeking to regain its rights in the waters of the St. Lawrence at the point in question. The purpose of a public park or the improvement of navigation would undoubtedly give to the state the right of eminent domain. But, although there is no public use stated in the condemnation acts, we may fairly take judicial notice of the various acts of both the legislative and executive branches of the state government at the time of the passing of these acts, in order to ascertain if possible the real purpose lying back of their passage. In 1911 the conservation law was passed as chapter 647 of the laws of that year. The conservation commission thereby created was directed in section 21 of the act to investigate the water resources of the state "for the conservation, development, regulation and use of the waters in each of the principal watersheds of the state with reference to the accomplishment of the following public uses and purposes: * * * (4) The development, conservation and utilization of water power in the watershed and to create a revenue for the state." In his message of January 13, 1913, already referred to, the Governor in urging upon the Legislature the repeal of the charter of the appellant company states that not only is the special act unconstitutional for the four reasons already discussed by us, but that its provisions "are in other respects improvident, unwise and indefensible," and quotes at length from the report of the State Conservation Commission as follows:

"The vast power available at this place constitutes one of the state's greatest natural resources. The advances in the art of electrical transmission make it economically feasible to use the same throughout the state. At present it is going to waste. It is for the interest of all that this power should be developed and utilized by the people and for the people. Cheap power will enlarge the use of electricity for domestic and commercial purposes; stimulate industry; increase our wealth and add to our population. Private interests should not be allowed to exploit and monopolize the same. The state should develop this power for the benefit of the ultimate consumer."

The message then states that the full economic development of the Long Sault Rapids will produce 1,000,000 horse power, refers to the great value to the state and the people of such power, and concludes:

"In order that we secure for all our citizens the many and the lasting beneficial results of the proper development of our natural resources, particularly of our now unused water powers, in accordance with our constructive policy in these matters, to which our state now stands committed, I respectfully recommend that chapter 355 of the Laws of 1907—the Long Sault Development Company's charter—be immediately repealed."

In his memorandum of approval of the repealing act the Governor further states that the repeal "will secure to all our citizens the beneficial results of the proper development of our natural resources, particularly of our now unused water powers, in accordance with

the constructive policy of real conservation to which the state of New York now stands committed." There accordingly seems to be no doubt that the object of the Governor in securing the repeal of the Long Sault Company's charter was to reclaim for the people a valuable water power site with the idea that such site would ultimately be made use of by the people, as distinguished from a private corporation, for the generation and distribution of electric power. That the Legislature shared in this purpose seems evident by their passage of the repealing act, even although the repeal is specifically based solely upon the ground of the unconstitutionality of the original act of incorporation, but with the saving clause of section 4 mentioned. The question of the water power of the state being developed for the direct benefit of the people of the state was being favorably considered by the Legislature at the time of the passage of the Long Sault repealing act, as is shown by the fact that at least two bills amending the conservation law were prominently before the Legislature. Both bills provided for the state utilization of water powers and contained condemnation provisions. Of these the Murtaugh-Patrie bill passed both houses, but was vetoed by the Governor on various grounds, including among others the ground that the state should begin its policy of water development at the Long Sault Rapids.

[19] The purpose of the Legislature in enacting the repealing act being thus fairly shown to be for future power generation by the state from public waters, we are not prepared to hold that such a proposed use is not a public one. This question does not appear ever to have been decided in this state, but in some jurisdictions it has been held that the generation of electric power by water for sale to the public on equal terms is a public use (Walker v. Shasta Power Co., supra, 160 Fed. at page 859, 87 C. C. A. 660, 19 L. R. A. [N. S.] 725), and some authorities seem to hold that the development of water power even for private consumption is such a public purpose as to justify the exercise of the right of eminent domain (Hazen v. Essex Co., supra, 12 Cush. [Mass.] at pages 477, 478, 22 L. R. A. [N. S.] 137–151, note). Without going to the extent of this latter case, which may be questioned on principle, we see no reason why the furnishing by the state of electric power generated by the state waters to the public upon equal terms would not be properly a public use, especially as the cases seem to hold that this same business if engaged in by a private corporation would be a public one. Available water power sites in any state must always be limited in number and will probably increase in value with the progressive exhaustion of nearby coal deposits. The navigable waters of the state are primarily owned by the public, and if the state in furtherance of a policy of conservation decides to retain or regain all its rights therein and ultimately to use such waters for power generation, such a policy seems to us clearly public in its nature, so that the right of eminent domain may be invoked.

[20] A single question remains, whether the repealing act was in fact invalid as not having the requisite number of votes. The act is stated to have been passed "three-fifths being present." The appellant company now claims that the act is void as in violation of section

20 of article 3 of the Constitution, which requires the assent of two-thirds of the members elected "to every bill appropriating public moneys or property for local or private purposes." It is admitted that the original act incorporating the appellant company was a private bill, and it is now claimed that the repealing act which provides for the payment of certain public moneys is likewise a bill appropriating public moneys for a private purpose. To this we cannot assent. If the general purpose of the repealing act is, as it appears to us, presumptively a public one by enabling the state to regain possession of a valuable water power, any moneys necessarily to be expended to secure such result must be regarded as appropriated for a public use. As we have heretofore held, the state had the right to exercise its right of condemnation as regards the special franchises of this company. But this right could be exercised only upon making due compensation, which would of necessity include a return of moneys already received by the state from the company. The repayment of such moneys is therefore a simple act of justice to compensate for the property taken. It is a part of the condemnation proceedings by the state as provided for by the two acts of May 8, 1913, and as such "is but a part of its legitimate functions and duties as a sovereign and the purpose in such case would seem to be public." Waterloo Woolen Manufacturing Co. v. Shanahan, 128 N. Y. 345, 360, 28 N. E. 358, 362 (14 L. R. A. 481).

The two orders appealed from should be affirmed, without costs, however, as they are here sustained by matters arising after the appeals were taken and in fact argued.

Orders affirmed, without costs. All concur, except KELLOGG, J., dissenting in memorandum in which HOWARD, J., concurs.

JOHN M. KELLOGG, J. (dissenting). I agree with the Presiding Justice that the original act creating the Long Sault Development Company was in most respects constitutional, and that the State Treasurer should have accepted the tender. I dissent from the determination that the repeal was in any way a condemnation of the property under the power of eminent domain.

Many times we are left in doubt as to the legislative intent. In this case, the Legislature has declared its intent and bases the repeal solely upon the ground that the original act was unconstitutional. There is no suggestion that it intended to appropriate the property of the company for public use. It sought to repeal the grant of rights which it had made to the company and, as a matter of fairness, felt bound to reimburse it for the expenditures it had made under the act.

The provision that the enumeration of the grounds for the repeal shall not qualify or impair the force of the repeal means simply that the repeal is absolute, whether the grounds stated are good or bad. It does not mean that we can ignore the declared intent of the Legislature and find a legislative intention directly opposite to that expressed in the act.

The Legislature declared in plain words the reasons which impelled it to make the repeal, but declared that the repeal should be effective

in any event. An attempt by the state to recede from its contract cannot be construed into appropriating property under its power of eminent domain.

The company had some right under the grant. The act creating the company granted to it certain rights, so far as the state had the power to make such grant, and the company was to make annual compensation for such grant. The fact that the grant is not as broad and as effective as its terms imply is no reason why the state can recede from it. It might furnish ground for the company to seek to be relieved from paying the purchase price that the state cannot legally transfer what is undertook to grant. The fact that the company is getting less than the contract contemplated it should get is no reason why the state can refuse to receive the consideration.

We may assume that the Legislature had the power to repeal the charter of the corporation, but it cannot, by repeal, take away the vested rights. We need not consider whether the company has sufficient life to continue this proceeding, as the complaint of the taxpayer may well be heard and the court may well act upon it. The mandamus should therefore issue, leaving it to be determined in a proper way and proper manner what right the company, or a trustee appointed to receive its assets, may have.

(81 Misc. Rep. 541.)

In re SEWER IN KISSEL AVE. AND BRIGHTON BOULEVARD IN CITY OF NEW YORK.

(Supreme Court, Special Term, Kings County. July, 1913.)

1. MUNICIPAL CORPORATIONS (§ 278*)—ASSESSMENT PROCEEDINGS—POWER TO INSTITUTE—BOARD OF ESTIMATE AND APPORTIONMENT.

Though Greater New York Charter (Laws 1901, c. 466) § 428, authorizes local boards to deal in the first instance with applications for local improvements made to them by petition, the board of estimate and apportionment of the city of New York, with the co-operation of the mayor of the city, may of its own volition and initiative carry through public sewer improvements as shall be deemed best for the city at large, irrespective of any action or lack of action by the subordinate board.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 734–738, 744; Dec. Dig. § 278.*]

2. MUNICIPAL CORPORATIONS (§ 450*)—SEWERS.

A sewer or need of a sewer is not necessarily a matter of purely local concern, but may affect the whole city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

3. MUNICIPAL CORPORATIONS (§ 407*)—CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS—ASSESSMENT PROCEEDINGS—HEARING.

Refusal of the board of estimate and apportionment of the city of New York to permit objectors to present evidence at the "hearing" called for in Greater New York Charter (Laws 1901, c. 466) § 980, in assessment proceedings for public improvements, did not constitute an appropriation of property without due process of law; such "hearing" being but a step in the determination by the board of the advisability of instituting proceedings to acquire title to carry out a proposed improvement, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

property owner being abundantly protected by Greater New York Charter (Laws 1901, c. 466) §§ 396, 978, 979, 980, 981, 984, which provide for a complete hearing when the proceeding shall have advanced to a point fixed by law for giving the same.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1003, 1004; Dec. Dig. § 407;* Constitutional Law, Cent. Dig. §§ 871–875; Dec. Dig. § 290.*]

4. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS—ASSESSMENT PROCEEDINGS.
Due process of law requires that every person to be assessed for the purpose of taxation be given an opportunity to be heard at some stage of the proceeding.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871–875; Dec. Dig. § 290.*]

5. MUNICIPAL CORPORATIONS (§ 495*)—BOARD OF ESTIMATE AND APPORTIONMENT—REVIEW OF DECISIONS—RIGHT.
The decisions of the board of estimate and apportionment of the city of New York are not reviewable by the courts, when made by the board in the exercise of the legislative power delegated to it by the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1166; Dec. Dig. § 495.*]

6. MUNICIPAL CORPORATIONS (§§ 406, 407*) — DUE PROCESS — DELEGATION OF LEGISLATIVE POWERS—ASSESSMENT DISTRICT.
The Legislature has power to fix an area of assessment without either notice or hearing to the people affected by that area, and also the power to delegate that function to subordinate governmental agencies.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1001–1004; Dec. Dig. §§ 406, 407.*]

7. MUNICIPAL CORPORATIONS (§ 450*) — ASSESSMENT DISTRICT — POWER OF BOARDS.
The power to fix the area of assessment and the benefit in case of a sewer rests in both the board of estimate and apportionment and in the commissioners of estimate and assessment, but the exercise of this power in its finality rests under Greater New York Charter (Laws 1901, c. 466) § 396, with the commissioners; the action of the board being properly viewed as a recommendation suggesting the area benefited by the proposed improvement, which recommendation may or may not be filed by the commissioners after investigating and hearing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

In the matter of the application of the City of New York. On motion for the appointment of commissioners of estimate and a commissioner of assessment for the purpose of acquiring an easement for sewer purposes in Kissel avenue and Brighton boulevard, borough of Richmond. Motion granted.

Archibald R. Watson, Corp. Counsel, of New York City (Joel J. Squier and L. Howell La Motte, both of New York City, of counsel), for petitioner.

William Allaire Shortt, of New York City, for objectors Sailors' Snug Harbor and others.

John Bright Stevens, of New York City, for objector Stevens.

Henry W. Rianhard, of New York City, for objectors Rianhard and others.

Kenney & Eadie, of New Brighton, for objector Walser.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SCUDDER, J. This is a motion for the appointment of commissioners of estimate and a commissioner of assessment for the purpose of acquiring an easement for sewer purposes in Kissel avenue and Brighton boulevard in the borough of Richmond.

The motion is opposed on the ground, first, that the board of estimate and apportionment is without authority to institute a proceeding for the acquisition of an easement for sewer purposes, and that such a proceeding must be initiated by the local board of the district in which the lands, easements in which are acquired, are located; second, that the statute and Constitution require the hearing of evidence by the board of estimate and apportionment, and its refusal to swear and hear witnesses renders its resolution fixing an area of assessment for benefit, without such a judicial hearing, void.

It appears in the minutes of the board of estimate and apportionment of December 12, 1912, that the borough president of Richmond recommended and requested the board of estimate and apportionment to acquire title to the sewer easements hereinbefore referred to. Upon this recommendation and request the board of estimate and apportionment authorized this improvement and directed the institution of these proceedings. After giving a public hearing in accordance with an advertised notice by publication in the City Record, a corporation newspaper, on the 9th day of January, 1913, the board of estimate and apportionment adopted a resolution pursuant to the provisions of sections 396 and 970 of the Greater New York Charter, as amended, deeming it for the public interest that title and easement for sewer purposes in the streets named be acquired by the city of New York, and requested the corporation counsel to apply for the appointment of commissioners, in pursuance of the provisions of the Greater New York charter.

It appears, also, that the board of estimate and apportionment on January 9, 1913, after giving a public hearing pursuant to a notice published in the City Record, a corporation newspaper, which notice gave the proposed area of assessment for this improvement, adopted the proposed area of assessment for benefit in these proceedings. The affidavits submitted in opposition to this motion show that upon one or more occasions a petition was presented to the local board of the district in which it is proposed to locate the new sewer, praying for its construction, and that in each instance the petition was rejected by the local board.

Section 396 of the Greater New York Charter provides:

"Sec. 396. Id.—Power to Acquire Lands for Sewers. The city of New York is authorized to acquire title for the use of the public to all or any of the lands and premises required for sewers, or to easements therein for that purpose, whether the same be above or below high-water mark or under water. The board of estimate and apportionment, at the request of the president of the borough where such lands are located, is authorized to direct the same to be done. It shall be the duty of the corporation counsel, when requested in writing by the board of estimate and apportionment, immediately to institute a proceeding to acquire title for the use of the public to lands and premises or easements therein, required for the building of sewers or drains, in the same manner that is provided by this act for the acquisition of lands for the purpose of opening streets. The expenses incurred in the acquisition of such lands and premises, with the buildings and improvements thereon, so

far as the same shall be taken in such a proceeding, shall be assessed in accordance with the provisions of this act relating to the opening of streets upon all the property deemed by the commissioners of estimate and assessment appointed in such proceeding to be benefited by the acquisition of such lands for such purpose, and upon the owners thereof or persons interested therein."

[1] It is contended on the part of the objectors hereto that section 428 of the Greater New York Charter takes the institution of these proceedings out of the power of the board of estimate and apportionment and gives it to the local board of the district in which the property sought to be condemned is located. Section 428 of the charter provides:

"Sec. 428. A local board, subject to the restrictions provided by this act, shall have power in all cases where the cost of the improvement is to be met in whole or in part by assessments upon the property benefited, to initiate proceedings for the following purposes: To construct tunnels and bridges lying wholly within the borough; to acquire title to land for parks and squares, streets, sewers, tunnels and bridges, and approaches to bridges and tunnels; to open, close, extend, widen, grade, pave, regrade, repave and repair the streets, avenues and public places, and to construct sewers within the district; to flag or reflag, curb or recurb the sidewalks, and to relay crosswalks on such streets and avenues; to set or to reset street lamps; and to provide signs designating the names of the streets. All resolutions affecting more than one local improvement district or the borough generally, shall be adopted only at a joint meeting of all the local boards of the borough, and by a majority of the members of said boards."

This section of the charter relates to acquiring title to land for parks, squares, streets, etc., as well as for sewers. The Court of Appeals in the case of Reis v. City of New York, 188 N. Y. 58, 80 N. E. 573, fully reviews and determines to what extent section 428 of the charter restricts the powers of the board of estimate and apportionment to institute local improvements upon its own motion. Referring to the sections of the charter affecting local boards, including section 428, supra, the court says:

"Referring to these sections of the charter, it is insisted in behalf of the appellant that they deprive the board of estimate and apportionment of any power to change the city map so as to open or close streets except in cases where the proceeding is inaugurated by a local board. I am unable to discover any such limitation or restriction either in the express language of these sections or deducible therefrom by fair implication. If the view thus contended for be correct, there would be no power in the general municipal government to set on foot any public improvement which demanded or contemplated the opening or closing of a street, no matter how desirable, without first obtaining the sanction of an official board of a local and limited jurisdiction. In that event it is quite conceivable that the selfish interests of a locality might outweigh and prevail against the interests of the community at large. It seems to me that the plain intent of these statutory provisions is to confer upon the local boards the authority to deal in the first instance with applications for local improvements made to them by petition, but that the Legislature meant to commit to the jurisdiction of the board of estimate and apportionment, with the co-operation of the chief executive of the city, the power of its own volition to initiate and carry through such public improvements as they should deem for the best interests of the city at large, irrespective of any action or lack of action by the subordinate local boards." 188 N. Y. 66, 67, 80 N. E. 575.

This case (Reis v. City of New York) must be considered as stare decisis upon all questions involved therein, and as establishing the

law whenever similar questions are presented. It is not only authority upon the questions which it expressly decides, but also upon all such as logically come within the principles therein determined. Lahr v. Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528.

[2] The reasoning of the court in Reis v. City of New York applies equally strong in the case of a sewer, if not more so, than in the case of the opening of a street. A sewer or the need of a sewer may involve or affect the whole city; it is not of necessity, nor as a fact, a matter of purely local concern. It seems to me uncontrovertible that the board of estimate and apportionment, at the request of the president of the borough of Richmond, under the authority of section 396 of the charter and the facts herein shown, had the authority to institute proceedings to acquire title to an easement for the sewer purposes herein and duly exercised that authority, and I so hold.

[3] Passing to the second objection, it is contended by the learned counsel for the objectors that these proceedings are illegal, and that this motion cannot be entertained, because the board of estimate and apportionment omitted "a statutory and constitutional sine qua non of jurisdiction" when it refused to permit objectors to offer and swear witnesses and to hear their testimony at the hearing herein before the board of estimate and apportionment held January 9, 1913.

[4] It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceeding. That "due process of law" requires this has been quite uniformly recognized. Stuart v. Palmer, 74 N. Y. 192, 30 Am. Rep. 289.

If I am correct in my interpretation of the sections of the charter controlling the proceeding before me, "the hearing" called for in section 980 of the charter is but an incident or step in the determination by the board of estimate and apportionment of the advisability of instituting proceedings to acquire title to carry out a proposed improvement, and was not intended by the Legislature as the formal hearing and notice preliminary and essential to the taking of private property for public purpose under the guise of an assessment and tax, failure to make provision for which hearing would be in contravention of the Constitution, because depriving an owner of his property "without due process of law."

I am fortified in my opinion that this must be so because there does not seem to exist valid reason for two judicial hearings to impose one tax, and the Legislature has abundantly protected the property owner by providing for a very full and complete hearing in a case such as this in the following provisions of the charter:

By section 396 of the charter, the expense incurred in the acquisition of lands for sewers is assessed in accordance with the provisions of the charter relating to the opening of streets.

Section 978 of the charter, after providing that commissioners of estimate and assessment shall give notice of their appointment in such a proceeding, stating in that notice "a time and place" when parties interested "shall be heard in relation thereto," further provides:

"At the time and place fixed by said notice, * * * the said commissioners shall hear such owners and examine the proof of such claimant or claim-

ants, or such additional proof and allegations as may then be offered by such owners or on behalf of the city of New York."

By section 979 of the charter the commissioners are authorized to administer oaths, to reduce testimony to writing, to cause such maps to be prepared as will assist them to hear and determine the claims of owners and persons interested, and cause diagrams to be prepared which shall distinctly indicate the names of owners of land to be taken or assessed by such proceeding.

Section 980 provides that the commissioners, after hearing such testimony and considering such proof as may be offered, shall, without unnecessary delay, ascertain and estimate the compensation which ought justly to be made by the city of New York to respective owners, and that the commissioner of assessment shall make a just and equitable estimate and assessment, also of the value of the benefit and advantage of such improvement to the respective owners entitled unto or interested in the lands not required for the said improvement.

By section 396 of the charter the expenses incurred in the acquisition of such lands are assessed upon all the property deemed by the commissioners of estimate and assessment appointed in such proceeding to be benefited by the acquisition of such lands for such purpose (sewers), and upon the owners thereof or persons interested therein.

By section 981 the commissioners are required to deposit in the bureau of street openings the abstract of their estimate and assessment and to publish a notice for 15 days in the City Record and in the corporation newspapers, stating their intention to present their report for confirmation to the court at a specified time and place, and all persons interested, having any objection, are notified to file the same in writing with the commissioners within 20 days, and the commissioners are required to hear parties so objecting at the place and time specified in the notice. At the time and place named in the notice the commissioners are required to hear the persons who have objected, and who may then and there appear, and are required to adjourn from time to time until all such persons shall be fully heard.

It is provided in section 984 that after considering the objections, and making any alteration of their estimate or assessment, the commissioners shall file their reports in the office of the clerk of the county where the lands are situated at least five days before the time mentioned in the notice for the presentation of their report to the court for confirmation or the date to which the same has been adjourned.

It has been held that due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. Stuart v. Palmer, 74 N. Y. 191, 30 Am. Rep. 289. Certainly the foregoing procedure prescribed by the Legislature gives to the owners of the property to be assessed for the expense of the proposed sewer herein, as well as the owners of the property to be taken therefor, ample notice of the contemplated assessment and taking, and affords them a fair opportunity to be heard thereon in an orderly proceeding adapted to the nature of the case.

The learned counsel for the objectors ignores the provisions of the

charter referred to, and contends that the constitutional requirement can alone be satisfied by a judicial hearing in this proceeding by the board of estimate and apportionment. In this I think he is in error. In Matter of Common Council of Amsterdam, 126 N. Y. 164, 27 N. E. 274, Judge Finch said:

"But the constitutionality of an act like that under discussion does not depend upon a double notice and a double opportunity to be heard. The Legislature may grant so much if it shall choose; but it is not bound to do so, and acts within its authority if it requires one sufficient and adequate notice, and not two. * * * The assessment by the commissioners is proposed and merely tentative, and has no effect upon the owner or his property until final confirmation, and at that point, at that vital and essential 'stage of the proceedings,' the charter requires notice to the owner, and gives him an opportunity to be heard as to the assessment. If such notice is awarded by the statute, it is no consequence whether there is a hearing before the commissioners."

Mr. Justice Gray in Spencer v. Merchant, 125 U. S. 355, 356, 8 Sup. Ct. 921, 926 (31 L. Ed. 713), said:

"If the Legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

By the terms of the charter we have already seen that a hearing has been provided for in a proceeding such as this, but it is yet to be had herein because this proceeding has not advanced to the point fixed by law for the giving of the hearing.

[5] The decisions of the board of estimate and apportionment are not open to review by the courts when made in the exercise of its legislative power delegated to the board by the Legislature. This rule applies alike to the decisions of the board authorizing the sewer in Kissel avenue and to the fixing of an area of assessment for that improvement; both acts falling within the board's legislative and discretionary power. In Spencer v. Merchant, supra, Mr. Justice Gray (125 U. S. 356, 8 Sup. Ct. 927, 31 L. Ed. 713) said:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the Legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the Legislature may avail itself of such information as it deems sufficient, either through investigations by its commit-

tees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

[6] The Legislature has the power to fix an area of assessment without either notice or hearing to the people affected by that area, and also has power to delegate that function to subordinate governmental agencies. People v. Mayor, 4 N. Y. 419, 55 Am. Dec. 266; McLaughlin v. Miller, 124 N. Y. 510, 26 N. E. 1104; Matter of Cruger, 84 N. Y. 619.

"The right to compensation is the right of the citizen whose land is taken, which the Legislature can neither ignore nor deny. The power of taxation, on the other hand, is vested in the Legislature and is practically absolute, except as restrained by constitutional limitations. The power of taxation being legislative, all the incidents are within the control of the Legislature. The purposes for which a tax shall be levied, the extent of taxation, the apportionment of the tax, upon what property or class of persons the tax shall operate, whether the tax shall be general or limited to a particular locality, and in the latter case the fixing of a district of assessment, the method of collection, and whether the tax shall be a charge upon both persons and property, or only on the land, are matters within the discretion of the Legislature and in respect to which its determination is final. * * * There is no constitutional guaranty that taxation shall be just and equal. * * * The Legislature may itself fix a district of assessment, or the power may be delegated by the supreme legislative body to the authorities of subordinate political and municipal divisions, or other official agencies, as may also the incidents of the power, such as the apportionment and distribution of the tax, as between the persons and property upon which it is laid. * * * The imposition of local assessments for benefits is an exercise of the taxing power." Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777.

While section 396 of the Greater New York Charter and section 980 thereof seem to conflict in their provisions with reference to the final authority to determine the area of assessment for benefit in the matter of acquiring lands for sewers, this conflict is not important, and clearly arises from the fact that the Legislature, when it amended section 980 of the charter, conferring upon the board of estimate and apportionment the duty to fix and determine upon an area of assessment for benefit in all proceedings authorized by it and taking from the commissioners of estimate and assessment the power to extend the assessment to all lands benefited by the improvement, omitted to amend to conform therewith the last paragraph of section 396 of the charter which reads:

"The expenses incurred in the acquisition of such lands and premises, with the buildings and improvements thereon, so far as the same shall be taken in such a proceeding (to acquire lands for sewers), shall be assessed in accordance with the provisions of this act relating to the opening of streets upon all the property deemed by the commissioners of estimate and assessment appointed in such proceeding to be benefited by the acquisition of such lands for such purpose, and upon the owners thereof or persons interested therein."

[7] It thus appears that the power to fix the area of assessment and benefit in the case of a sewer rests in the two boards, but the exercise of that power in its finality under the terms of section 396 of the charter remains with the commissioners of estimate and assessment, and they will fix the area of assessment for benefit when in the

exercise of their discretion they assess the expense upon all the property deemed by them to be benefited.

The action, then, of the board of estimate and apportionment can be viewed in the light of a recommendation suggesting the area benefited by the proposed improvement, and this suggestion will or will not be followed by the commissioners of estimate and assessment, as they shall determine after hearing the property owners, taking the evidence, viewing the property, and determining where the benefit of the proposed improvement will fall.

It follows that the objectors then will have their day in court, and their opportunity not only to be heard upon the question of the assessment upon their property after it is laid, but also will have an opportunity to be heard upon the question whether their property is to be included within the area of assessment or is benefited at all. The action of the board of estimate and apportionment in attempting to fix and determine the area of assessment for benefit, and in refusing to give a judicial hearing to the property owners affected, in no way vitiates this proceeding.

Motion for appointment of commissioners granted.

(81 Misc. Rep. 522.)

PEOPLE ex rel. NOYES v. SOHMER, State Comptroller.

DICK et al. v. SAME.

(Supreme Court, Special Term, Albany County. July, 1913.)

1. TAXATION (§ 537*)—ILLEGAL STAMP TAX—RECOVERY OF PAYMENT.

Persons who purchased stamps and affixed them to stock certificates in good faith between the date of the enactment of chapter 414, Laws 1906, amending Laws 1905, c. 214, imposing a stamp tax, and the date of the decision of the Court of Appeals declaring the taxing clause of such statute unconstitutional, are entitled to have the amount so paid refunded by the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 996–998; Dec. Dig. § 537.*]

2. STATES (§ 182*)—ILLEGAL STAMP TAX—CLAIM FOR PAYMENT MADE—ALLOWANCE OR REJECTION.

The action of the comptroller in returning a claim for taxes paid under the unconstitutional taxing clause of Laws 1906, c. 414, amending Laws 1905, c. 214, with a letter stating that he was returning same "because of the conclusion stated" in the opinion of the Attorney General, which conclusion was that the claim did not meet the requirements of the statute and was not sufficient to be either allowed or disallowed, did not constitute either an allowance or rejection of the claim.

[Ed. Note.—For other cases, see States, Cent. Dig. § 170; Dec. Dig. § 182.*]

3. MANDAMUS (§ 101*)—GROUNDS—REFUSAL TO ACT.

Where the comptroller of the state refuses to either allow or reject a claim for taxes paid under an unconstitutional statute, mandamus will lie to compel him to either approve or reject the claim as provided by law.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 211–216; Dec. Dig. § 101.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

Proceeding by the People, on the relation of Charles P. Noyes, for writ of mandamus against William Sohmer, Comptroller of the State of New York, and application by Evans R. Dick and others for writ of mandamus against the same defendant. Writs granted.

An application is made in each of the above-entitled proceedings for a peremptory writ of mandamus requiring the comptroller of the state to pass upon the claim of each of the relators covering an alleged excess payment of tax under the stock transfer act.

Goldman, Heidenheimer & Unger, of New York City, for relator Noyes.

David H. Miller, of New York City, for petitioners Dick and others.

Thomas Carmody, Atty. Gen. (Edward J. Mone, Deputy Atty. Gen., of counsel), for State Comptroller.

RUDD, J. [1] Chapter 241 of the Laws of 1905 imposed a tax of "two cents on each one hundred dollars of face value or fraction thereof" of stock sold. Chapter 414 of the Laws of 1906 amended that statute by basing the tax on "each share of one hundred dollars of face value or fraction thereof." The amendment taking effect May 11, 1906.

The Court of Appeals, in People ex rel. Farrington v. Mensching, 187 N. Y. 8, 79 N. E. 884, 10 L. R. A. (N. S.) 625, 10 Ann. Cas. 101, declared the taxing clause of the amending statute unconstitutional. The tax provision of the original enactment was left in operation. Between the time of the passage of the amended law and until the decision of the Court of Appeals the relators purchased certain stamps of the comptroller of the state and canceled the same, affixing the stamps upon the shares of stock irrespective of the face value, and now claim a refund from the treasury of the state for the amount of excess taxes paid, which it has been determined by the Court of Appeals were paid to and received by the treasurer of the state under a law which was unconstitutional in its requirement.

The claims here involved were presented to the comptroller of the state under chapter 186 of the Laws of 1910, which went into effect April 29, 1910. It was entitled "An act to amend the Tax Law in relation to refunds of taxes on transfers of stock," and added a new section to the Tax Law (Consol. Laws 1909, c. 60), known as section 280. This specifically refers to the refund of taxes erroneously paid. This provides in substance that if any stamp has been erroneously affixed to any certificate of stock the comptroller may upon presentation of the claim for the amount of such stamp, and upon the production of satisfactory evidence that such stamp was erroneously affixed, so as to cause loss to the person making the claim, pay such amount or such part thereof as he may allow such claimant out of any moneys appropriated for that purpose.

The section provides in detail as to the form in which the claims shall be presented, when they shall be presented, and that if the comptroller rejects a claim, or any part thereof, the claimant may file a claim for the recovery of such sum as the comptroller shall have refused to allow with the Court of Claims, now the Board of Claims,

which shall constitute a private claim against the state, and shall be subject to all the provisions of law governing such claims, except that such claims so presented shall be filed with the Court of Claims within 90 days from the date on which such claim shall be rejected by the comptroller.

[2, 3] The application here made is not for an adjudication upon the alleged claims of the relators, and does not call upon the court in any way to pass upon the validity of such claims. It is simply an application asking the court to require the comptroller to do that which the law calls upon him to do, namely, either approve of the claims or reject the claims. There seems to be little dispute in the facts. When this court determines the simple question whether or not the comptroller as a matter of fact rejected the claims, the questions here involved are answered.

It is not for this court to determine whether the claims should be rejected because no appropriation has been made by the Legislature. It is not for the court to determine whether the parties here applying are those who have sustained the loss alleged to have been made by the improper and illegal requirement on the part of the state of the amounts which have been paid in excess of what should have been paid. It is, as above stated, simply: Did the comptroller by the return of the claims accompanied by a letter of the Attorney General reject the claims? If he did, a basis has been laid for the presentation by the claimants of their claims to the Board of Claims. If they have not been rejected, the claimants here can find no jurisdiction within which they can seek to recover their moneys, or the moneys which have been received by the treasurer of the state in violation of the organic law of the state.

The expressions by the comptroller in the disposition of a claim presented should not be uncertain or indefinite. They should not be such as would require much hesitation on the part of a court to know whether the comptroller had as a matter of fact rejected the claim. It is a simple requirement; no reason need necessarily be assigned for the rejection. It should be absolute in its nature, and it should not result in misleading or in doubt. It should not be of such a character or in such form as would raise a question of doubt as to whether jurisdiction had been created in the tribunal provided by law to pass upon the real merits of the claim.

The comptroller returned the claim in 1910, accompanied by a circular letter and by a printed copy of the opinion of the Attorney General. This letter and the opinion are a part of the relators' moving papers. The comptroller stated that he was returning the claim "because of the conclusion stated" in the opinion of the Attorney General. The conclusion was:

"In my judgment, these claims do not meet the requirements of the statute; and I therefore advise you that they are not sufficient for your action either to allow or disallow the claim."

The comptroller evidently acted upon the advice of the Attorney General; that advice was that the claims were not sufficient to justify the comptroller acting upon them. If the comptroller did not act upon them, he certainly did not reject them. In fact, the comptroller

acts under the suggestion of the Attorney General to the effect that he does not either allow or disallow, and if he does not disallow he certainly does not reject.

In Flower v. State of New York, 143 App. Div. 871, 128 N. Y. Supp. 208, the court has held that persons who purchased and affixed such stamps to stock certificates in good faith before the statute was declared to be unconstitutional were entitled to have the amount paid refunded, and also that the Court of Claims would have no jurisdiction until the claim had been passed upon by the comptroller of the state. That certainly does not mean simply looked at by the comptroller; it means some kind of a determination by the comptroller as to the validity of the claim. It has been held in the Flower Case:

"It is clearly the duty of the comptroller to pass upon the plaintiff's claim, ascertain and determine the amount thereof, and certify to the same in proper manner, so that it may be paid from any funds properly applicable to that purpose."

The fact that there are a large number of similar claims pending and that the amount involved is large is not at all controlling. If that means that the state treasurer has received a large amount of money by the collection of excess taxes under a law which has been declared unconstitutional, it certainly seems as if it would be the duty of the officials of the state to promptly co-operate to the end that such amount, if illegally received, might be refunded. But, as above stated, it is not a question here of the legality of the claim, but simply for the construction by the court of the acts of the comptroller in the returning of the claims here involved. This court holds that the comptroller has not rejected the claims.

The court is asked to direct the comptroller to act in accordance with the duties which devolve upon him by law, namely, to allow or disallow, either to admit or reject, the claims, not indicating here in any way any opinion either as to the character of the claims or as to the validity of the claims or the owners thereof, simply to do that which the law requires to be done. Peremptory writs of mandamus covered by the petitions may issue.

Motions granted.

(81 Misc. Rep. 519.)

WHISTLER et al. v. COLE.

(Supreme Court, Trial Term, Saratoga County. July, 1913.)

1. VENDOR AND PURCHASER (§ 231*)—NOTICE—RECORDS—COVENANTS IN DEED.
A grantee of a lot was chargeable with notice of a building restriction, which was contained in the grantor's deed of an adjoining lot to another and covered both lots, where an examination of the records would have disclosed such covenant, and reasonable prudence required such examination to be made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. § 231.*]

2. VENDOR AND PURCHASER (§ 230*)—CONSTRUCTIVE NOTICE—DEEDS.
A purchaser of land is chargeable with notice by implication of every fact affecting the title and discoverable by an examination of the deeds

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or other muniments of title of his vendor, and of every fact as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 502–512; Dec. Dig. § 230.*]

3. INJUNCTION (§ 62*)—GROUNDS—RESTRICTIVE COVENANTS.

The purchaser of a lot from a vendor, who, in a prior conveyance of an adjoining lot, has covenanted that both lots shall be subject to a certain reasonable building restriction, may be enjoined from violating such covenant, where he was chargeable with notice of same at the time of his purchase.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124–127, 129; Dec. Dig. § 62.*]

Action for an injunction by Benjamin A. Whistler and another against Henry G. Cole. Judgment for plaintiffs.

William T. Moore, of Mechanicville, for plaintiffs.

Oscar Warner, of Mechanicville, for defendant.

VAN KIRK, J. In and prior to April, 1911, Elizabeth P. Ladow owned two adjoining lots on Main street in the village of Mechanicville, N. Y. Under date of April 28, 1911, she conveyed to plaintiffs one of said lots by a deed which contained this covenant:

"The party of the first part, for herself, her heirs and assigns, covenants and agrees to and with the parties of the second part, their heirs and assigns, that there shall not hereafter be built or erected on the lot of land now owned by the party of the first part, lying northerly of the premises hereby conveyed and extending therefrom to Underwood street, any building the front or westerly wall of which shall extend nearer to said Main street than the line of the front or westerly wall of the dwelling house now located on the premises hereby conveyed."

Under date of September 30, 1911, she conveyed to the defendant, Henry G. Cole, the other lot by a deed in which there was no covenant or restriction and no reference to the covenant made in the deed of April 28th. These two lots are in a residence district in Mechanicville, where the neighboring houses are well back from the street, and the restriction contracted for in the covenant is a reasonable restriction. It was the evident intent of the parties to the deed of April 28th that no building should be erected upon the adjoining lot belonging then to the plaintiffs' grantor nearer the street than the dwelling on the lot conveyed, and the plaintiffs paid full value for the premises under such understanding and agreement.

[1] At the time this action was begun the defendant had constructed a wall for a building upon his said lot and was about to erect a building thereon. Said wall was considerably nearer Main street than the front wall of the dwelling house upon plaintiffs' premises, and this action was thereupon begun. The covenant in the deed of April 28th is valid as between the parties thereto. It is also binding as against the defendant, the purchaser of the second lot, if he had notice of the said covenant. Cambridge Valley Bank v. Delano, 48 N. Y. 326; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335; 1 Am. St. Rep. 816. It is not claimed that the defendant had actual notice, but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the record disclosed the covenant, and that a proper search would have revealed it to him. It is true that the covenant does not appear directly in the chain of title of the defendant's lot. Elizabeth P. Ladow had procured the two lots from different parties, so that a search of the chain of title of the defendant's lot alone would not have disclosed the covenant; but it appears by the deed to defendant that Elizabeth P. Ladow had owned the lot there conveyed since December 28, 1905, and that her deed thereto was recorded in the clerk's office of Saratoga county September 10, 1907.

[2] In Cambridge Valley Bank v. Delano, supra, 48 N. Y. on page 336, the court said:

"The principle of equity is well established that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title, which would be discovered by an examination of the deeds or other muniments of title of his vendor, and of every fact as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted."

Reasonable prudence would require of the defendant, when about to purchase this lot, to examine the conveyances made by his grantor, Elizabeth P. Ladow, during the time she owned the lot which she was about to convey to him, to determine whether or not there had been any conveyances by her of the lot, or any part thereof, she was about to convey to him. An examination of the record would have disclosed that, in April of the same year, his vendor had conveyed to these plaintiffs the adjoining lot, and in the conveyance of said adjoining lot is the covenant in question.

[3] I conclude, therefore, that the defendant was chargeable with notice of this covenant and is bound by its terms; that the covenant was intended as a restriction upon the adjoining lot for the benefit of this property and for enhancing its value; and that, from a violation of this covenant, the defendant may be enjoined. Post v. Weil, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809; Davis v. McCarthy, 131 App. Div. 755, 116 N. Y. Supp. 149.

Plaintiffs are entitled to judgment restraining defendant from violating said covenant, with costs.

Judgment for plaintiffs.

(81 Misc. Rep. 334.)

LOCKWOOD et al. v. SMITH.

(Supreme Court, Trial Term, Suffolk County. June, 1913.)

1. CONTRACTS (§ 186*)—ENFORCEMENT—THIRD PERSONS.

Where, by a written agreement, a grantee agreed to support the grantors during their lives and to pay their funeral expenses, no action could be maintained thereon for the funeral expenses by parties claiming under the undertaker, who was not a party to the agreement, whether such agreement was under seal or not.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 790–797; Dec. Dig. § 186.*]

2. FRAUDULENT CONVEYANCES (§ 208*) — PROSPECTIVE CREDITORS — FUNERAL EXPENSES.

That a decedent in good faith disposes of all his property prior to his death does not constitute a fraud upon an undertaker who buries him;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a decedent being under no obligation to preserve or retain his property until his death, to be used to pay his funeral expenses.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 631, 633; Dec. Dig. § 208.*]

Action by Maud A. Lockwood and others against Jarvis E. Smith. Judgment for defendant.

Jetur W. Hand, of Riverhead, for plaintiffs.

Jarvis E. Smith (Robert S. Pelletreau, of Patchogue, of counsel), for defendant.

JAYCOX, J. [1] This action is brought to recover the funeral expenses of one Thomas Atkin. During his lifetime said Thomas Atkin and Ann E. Atkin, his wife, entered into a written agreement with the defendant, in consideration of the conveyance of certain real estate, to support the said Ann E. Atkin and Thomas Atkin during the term of their natural lives, and at their decease to pay their respective funeral expenses. The making of the agreement, the conveyance of the property to the defendant, the rendition of the services, and their reasonable value are all admitted. The defendant, however, says that he cannot be sued by these plaintiffs under the agreement in question as it is under seal, and relies upon Case v. Case, 203 N. Y. 263, 96 N. E. 440, Ann. Cas. 1913B, 311, as absolute authority for his position.

That case recognizes the fact that there are exceptions to the rule which prevents a person not a party to an instrument under seal from bringing suit thereon, and my examination of the cases leads me to the conclusion that the presence or absence of a seal has had very little bearing upon decisions of the courts. The case in question states:

"The case at bar is not within this or any other exception to the general rule, for the plaintiff is a mere volunteer, who is not a party to the contract, and who is an utter stranger to the consideration."

Under these circumstances the plaintiff would not be entitled to recover whether the agreement was under seal or not. Later in the opinion it is said that in Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49, Judge Andrews seems to put the whole doctrine in one pregnant paragraph, and quotes as follows:

"It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance, and so within the contemplation of the parties, and in addition the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance."

If these elements are present the agreement has been enforced at the instance of the third party, regardless of whether the instrument was under seal or not. See Coster v. City of Albany, 43 N. Y. 399, and a long line of cases following it, down to and including Pond v. New Rochelle Water Co., 183 N. Y. 344, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504; also Baird v. Erie R. Co., 148 App. Div. 452–461, 132 N. Y. Supp. 971.

The real distinction between the cases where a third party has been permitted to enforce an agreement and those in which the third party

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

has been denied relief is that in the former class of cases the promisee has been under some legal obligation to the third party, which that party would have a right to enforce against the promisee. That was the situation in Lawrence v. Fox, 20 N. Y. 268, and that has been the situation in all the cases in which that case has been followed. This distinction is made very clear in Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195, where the grantee in a deed assumed the payment of a mortgage which covered the premises described in the deed. The grantor was not personally liable for the payment of this mortgage, and it was held that the mortgagee could not enforce the covenant in this conveyance as the grantor was not under any obligation to the mortgagee.

In the case of Coster v. City of Albany, supra, the state was about to make an improvement which would result in an injury to the plaintiffs. It was therefore under an obligation, or at least owed the duty, to these plaintiffs of indemnifying them. This duty the defendant assumed in an agreement between it and the state, and it was held that the plaintiffs could enforce that agreement notwithstanding its being under seal.

In Pond v. New Rochelle Water Co., the village of Pelham Manor owed the plaintiff, who was a resident of such village, a duty, and in the execution of that duty it had entered into a contract with the defendant, and the court held that, notwithstanding the contract being under seal, it could be enforced at the instance of a resident of said village of Pelham Manor.

If I am right in my view as to the essential elements which will permit the enforcement of a contract by a person not a party to it, it then remains but to ascertain whether or not in this case those elements are present. To state the matter more clearly I will quote from Vrooman v. Turner, supra:

"To give a third party, who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally."

[2] In this case it is but necessary to determine, therefore, whether the decedent, Thomas Atkin, owed any duty or obligation to the plaintiffs or their intestate. I am unable to discover any such duty or obligation. While the property of a decedent is liable for his funeral expenses, he is under no obligation to preserve or retain property until his death, that it may be subject to the payment of his funeral expenses; and, if in good faith he disposes of all of his property prior to his death, it never would be held that thereby he had committed any fraud upon one who, after his death, should see that he was decently and properly buried. I am, therefore, unable to see that at the time of making this agreement the promisee, Thomas Atkin, was under any duty or obligation to the plaintiffs or their intestate which would permit them to maintain this action. I am unable to see that there is any privity between the plaintiffs or their intestate and the promisee, Thomas Atkin, in the agreement above mentioned.

The defendant is therefore entitled to judgment dismissing the complaint.

Judgment for defendant.

(81 Misc. Rep. 338.)

LAFAYETTE TRUST CO. v. RICHARDS et al.

(Supreme Court, Trial Term, Queens County. June, 1913.)

1. EVIDENCE (§ 441*)—PAROL—PURCHASE-MONEY MORTGAGE.
Parol evidence of an agreement to improve the mortgaged property is inadmissible to change the terms of a purchase-money mortgage.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. § 441.*]

2. EVIDENCE (§ 419*)—PAROL—CONSIDERATION.
The rule permitting parol evidence of failure of consideration, does not permit a party to prove by parol a different consideration from that expressed in the instrument sued on, and then to show that such different consideration has failed.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. § 419.*]

3. MORTGAGES (§ 459*)—FORECLOSURE—DEFENSE.
In an action to foreclose a mortgage, damage from breach of a collateral agreement is not available as a defense, when not pleaded in the answer or as a counterclaim.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1343–1347; Dec. Dig. § 459.*]

Action by the Lafayette Trust Company against Sarah A. Richards and another to foreclose a mortgage. Judgment for plaintiff.

Frank M. Patterson, of New York City (Frederick Mellor, of New York City, of counsel), for plaintiff.

James A. Sheehan, of Brooklyn, for defendants.

CRANE, J. [1] The defendants seek to reduce the amount due upon the mortgage in this foreclosure case by reason of the failure of the mortgagee to carry out an oral agreement not contained in the written contract of sale. The mortgage is a purchase-money mortgage, given as part consideration for a deed of the property in question. The contract in writing entered into and executed by the grantor provided for the conveyance of the property which the defendants had received by the subsequent deed, and for the term of payment, etc.; but nothing was mentioned in the contract pertaining to the matter which the defendant seeks to establish by parol. It is said that the Somerville Realty Company agreed to extend into and upon the property the improvements of water and gas, and to grade and pave the streets in front thereof. No mention whatever is made of any such agreement in the contract of sale, or the deed or mortgage. The mortgagee having failed to pave the streets, the mortgagor seeks to reduce the amount of the mortgage by the damage she has thus sustained. To permit a written contract to be thus amended by reading into it an agreement to improve the property, or to convey something more than is therein stated, would be in violation of the general rule that a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

written contract cannot be changed or modified by oral testimony. Studwell v. Bush Co., 206 N. Y. 416, 100 N. E. 129; Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961; Eighmie v. Taylor, 98 N. Y. 288.

[2] The defendant, however, claims that the oral testimony in this case does not change or modify the contract, but is within that exception to the general rule which permits parties between themselves to show the true consideration or a failure of consideration, and cites Baird v. Baird, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375. It will be noted that the defendant does not claim that the consideration expressed in the contract has in any way failed; but she desires to prove a different consideration than that expressed, and then to show that this latter has failed. The contract specifically stated the consideration, in that it contained a full and complete description of the property and a statement of the defendant's agreements to be performed upon a conveyance thereof. Under such circumstances it is not permissible to show a different consideration by oral testimony by including therein property not mentioned. The scope and limitation of the right to show that there was no consideration, when one has been expressed in a written contract, is very well stated in Sturmdorf v. Saunders, 117 App. Div. 762, 102 N. Y. Supp. 1042, where all the authorities are reviewed. To modify a specific statement as to the consideration contained in an agreement, so as to include other and additional property, would wipe out altogether the general rule regarding the variance of written contracts by parol evidence.

[3] If the defendant claims that the oral agreement comes within the exception regarding collateral agreements mentioned in the case of Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512, then it is sufficient to say that no such claim has been made in the answer, and no counterclaim set up for damages growing out of the failure to keep such agreement. Revoir v. Barton, 71 Hun, 457, 24 N. Y. Supp. 985; McCrea v. Connor, 30 App. Div. 598, 52 N. Y. Supp. 231; De Kay v. Bliss, 120 N. Y. 91, 24 N. E. 300. Judgment is therefore given for the plaintiff, with costs.

Judgment for plaintiff, with costs.

(82 Misc. Rep. 238)

PEOPLE v. WALDHORN.

(Oswego County Court. September 22, 1913.)

1. ARSON (§ 24*)—ATTEMPT TO COMMIT ARSON—INDICTMENT—REQUISITES—"ATTEMPT TO COMMIT A CRIME."

Pen. Code, § 2, defines an "attempt to commit a crime" to consist of an act done with intent to commit the crime, and tending, but failing, to effect its commission. Section 221 declares that a person who willfully burns or sets on fire in the nighttime a building wherein to the knowledge of the offender there is at the time a human being is guilty of arson in the first degree. Code Cr. Proc. § 275, provides that an indictment shall contain a plain and concise statement of the act constituting the crime. *Held*, that an indictment for attempt to commit arson in the first degree, charging that accused on a specified date did feloniously, etc., set fire to and burn the structure described, wherein to his knowledge there was a human being, and by such manner and means did attempt to commit arson in the first degree, was fatally defective for fail-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ure to allege the act or acts showing the manner in which defendant attempted to fire the building.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 51; Dec. Dig. § 24.*

For other definitions, see Words and Phrases, vol. 1, pp. 507–509; vol. 8, p. 7582; vol. 1, pp. 622–627.]

2. INDICTMENT AND INFORMATION (§ 149*)—DEMURRER—RIGHT TO DEMUR.

Where accused demurred to the indictment at arraignment, as authorized by Code Cr. Proc. § 322, his right to demur was not affected by the fact that he had previously obtained a copy of the minutes of the grand jury and had unsuccessfully moved to dismiss the indictment thereon.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 496; Dec. Dig. § 149.*]

Samuel Waldhorn was indicted for attempt to commit arson in the first degree. On demurrer to indictment. Sustained.

Francis D. Culkin, Dist. Atty., of Oswego, for the People.
Frederick T. Cahill, of Oswego, for defendant.

ROWE, J. [1] If the charge in this case was arson, instead of an attempt to commit arson, the indictment could probably be sustained. To ascertain the elements necessary to constitute the crime of an attempt to commit arson, reference must be had to sections 2 and 221 of the Penal Code. Section 2 defines "attempt to commit a crime" as follows:

"An act, done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime."

As far as it is material in this case, section 221 defines arson in the first degree as follows:

"A person who willfully burns, or sets on fire, in the nighttime * * * (2) * * * a * * * building * * * wherein, to the knowledge of the offender, there is, at the time, a human being, is guilty of arson in the first degree."

Criminal procedure is not the technical maze it once was; in fact, it has greatly changed, and the strong tendency of the courts is toward still more simple practice and the trial of cases upon their merits, but defenses and objections which are based upon substantial merit or statutory right cannot be set aside. The demurrer in this case is upon the grounds: (1) That the indictment does not conform substantially to the requirements of sections 275 and 276 of the Code of Criminal Procedure; (2) that the facts stated do not constitute a crime. Section 275 of the Code of Criminal Procedure requires that the indictment must contain "a plain and concise statement of the act constituting the crime."

These statutory provisions thus require the *acts* to be set forth showing the manner in which it is alleged the defendant attempted to set fire to the building in question. An attempt to burn a building can be made in numerous ways. No facts or acts of the defendant are set forth in this indictment showing how the attempt was made. The indictment reads as follows:

"The grand jury of the county of Oswego by this indictment accuse Samuel Waldhorn of the crime of attempting to commit the crime of arson in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

first degree, committed as follows: The said Samuel Waldhorn, on or about the 19th day of February, 1912, at the city of Fulton, in this county, in the nighttime, did feloniously, willfully, and unlawfully attempt to set on fire and burn a structure, building, and erection, to wit, a certain brick block and store called and known as the 'Collins Block,' then and there situate in said city of Fulton, being then and there the property of and belonging to Nellie C. Evans and Lena Collins, wherein to the knowledge of said Samuel Waldhorn at said time there was a human being, and the said Samuel Waldhorn, by the means and in the manner aforesaid, did then and there attempt to commit the crime of arson in the first degree, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity."

If the defendant attempted to burn this building on the night in question, by arranging combustible materials in one of the rooms of the building and setting fire to it with intent to so burn such building, or in whatever manner and by whatever means it is claimed the defendant attempted to burn such building, the facts constituting the crime, to wit, the criminal acts of the defendant by which such attempt was made, must be set forth in the indictment in order to have it comply with section 275 of the Code above quoted. People v. Corbalis, 178 N. Y. 516, 71 N. E. 106; People v. Dumar, 106 N. Y. 502, 13 N. E. 325; People v. Kane, 161 N. Y. 386, 55 N. E. 946; People v. Stark, 136 N. Y. 538, 32 N. E. 1046. Judge Danforth, writing the opinion for a unanimous court in the Dumar Case, in speaking of the indictment says:

"It must contain a plain and concise statement of the act constituting the crime, without unnecessary repetition. Section 275. The indictment, therefore, must charge the crime, and it must also state the act constituting the crime. The omission of either of these things would necessarily be fatal to the indictment. If there was no accusation of a crime, the paper, however formal in other respects, would not be an indictment, and so there would be no criminal action. If it contained no statement of the act constituting the crime, there would be no description of the offense, and neither an acquittal nor a conviction would enable the defendant to withstand a further prosecution for the same crime. Moreover, the plain words of the statute, as well as its object, would be disregarded; for the manifest intention of the Legislature in requiring the indictment to state the act constituting the crime was, among other things, that the accused should learn from it what he was called upon to defend. The form of the indictment given in the Code (section 276) leads to the same conclusion."

After referring to the changes in the law made by the Code he says:

"But the general principle of pleading has not been substantially changed. Under either system an offense consists of certain acts done or omitted under certain circumstances, and under neither is any indictment sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed, so as to bring the accused within the true meaning and intent of the statute defining the offense. Under the former, this end was secured by rules formulated and applied by the courts through long series of decisions; under the latter, it is made imperative by the provisions of the statute."

Whether defendant attempted to set fire to the building in person or by hiring another to do the act need not necessarily be set forth in the indictment, but the acts complained of as constituting the crime must be set forth. People v. Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701. In the above case the crime charged was abortion. The acts constituting the crime, the instrument used to produce the

abortion, and the manner of using it are fully set forth in detail in the indictment. In each of the other cases cited by the people where indictments have been sustained it will be found that the acts constituting the crime have been set forth in the indictment.

[2] In the case at bar the defendant Waldhorn applied for and obtained by order of the court a copy of the minutes of the grand jury, and thereafter moved to dismiss the indictment upon the ground that the evidence of the accomplice was in no way corroborated. The motion was argued March 1, and an order entered April 21, 1913, denying the motion. The defendant was not arraigned until the May term of this court, and he then upon such arraignment interposed the demurrer. It is claimed by the counsel for the people that the defendant is now barred from raising any question under this demurrer by asking for and receiving the copy of the grand jury minutes in the case; and counsel cites in support of such contention People v. Scannell, 36 Misc. Rep. 483, 73 N. Y. Supp. 1067. The Scannell Case did not arise upon a demurrer. The defendant desired to interpose what he called a plea in abatement, and the decision in the case rested upon the ground that such a plea is now unknown to our law.

The demurrer in this case was put in at the time of the arraignment, as provided by section 322 of the Code, and the defendant has a statutory right to thus test the validity of the indictment. His having in his possession the minutes of the grand jury does not modify or change this right. He is to be tried upon the indictment, and upon the evidence to be introduced upon the trial under the indictment, and not upon the evidence taken before the grand jury. The people are not bound to swear a single witness who was sworn before the grand jury, nor are they obliged to prove that the crime was committed in the way testified to by the witnesses before the grand jury. In this case the evidence will probably be the same, but that circumstance does not change the law of the case. The indictment and the indictment alone is the test of the admissibility of the testimony introduced upon the trial.

If the case went to trial on this indictment, it is difficult to say what evidence could be introduced under it. The next grand jury sits in this county before the next term of this court convenes. The defects in this indictment may be avoided in a new indictment, and the case is one which should be resubmitted to the next grand jury of the county.

Let an order be entered allowing the demurrer and ordering the case resubmitted to the next grand jury sitting in this county.

(81 Misc. Rep. 484.)

MATTICE v. MATTICE.

(Schoharie County Court. July, 1913.)

1. ANIMALS (§ 96*)—INJURY TO TRESPASSING ANIMAL—NEGLIGENCE.
Where a landowner, instead of driving a trespassing colt into the highway, attempts to confine it on his premises in a closed lane fenced with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

barb wire so low as to invite the colt to jump over, and without any sufficient barrier to prevent it, he is liable for damages resulting from the colt's attempting to jump the fence, as he should have known it would likely do.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 375–379; Dec. Dig. § 96.*]

2. JUSTICES OF THE PEACE (§ 185*)—APPEAL—JUDGMENT—EVIDENCE.

The authority conferred by Code Civ. Proc. § 3063, upon County Courts to reverse a judgment of a justice of the peace, because against the weight of the evidence, is exercisable only when the judgment is so plainly against the weight of the evidence that the justice could not reasonably have arrived at the decision made.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 716–720; Dec. Dig. § 185.*]

Action by Garfield L. Mattice against Charles S. Mattice before a justice of the peace. From judgment for plaintiff, defendant appeals. Affirmed.

M. S. Wilcox, of Jefferson, for appellant.
Charles E. Nichols, of Jefferson, for respondent.

BEEKMAN, J. This action was brought for damages resulting from plaintiff's colt being injured by coming in contact with a barb-wire fence, which was alleged to have been a nuisance and to have been negligently maintained by the defendant. The court below rendered judgment for the plaintiff.

[1] The plaintiff had placed his colt to pasture on the pasture lot of his brother, a short distance from defendant's lands. This pasture lot was fenced. Without the plaintiff's knowledge on the day of the accident, his colt, in company with another colt, in some way not clearly shown, escaped from the pasture, crossed a highway, and then jumped over defendant's highway fence at a point where plaintiff claims the fence was 18 inches high; the defendant claiming that the fence at the point where they jumped over was 4 feet high. No one saw them go over the fence, but the location is sought to be fixed from the tracks found. The colts having thus come upon the defendant's lands, the defendant claims that they were trespassing, and that, therefore, he is not liable for any injuries which the plaintiff's colt later received by jumping over defendant's barb-wire fence.

From this pasture a lane ran a considerable distance easterly down to the defendant's barnyard. The lane had a wall fence on the northerly side thereof along the highway and a barb-wire fence on the southerly side. Where the lane ran into the barnyard there were bars, which plaintiff testifies were about 3 feet high. The barnyard was practically surrounded by barb-wire, except where the barn extended partly across the rear. The plaintiff and some other witnesses testify that this fence was 3 feet and 4 inches high, composed of three strands of barb wire, with sharp barbs about one-half inch long, there being five barbs to the foot. The fence posts were about a rod apart. There was no bar of wood or anything on top. The northerly side of the barnyard abutted the highway, fenced as above stated; there,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

however, being some evidence of the fence setting back about 7 feet from where a stone fence along the highway used to stand.

The following is a part of the defendant's testimony on his direct examination:

"Q. On or about the 10th day of September, state whether you found this colt in your pasture with your horses, or with one of your horses? A. Yes; I found him in the lane; he came down with my horses. Q. Did you go up in the lot after your horses? A. I started to go after one of them. When I got up there in sight, I saw them coming. I thought they were my colts first. Q. What did you do with your horses? A. I took my horse out. Q. You got him and led him into the highway? A. Yes, sir. Q. What did you do with reference to putting up the bars? A. I took my horse into the highway, and they followed. I took my horse, and turned and led him back into the lane, and they followed. Q. You put up the bars, leaving the two colts in the lane? A. Yes, sir."

The defendant testified he then took his horse into the road and "across lots right across the road." Later, in detailing a conversation he had with the plaintiff, defendant testified:

"I said I shut him [the colt] back in the lane."

In the testimony of one of the plaintiff's witnesses as to a conversation with defendant, the following appears:

"Q. What did defendant say about the injury? A. He said it was too bad; said it had spoiled the colt. Q. He thought they might jump over the fence when he took his own horse out? A. Yes, sir."

The defendant lived on one side of the highway, and the plaintiff's father and brothers on the opposite side; the plaintiff being the nephew of the defendant. After the defendant had shut plaintiff's colt, and the colt running with him, back in the lane, and put up the bars, he took his own horse across the highway to a place about eight or ten rods away from the barnyard, where it seems his other horse had strayed, and where, as one witness expresses it, the defendant was "leading one horse to get the other." While the defendant was thus engaged, the plaintiff's colt and the one running with him jumped over the bars between the lane and the barnyard, and the plaintiff's colt jumped from the barnyard, over the wire fence between the barnyard and the highway, and in doing so became entangled in the barb wire. One witness saw the colt "kicking and thrashing around" on the barb-wire fence. The colt was so severely cut as to be worthless, and was killed by direction of a veterinary.

As to the manner in which the colts got from the lane to the barnyard there is the following testimony by the defendant:

"Q. Did they in some way get over into the yard? A. Yes, sir. Q. Did you discover any tracks? A. Yes; I saw tracks, and saw hair on the fence, this on the pole; they seem to have jumped right over the top of the post."

It is apparent that, when the defendant took the colt back into the lane and put up the bars, as the testimony shows, he assumed control over it, and the situation is entirely changed from the case of a mere trespasser coming upon lands of another and meeting with an injury, without any direct interposition or guidance by the owner of the lands. By taking charge of this colt, and assuming the custody

and control of it, the defendant assumed certain duties with reference to its safety.

"The owner or occupant of land has the right to drive off animals trespassing on it and to use ordinary and reasonable means for this purpose. He may drive such animals into the highway and leave them to their fate for which he is not responsible." Shearman & Redfield, Negligence (6th Ed.) § 640.

Instead of so doing, and instead of permitting the colt to continue to follow his horse along the highway, he leads his own horse back into the lane, until he gets the following colts into the lane, then leads his horse out again, and leaves the colts shut up behind the bars. He attempted to confine the colts on his premises, and it is necessary to examine the surrounding circumstances to see whether the court below erred in finding that the plaintiff's property was injured by the maintenance of a nuisance or the negligence of the defendant.

The defendant finds the colt in the pasture and lane with his own horse. The colt is between two and three years of age and weighs about 1,000 pounds, and the propensities of the animal must be taken into account, the likelihood of its breaking over a barrier, and the fact that the ordinary colt is more likely to leap fences than an older work horse. A colt away from its usual pasture or inclosure would be apt to want to return to its home, and especially as in this case, where it had followed the horse with which it had been in company, and then been taken back to an inclosure; the same horse being used as a decoy to lead the colt back in the lane. Then the horse was led away from the colt. Naturally the colt, seeing the horse being led away for a considerable distance within its sight and in a direction towards its usual place of pasturage, would be restive, and moved by its instinct to follow the horse, or return to its usual haunts. This the defendant, a farmer familiar with the habits of horses, may be supposed to have known. He knew the colt followed his horse out of the lane, and when he used his own horse to get the colt to follow back into the lane he ought to have known that the colt would follow *again* unless there was a sufficient barrier to prevent. Under the circumstances, when he shut the colt in the lane, with a barb-wire fence on one side of the lane, the wall on the other, and the bars at the end, it was to be reasonably expected that the colt would be apt to break over the fence or bars, and then come into the barnyard, where the only barrier on the side towards the highway and the colt's usual place of abode was a barb-wire fence 3 feet and 4 inches high, with no stick on top. The bars were only about 3 feet. Here the testimony of the witness above referred to as to what the defendant said is significant:

"Q. What did the defendant say about the injury? A. He said it was too bad; said it had spoiled the colt. Q. He thought it might jump over the fence when he took his own horse out? A. Yes, sir."

Neither the fence nor the bars would seem to be a proper fence to safely confine a colt of that age under the circumstances disclosed in the case, nor does it seem that the defendant used ordinary diligence in caring for the colt he had undertaken to restrain on his land. Both the bars and the wire fence were so low as to invite the colt to jump over. The likelihood of a young horse coming in contact with a barb-

wire fence under the circumstances was bound to be attended with danger.

The character which is given barb-wire fences is shown by reference to the statutes. Section 369 of the Town Law (Consol. Laws 1909, c. 62) provides that a division fence may be built of barb wire providing the owner of the adjoining property gives his written consent. If the adjoining owner refuses to consent to the building of such a fence, it may be built in the following manner:

"The fence shall be of at least four strands of wire with a sufficient bar of wood at the top; and the size of such top bars and of the posts and supports of such fence and their distances apart shall be such as the fence viewers of the town may prescribe, and with posts no farther apart than fourteen feet; and such fence shall be otherwise substantially built and a reasonably sufficient inclosure for holding the particular kind or class of cattle or animals usually pastured on either side of the fence. * * * But any person building such a fence without the written consent of the owner of the adjoining property shall be liable to all damages that may be occasioned by reason of such fence."

The Legislature recognized the fact that, even when the adjoining owner should consent, the fence should have a sufficient bar at the top, and that it should be otherwise sufficiently built for the "particular kind of animals," etc. A fence that might not be dangerous or insufficient for cattle might be very dangerous for colts or horses.

Section 52 of the Railroad Law (Consol. Laws 1910, c. 49) absolutely prohibits a railroad company from building a barb-wire fence along its right of way.

Section 56 of the Highway Law (Consol. Laws 1909, c. 25), which provides for the erection of wire fences for the prevention of snow blockades, further says:

"In no case shall the town superintendent approve of or permit the use of barb wire for such fences."

All of these provisions of the statute are founded upon the notorious fact that barb-wire fences are dangerous, and especially so when there is no board or bar on the top. The defendant exposed plaintiff's colt to the danger of coming in contact with this barb wire when he took charge of the colt.

In all the cases where the owner of the premises has not been held liable for injuries to trespassing animals, the circumstances have been such that the owner of the premises was not negligent in the care and treatment of the trespassing animal. In this case there was evidence from which the justice might reasonably find negligence on the part of the defendant.

The reasoning of the Supreme Court in the case of Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766, 4 L. R. A. 395, is applicable. The court in that case says:

"The defendants inclosed their land with a barb-wire fence, part of it running along a highway [then follows the description of the fence, three strands with no rail on top]. The question of negligence * * * was properly and fairly left to the jury under the instructions of the court. * * * We cannot say that the evidence is insufficient * * * to support the verdict. [Then follows a citation of the California statute as to the manner of building wire fences, 4½ feet high, with rail on top, etc.] Of course, the liability of the

defendants does not depend upon the question whether their fence came up to the legislative standard, which fixes the liabilities of owners of trespassing animals in certain counties; but the act quoted shows what the Legislature * * * considered a good fence. The defendants were not bound to maintain any fence at all; but, having undertaken to maintain one, they were bound to see that it was not made a trap for passing animals. It is the duty of the landowner to take notice of the natural propensity of domestic animals, and to exercise reasonable care to prevent his fence from becoming dangerous. The fact that the fence was constructed entirely upon the defendants' land is no defense, if negligently constructed or maintained. The case comes within the rule established by a recent decision of this court in Malloy v. Savings & Loan Soc., 21 Pac. 525. In that case the defendant had negligently suffered a privy vault and cesspool to remain open upon its premises, about 10 feet from the sidewalk of a public street in the city of San Francisco, without any inclosure, and plaintiff's minor child, without any fault or negligence on plaintiff's part, had fallen into the same and was drowned therein. The demurrer to the complaint, which stated substantially these facts, was sustained in the court below, and the order reversed here. The decision was based upon the principle that one should so use his own property as not to injure the property of another."

If it is reasonable that it should be provided by statute that an owner shall be liable for damages caused by the construction of a division barb-wire fence of four strands with a bar of wood at the top when the adjoining owner does not consent, a three-strand barb-wire fence without any top piece may reasonably be deemed dangerous and a nuisance, and a person who places a colt in proximity to such fence may reasonably be considered guilty of negligence.

[2] In this case now on appeal there was evidence from which the court below was authorized to find in favor of the plaintiff. I do not think the judgment should be reversed. Rehler v. Western N. Y. & P. R. Co., 55 Hun, 604, 8 N. Y. Supp. 286; McCarragher v. Gaskell, 42 Hun, 451.

"It is manifest that the authority conferred by section 3063 of the Code upon County Courts to reverse a judgment of a Justice's Court because it is contrary to or against the weight of evidence is to be exercised only when the judgment is so plainly against the weight and preponderance of proof that it can be seen that the justice could not reasonably have arrived at the decision which he made. The County Court by this provision of the Code has no greater power over judgments rendered by justices of the peace than has the Appellate Division and Court of Appeals over judgments of courts and referees. * * * 'A court on appeal cannot set aside the findings of the trial court merely because they are of opinion that, upon the record before them, they would feel constrained to find the fact the other way.'" Murtagh v. Dempsey, 85 App. Div. 204, 205, 206, 83 N. Y. Supp. 296; Sanger v. French, 157 N. Y. 213, 51 N. E. 979; Vandeymark v. Corbett, 131 App. Div. 391-394, 115 N. Y. Supp. 911.

The judgment appealed from is affirmed, with costs.

Judgment affirmed, with costs.

(81 Misc. Rep. 575.)

In re DUNCAN et al.

(Surrogate's Court, Erie County. July, 1913.)

EXECUTORS AND ADMINISTRATORS (§ 495*)—COMMISSIONS—POWER OF SALE.

Where a sale by executors of testator's real estate under a power is unnecessary, the personal property being sufficient to pay all bequests and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an annuity to the widow, and the residuary legatees and devisees elect to take the realty free from all powers of sale given to said executors, the latter are not entitled to commissions on the unsold realty.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2089–2106, 2108; Dec. Dig. § 495.*]

In the matter of the judicial settlement of the accounts of Elmer E. Duncan and others, executors. Decree entered.

Albert C. Spann, of Buffalo, for Alice E. Doyle, executor and residuary legatee.

Charles C. Farnham, of Buffalo (Simon Fleischmann, of Buffalo, of counsel), for Elmer E. Duncan and William C. Kelderhouse, executors.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, for Mabel R. Anderson and Harriet Drake Baker, residuary legatees.

HART, S. The will of John Kelderhouse, the testator, was probated in this court on July 27, 1911. Letters testamentary were issued to Elmer Duncan, Wm. C. Kelderhouse, and Alice E. Doyle. The widow is given the homestead and contents for life, with reversion to residuary estate, and an annuity of $5,000 payable in quarterly installments. Bequests of $7,000 are made to collateral relatives, friends, and employés, and $2,000 to the Young Women's Christian Association. The residue of "every kind and nature and wheresoever found" is bequeathed to the executors in trust, for his nieces, Jennie K. Doyle, Alice E. Doyle, and Grace H. Doyle, Mabel R. Anderson, and Harriet T. Drake, share and share alike. The widow, Jane Kelderhouse, died on December 11, 1911; her annuities have been paid in full. The executors have filed their account, showing a balance on hand of cash and personal property, amounting to nearly $67,000. A contested claim of $12,000 only remains for the completion of executorial duties before final distribution of the estate. The only other persons interested in the estate are the residuary legatees and devisees, and this accounting is only in controversy as to the amount of executors' commissions as being applied to the unsold real property, the value of which was estimated by the transfer tax appraiser to be the sum of $314,404, no part of which has been disposed of, excepting a small parcel inventoried at $175. The application for commissions on the unsold realty is made in behalf of two of the executors; Alice E. Doyle, as executor and residuary legatee, opposing the allowance.

Under the sixth clause of the will, the residue of the estate, real and personal, is given to the executors in trust for his nieces, and the executors claim that this language necessarily works an equitable conversion of his estate, and that it must be treated as personal property in determining the question of commissions. The cases cited (Power v. Cassidy, 79 N. Y. 602, 35 Am. Rep. 550; Lent v. Howard, 89 N. Y. 169) in neither instance is an imperative sale directed by will, and the duties of the executors differ substantially from those in the present case in their range and scope. The executors of this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

will are given a power of sale which has not been exercised; the personal property being ample to pay the annuity to the widow for the short time she survived her husband. To constitute equitable conversion of real estate into personalty, in the absence of actual sale, the power of sale as expressed in the will must be absolute and imperative. The words "executor" and "trustee" are used interchangeably by laymen in drawing wills and legal documents, and the use of the word "trust" need not necessarily create or complicate the administration of an estate, when construction is sought, nor will execution of a trust be denied in the absence of definite and exact words expressing the trust, but, on the contrary, will be construed by implication. A cardinal rule of construction that "the intention of the testator should govern, if not contrary to statute," applied to the present case, seems to indicate that the executors were granted a power which was unnecessary to exercise; to interpret his intention and extend this power into a trust, for the mere purpose of granting commissions, would appear to be a strained construction and interpretation of testator's intention. Cooke v. Platt, 98 N. Y. 35; Matter of Hardenbrook, 23 Misc. Rep. 538, 52 N. Y. Supp. 845.

The residuary legatees and devisees gave written notice of their election to take the realty of the testator free from any and all powers of sale given to the executors; the same plan as adopted by the devisees in Trask v. Sturges, 170 N. Y. 482, 63 N. E. 534, availing themselves of the holding that by this process the power of sale was extinguished; also held in Train v. Davis, 49 Misc. Rep. 169, 98 N. Y. Supp. 821:

"Where land is directed to be turned into money under a power and paid over to designated persons, and these persons are of lawful age, and, upon the sale of the land, at once entitled to the money, they may elect to take the land; and when they have so elected, and the election has been made known, the power of the trustee for conversion ceases and becomes extinguished, and he cannot thereafter lawfully proceed to execute the power. This doctrine arises from the principle that equity will not compel the execution of a trust against the wishes of the persons beneficially interested."

In my opinion, the executors have failed to present a case in law or equity justifying the construction of the will awarding them commissions on the unsold realty. A decree may be entered, passing the accounts of the executors and allowing commissions only upon the personal property.

Decreed accordingly.

(82 Misc. Rep. 234)

In re FASSIG'S ESTATE.

(Surrogate's Court, New York County. September 29, 1913.)

1. WILLS (§ 775*)—CONSTRUCTION—LAPSE BY DEATH OF LEGATEE—RESIDUARY PROVISIONS.

Where testatrix, leaving only personal property, gave certain amounts to her surviving children and to her grandchildren as representatives of their deceased parents, to her son P. and another son certain deposits in a savings bank, and to P. the furniture of a house, and gave the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

residue to P. and another son and to a daughter "an equal one-third share each," and P. and the daughter predeceased her leaving no issue, the gifts to P. and to the daughter lapsed and fell into the residue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1997–2000; Dec. Dig. § 775.*]

2. WILLS (§ 523*) — CONSTRUCTION — DESIGNATION OF LEGATEES — "GIFT TO CLASS."

Residuary bequests to two sons and a daughter "one-third to each," were not bequests to an aggregate class so that the survivor of the class took all, but went to each of the three children named in the residuary clause individually so that the surviving residuary legatee did not take the lapsed legacies of the deceased legatees, which passed according to the statute of distributions; a "gift to a class" being an aggregate gift to a body of persons living but uncertain in number, and not including a bequest made when the number of donees was certain and the share of each is certain and in no way dependent for its amount on the number who shall survive.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

Will of Maria Fassig construed, and decree to be settled accordingly.

Frank M. Patterson, of New York City, for petitioner.
Edmund J. Tinsdale, of New York City, special guardian.
W. Gibbes Whaley, of New York City, for Frederick Fassig.
Jeremiah A. O'Leary, of New York City, for Benjamin Gratz.
Charles H. Broas, of New York City, for Theodore Fassig.
Bergman & Davis, of New York City (Henry K. Davis, of New York City, of counsel), for contestant.

FOWLER, S. The will of Maria Fassig being adjudged entitled to probate is now regularly presented to the surrogate for construction, pursuant to the Code of Civil Procedure. Mrs. Fassig, the testatrix, left surviving her her son Frederick Fassig, her son Theodore Fassig, George Fassig, a grandson of testatrix and the only son of her deceased son John Fassig, and six grandchildren who were the children of her deceased daughter Elizabeth, and also five grandchildren who were the children of her deceased son William Fassig. The will of testatrix so far as pertinent is as follows:

"First. I direct my executor hereinafter named to first pay, as soon as possible after my death, all my just debts and liabilities, including funeral and testamentary expenses.

"Second. I give and bequeath unto my grandchildren, John Gratz, Fred Gratz, Peter Gratz, Harry Gratz, Benjamin Gratz, George Gratz, children of my deceased daughter, Elizabeth Fassig Gratz, the sum of $100 each; to my grandchildren, John Fassig, William Fassig, Thomas Fassig, Marie Fassig and Kathrine Fassig, children of my son, William Fassig, deceased, the sum of $100 each, and to my grandchild, George Fassig, the son of George Fassig, deceased, the sum of $100.

"Third. I give and bequeath unto my son, Theodore Fassig, the sum of $1,000, and to my son, Peter Fassig, the sum of $500 now on deposit in the Bowery Savings Bank, together with the accrued interest from the date of deposit.

"Fourth. I give and bequeath unto my daughter, Emma Fassig, all the clothes, jewelry and all linen belonging to me at the time of my death, and to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

my son, Peter Fassig, all furniture and other housefurnishings, belonging to me at the time of my death.

"Fifth. Of all the rest, residue and remainder of my estate, both real and personal of every kind, character and description whatsoever and wheresoever situated, I give, devise and bequeath to my sons, Fred Fassig and Peter Fassig, and to my daughter, Emma Fassig, an equal one-third share each. The estate passing under this will is personal property only."

The daughter Emma Fassig, mentioned in the fourth and fifth clauses of the foregoing will, predeceased testatrix, as did the son Peter Fassig, mentioned in the third, fourth, and fifth clauses. Peter and Emma so died single and without issue.

[1, 2] The question is: What becomes of the legacies to Peter and Emma? On behalf of the surviving son, "Fred," or Frederick Fassig by name, it is urged that the residuary gift swallows up the lapsed legacies, as it is to a "class," and that he as the sole survivor of the class takes all, including the shares of his coresiduary legatees who predeceased their mother, the testatrix. On the other hand, it is claimed in behalf of the son Theodore Fassig and the infant grandchildren of testatrix, representing her deceased children, that the residuary legacies to Peter and Emma given in the fifth clause of the will lapsed, as they were not gifts to a class, but to individuals. As they are not otherwise disposed of, it is claimed that they pass as provided for by the statute of distributions; the testatrix having died intestate as to such portions of her estate. Which of these respective contentions is the right one?

A "gift to a class" is an aggregate gift to a body of persons living, but uncertain in number. A bequest is not a gift to a class where at the time of making it the number of the donees is certain and the share each is to receive is also certain and in no way dependent for its amount upon the number who shall survive. Matter of Kimberly, 150 N. Y. 90, 44 N. E. 945. An examination of the language of the residuary gift in the will now before me shows that the gift is not an aggregate to a class so that the survivor takes all, but one to each of the three children of testatrix named in the fifth clause of the will, individually and distributively. Each was to take a one-third and no more. It was not a gift of an aggregate to those who should survive till a certain time. The gifts to Peter in the third and fourth clauses of the will certainly lapsed, as did the gift in the fifth clause of the will to Emma. These gifts fall into the residuary, of which Frederick is entitled to take one-third and no more. The two-thirds of the residuary given to Emma and Peter have lapsed, and not being disposed of by the will they are to be under the law governing distribution of intestates' estates. I have no doubt on this will and shall not take more time to consider it.

The result of the conclusion reached will work out thus: One-fifth of the residuary will go to "Fred" or Frederick Fassig; one-fifth to Theodore Fassig; one-fifth to the son of John Fassig, deceased; one-fifth to the children of Elizabeth (Fassig) Gratz, deceased; one-fifth to the children of William Fassig, deceased. Settle decree accordingly.

(158 App. Div. 435)

COHEN v. KOHLER.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

1. FRAUD (§ 47*)—ACTIONS FOR DAMAGES—PLEADING—NECESSITY OF ALLEGING DAMAGE.

In an action for damages from false representations, it is unnecessary to plead facts showing damage which necessarily and naturally flowed from the representation; but, where damages do not necessarily and naturally flow therefrom, additional facts showing damage must be pleaded.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 42; Dec. Dig. § 47.*]

2. FRAUD (§ 47*)—ACTION FOR DAMAGES—PLEADING—NECESSITY OF ALLEGING DAMAGE.

In an action for damages for falsely representing that a corporation in which plaintiff owns stock was not a paying proposition, in reliance on which representation she sold the stock to defendant, a complaint which failed to allege the value of the stock, or that it was worth more than she received for it, was insufficient, as failing to show any damage from the false representation.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 42; Dec. Dig. § 47.*]

8. PLEADING (§ 403*)—CURE BY SUBSEQUENT PLEADING.

In testing the sufficiency of a complaint, the answer cannot be considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343–1347; Dec. Dig. § 403.*]

Appeal from Trial Term, Queens County.

Action by Mabel Cohen against John F. Kohler. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

See, also, 141 N. Y. Supp. 1113.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and STAPLETON, JJ.

H. Irwin Keenan, of New York City, for appellant.

John Burlinson Coleman, of New York City, for respondent.

BURR, J. [1] The only representation of a fact which is alleged to be false is that the New York Pie Baking Company was not, at the date of the sale of plaintiff's stock, a "paying proposition." This is exceedingly general, but for purposes of a demurrer, within the authorities cited, it may be sufficient. If any damage necessarily and naturally flowed from this, it would be unnecessary to plead facts showing the damage. Thus in Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427, the injury complained of was the diversion of water. The law would presume some damage naturally and necessarily to flow from this, and the fact that the complaint did not demand the precise damages to which plaintiff was entitled, or that he mistook the true rule of damages, would not make it demurrable. The general rule is that, where some damages do not necessarily and naturally flow from a false representation, additional facts showing damage must be pleaded. Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

360, 49 Am. St. Rep. 651; Aron v. De Castro, 13 N. Y. Supp. 372,[1] affirmed 131 N. Y. 648, 30 N. E. 491;[2] Tregner v. Hazen, 116 App. Div. 829, 102 N. Y. Supp. 139.

[2] Notwithstanding that the New York Pie Baking Company was a paying proposition, and notwithstanding that defendant falsely stated and represented to plaintiff that it was not, and notwithstanding that plaintiff believed such representation and sold her stock on account thereof, if as matter of fact she received for it all that it was actually worth, no damage has resulted to her. It does not appear from the complaint what the stock was worth. For anything that appears therein, she may have received for it more than it was worth, if the Pie Baking Company had been a paying concern.

[3] The answer, to which, of course, we cannot refer for the purpose of testing the sufficiency of the complaint, shows that she received 150 for her stock. We may refer to this by way of argument and illustration, as showing the necessity of alleging that the stock was actually worth more than she was paid for it. Isman v. Loring, 130 App. Div. 845, 115 N. Y. Supp. 933, is not an authority to the contrary. The real gravamen of that action as set up in the complaint was that plaintiff was induced to enter into a contract with defendant to purchase certain land for $5,000 in excess of the bid or offer made to defendant by a certain railroad company, and that defendant falsely represented that said company had offered $70,000 for the land; whereas, as matter of fact, it had offered but $55,000, and that plaintiff, relying upon that representation, paid $75,000 for the land, and was damaged to the extent of $15,000. The question in that case was, not what the land was actually worth, but what the plaintiff was induced to pay for it by the false representation of defendant. There may be in the opinion in that case some statements in general language as to the necessity of pleading facts showing damage, but the language must be controlled by the facts in the case. As Judge Patterson says at the close of his opinion:

"It sufficiently appears by necessary inference from this complaint that the defendant agreed to sell the property upon the basis stated in the complaint, namely, $5,000 over and above an amount actually offered by the railroad company."

Defendant did not keep this agreement. By falsely representing the amount which the railroad company had offered to pay, he induced plaintiff to pay him an additional $15,000.

The judgment must be affirmed, with costs. All concur.

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 59 Hun, 623.

[2] Reported in full in the Northeastern Reporter; reported as a memorandum decision without opinion in the New York Reports.

(81 Misc. Rep. 352.)

BOYNTON et al. v. LAHENS et al.

(Supreme Court, Special Term, New York County. June, 1913.)

1. WILLS (§ 687*)—CONSTRUCTION.

A will bequeathing testatrix's residuary estate, all personalty, to trustees in trust (1) to hold and invest and pay the income to her children, share and share alike, during their respective lives; (2) and directed that, on the death of any of the children, the trustee should pay to its issue, share and share alike, one equal part of the estate, divided into as many parts as there shall be children surviving testatrix; (3) and further directed that, in case any child die leaving no issue, its share be disposed of as it may direct by will, or, failing such disposition, that it fall into testatrix's residuary estate "and be distributed as hereinbefore provided"; (4) and further directed that, in case any child shall predecease testatrix leaving issue surviving, the trustees pay over to such issue, share and share alike, the child's portion, and on the death of any other surviving children that they "pay to said issue, share and share alike, one equal part of said estate as provided in subdivision 2 thereof." *Held* that, on the death of any child without issue surviving and without disposing of its share by will, such share should be divided into as many subshares as there were children then surviving, which subshares should be added to each of the subsisting trusts, and that upon the death of each child the subshares so added should vest in its issue, if any, and that, if any child died intestate and childless, the subshares held for such child should vest in the decedent's next of kin, if any, as of the date of decedent's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1638–1643; Dec. Dig. § 687.*]

2. WILLS (§ 682*)—CREATION—INDEPENDENT TRUSTS—INCOME.

Where income and principal are given in equal shares out of one fund, kept in solido for mere convenience of investment, separate and independent trusts may be created for the several beneficiaries, and the shares and interests will be several, and held by them respectively as tenants in common, though the fund remains undivided.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1602, 1607–1611; Dec. Dig. § 682.*]

Action by Frederick C. Boynton and others, as trustees, etc., against Elinor V. Lahens and others, for the construction of a will. Judgment according to opinion.

Daly, Hoyt & Mason, of New York City, for plaintiffs.

Joseph L. Delafield, of New York City, for defendants Chester C. Boynton and Elinor V. Lahens.

Joseph V. Gallagher, of New York City, for defendant Nathalie Boynton.

W. Holden Weeks, of New York City, guardian ad litem.

GUY, J. [1] This is an action for a construction of the will of Theodosia Boynton, deceased. The testatrix died January 25, 1908, leaving her surviving five adult children, four of whom are now living; her son, Theodore V. Boynton, having died on November 15, 1911, intestate, married, and without issue. Two of the testatrix's surviving children are unmarried, the other two are married, and both of them have surviving minor children.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The testatrix's two surviving married children contend that the tenth clause of the testatrix's will is void, as unlawfully suspending the ownership of the residuary estate, which the account shows is all personalty, for more than two lives, and that the testatrix died intestate as to her entire residuary estate. The guardian for the infant children of the testatrix's two surviving married children claims that the five trusts set up in the residuary clause are all valid, and that the one-fifth share held in trust for the testatrix's since deceased son, Theodore V. Boynton, should be divided into four equal parts or subshares, each of which subshares should be added to and form a part of one of the four subsisting trusts, and upon the death of each child the subshare so added should vest *in the then next of kin of the testatrix.*

The residuary clause of the testatrix's will reads:

"Tenth. All the rest, residue and remainder of my estate, I give, devise and bequeath to my trustees hereinafter named, in trust, nevertheless, for the following uses and purposes, namely: (1) To hold and invest the same and collect the income therefrom and pay such income to my children, share and share alike, during their respective lives. (2) On the death of any of my said children, I direct my said trustees to pay to his or her issue, share and share alike, one equal part of my said estate, on the basis of a division thereof into as many parts as there shall be children me surviving. (3) In case any of my said children shall leave no issue him or her surviving, then I direct that said share set apart to him or her in trust as aforesaid shall be disposed of as he or she may direct by his or her last will and testament, and failing such disposition by him or her, then I direct that such share shall fall into my residuary estate and be distributed as hereinbefore provided. (4) In case any of my said children shall predecease me, leaving issue him or her surviving, then I direct my said trustees to pay over to such issue, share and share alike, that portion of the income of my said estate to which such child would have been entitled if living, and on the death of any one of the other surviving children, then I direct my said trustees to pay to said issue, share and share alike, one equal part of said estate as provided in subdivision 2 thereof."

The five trusts set up by the residuary clause of the will are not indivisible or joint, nor do they create a blended trust fund; but they are independent, separate, and distinct, the beneficiaries take as tenants in common, and the power of alienation of each share is only suspended during the lives of the two successive beneficiaries, during which that share with its respective subshare is limited. Schey v. Schey, 194 N. Y. 368, 373–375, 87 N. E. 817; Chastain v. Tilford, 138 App. Div. 746, 751–752, 123 N. Y. Supp. 513; affirmed, 201 N. Y. 538–543, 544, 94 N. E. 646; Vanderpoel v. Loew, 112 N. Y. 167, 177, 180–186, 19 N. E. 481; Matter of Mount, 185 N. Y. 162, 169, 170, 77 N. E. 999; Smith v. Edwards, 88 N. Y. 92–103; Moore v. Hegeman, 72 N. Y. 376, 382–384; Stevenson v. Lesley, 70 N. Y. 512, 515, 516; Amory v. Lord, 9 N. Y. 403, 415, 416; Chapl. Sus. Alien. (2d Ed.) §§ 100–112.

[2] Although the principal of the trust fund is held in one general mass for convenience of investment, yet the primary beneficiaries' interests, as well as the successive beneficiaries' interests, are several, and are held by them respectively as tenants in common, even though the fund remains undivided. Leach v. Godwin, 198 N. Y. 35, 41, 91 N. E. 288. No contingency resulting from the uncertainty as to which

of the alternative future estates in the subshares will vest or fail to vest could create any restraint on the power of alienation of the remainder. Real Prop. Law, § 51; Hennessy v. Patterson, 85 N. Y. 91, 99; Knowlton v. Atkins, 134 N. Y. 313, 317–322, 31 N. E. 914. The cases where trusts in joint tenancy for the lives of more than two persons, blended trust funds to be held intact until the death of the last of more than two beneficiaries, and trusts of personal property to continue during the lives of persons not in being at the creation of the trust, have been held invalid, are not in point. The testatrix intended, and I see no legal difficulty in the carrying out of such intention, that in the event of the death of any child without issue surviving, and without disposing of its share by will, the share of such child should be divided into as many subshares as there were children then surviving, which subshares should be added to and form a part of each of the subsisting trusts; that, upon the death of each child, the subshares so added should vest in its issue, if any; that if any such child died intestate and childless the subshare held for such child should vest in the decedent's next of kin, if any, as of the date of decedent's death. Matter of Wilcox, 194 N. Y. 306, 87 N. E. 497; Clark v. Cammann, 160 N. Y. 316, 328, 329, 54 N. E. 709; Greenland v. Waddell, 116 N. Y. 234–245, 22 N. E. 367, 15 Am. St. Rep. 400.

Judgment construing the will accordingly, with costs to plaintiff and to the infant defendants.

Judgment accordingly.

(158 App. Div. 487)

SHOVAN v. LOZIER MOTOR CO.

(Supreme Court, Appellate Division, Third Department. September 26, 1913.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—JURY QUESTION.
In an action against a master for the wrongful death of a servant, who was killed by reason of the falling of a ladder, the question of the master's negligence *held* for the jury, in view of Labor Law (Consol. Laws 1909, c. 31) § 18, making a master who furnishes a servant with unsafe ladders as scaffolding guilty of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 227*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.
Notwithstanding Labor Law (Consol. Laws 1909, c. 31) § 18, prohibiting a master from furnishing a servant with unsafe ladders as scaffolding, a master may, upon the injury of a servant by reason of the fall of an unsafe ladder, invoke the doctrine of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 668, 669; Dec. Dig. § 227.*]

3. NEW TRIAL (§ 157*)—HEARING—INSTRUCTIONS—LAW OF CASE.
On motion for new trial, the theory set forth in the instructions must be accepted as the law of the case.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 314, 317, 318; Dec. Dig. § 157.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. MASTER AND SERVANT (§ 265*) — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.

In view of Labor Law (Consol. Laws 1909, c. 31) § 202a, as added by Laws 1910, c. 352, § 2, referring to contributory negligence, a master, relying upon that defense, has the burden of proof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. § 265.*]

5. MASTER AND SERVANT (§§ 288, 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action for the wrongful death of a servant, the question whether the servant was guilty of contributory negligence and assumed the risk *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1090, 1092–1132; Dec. Dig. §§ 288, 289.*]

Appeal from Trial Term, Clinton County.

Action by Ida Shovan, as administratrix of the estate of Middy Shovan, deceased, against the Lozier Motor Company. From a judgment for plaintiff, and an order denying defendant's motion for new trial, it appeals. Affirmed.

The following is the opinion of Borst, J., in the trial court:

[1] I am of the opinion that the evidence in this case, in connection with section 18 of the Labor Law (Consol. Laws 1909, c. 31), which would seem to apply, was sufficient to make the defendant's negligence a question for the jury. McConnell v. Morse Iron Works, 102 App. Div. 324, 92 N. Y. Supp. 477; Cummings v. Kenny, 97 App. Div. 114, 89 N. Y. Supp. 579; Kelly v. National Starch Co., 142 App. Div. 286, 126 N. Y. Supp. 979.

[2] The provisions of the Labor Law referred to do not preclude the defendant, however, from invoking the contributory negligence, if any there was, of plaintiff's intestate. Gombert v. McKay, 201 N. Y. 27, 94 N. E. 186, 42 L. R. A. (N. S.) 1234.

[3, 4] Now, as to the contributory negligence of plaintiff's intestate. The case was submitted to the jury on the theory that on this question plaintiff had the burden of proof, and this must therefore undoubtedly be the law of the case on this motion. This burden, however, it would seem under the provisions of Labor Law, § 202a, as added by Laws 1910, c. 352, § 2, as it now stands, was on the defendant. Treating the case, therefore, on the theory on which it was tried, I think the intestate's negligence was a jury question.

[5] The jury were authorized to find that the spurs on the foot of ladders used about defendant's premises became dull by usage and were sharpened from time to time; that this was no part of the duties of the intestate. This was a duty, however, imposed by law upon the defendant, and especially so by virtue of the section of the Labor Law cited. The spurs on the ladder in question were dull, and the jury had the right to find from the evidence that, had they not been so, they would have sunk into the floor under the weight of plaintiff's intestate, and not have slipped, and the accident would thereby not have occurred.

Evidence was given by one of defendant's employés to the effect that some weeks prior to the day of the accident ladders, including the ladder in question, had been used by plaintiff's intestate and the witness; that the witness had forced the spurs into the floor in the intestate's presence by hitting them with a hammer. The truthfulness and force of this evidence was for the jury. Plaintiff's intestate might well have assumed that the spurs on the ladder in question had been sharpened between the time that witness referred to and the day of the accident when he came to use it. It does not appear that plaintiff's intestate knew that the spurs on the ladder were dull.

The direction to the intestate to perform the work in which he was engaged came from his foreman, who testifies: "I went in the power house. Shovan was there. I said to him, 'Middy, when you have time, or when you haven't

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

got much to do, take and connect up the radiator that is in the toilet room off of the assembly room with the 2½-inch pipe that we recently ran down through there from the heating coil in the northwest corner of the building. There is no particular hurry about it, but do it when you have time to do it. Your pipe is here on the floor.' The pipe was lying on the floor right beside him when I was speaking. 'The ladder stands up by the heating coil in the northwest end of the building.'"

The ladder was in place and the intestate was to go up that and make the connection. He had a pail of paint in his hand, which was to be used on the joints of the pipes which he was to connect. He was near the top of the ladder, when it slipped and the fall came, which resulted in his death. In view of the attention which he must necessarily have given to his work, the materials he was to take and use, and in view of the instructions given to him by the foreman to go up that ladder to do the work, it was at least for the jury to say whether he should have in mind, distracted as his attention might have been, that the defendant had failed to sharpen the spurs on the ladder. Kettle v. Turl, 162 N. Y. 255, 56 N. E. 626; Delaney v. City of Mt. Vernon, 89 App. Div. 209, 85 N. Y. Supp. 799.

The motions for a nonsuit and the new trial should therefore be denied.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

John H. Booth, of Plattsburgh, for appellant.
John E. Judge, of Plattsburgh, for respondent.

PER CURIAM. Judgment and order unanimously affirmed, with costs, on the opinion of Mr. Justice Borst at Trial Term.

(82 Misc. Rep. 247)

PEOPLE v. STEEPLECHASE PARK CO. et al.

(Supreme Court, Special Term, Kings County. September, 1913.)

1. NAVIGABLE WATERS (§ 36*)—RIGHTS OF PUBLIC—PASSAGE OVER BEACH OR SHORE—JUS PUBLICUM—JUS PRIVATUM.

The people hold the fee title to tidal lands of the state, including the beach or foreshore, over which the tide ebbs and flows and for which no patent has been granted, in their sovereign capacity for the benefit of the public, and the right of public passage thereover is of the same nature as the jus publicum of the common law, and cannot be regarded as having had its origin in the jus privatum which is not recognized as part of our common law except in so far as it has devolved upon littoral and riparian owners. Such public right of passage includes, not only the right to pass on foot, but also, where it is physically possible, with vehicles, as a beach constitutes a sort of natural public highway, which, although it may not be subject to all the incidents of a regularly established public highway, is subject to public travel by all means used on the public highways of the state.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–200; Dec. Dig. § 36.*]

2. NAVIGABLE WATERS (§ 37*)—BEACH OR SHORE—CONSTRUCTION OF GRANT TO PRIVATE OWNERS.

A grant or patent of certain land under water and between high and low water mark, containing no habendum clause or any restrictions upon the grant, but without words to indicate any intention to surrender or extinguish the public right of passage thereover, did not deprive the public of such right.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201–226, 285; Dec. Dig. § 37.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. NAVIGABLE WATERS (§§ 44, 45*)—LITTORAL RIGHTS—ACCRETION AND EROSION.

Under a patent to land bounded by the "Maine Ocean," thereby meaning high-water mark, the patentee and his successors acquired whatever might be added to the upland by accretion, and lost whatever might be taken away by erosion, which are both gradual processes; and an accretion to the shore over which the tide ebbed and flowed, continuing from 1855 to 1900, a recession of 200 or 250 feet between that date and 1902, and a restoration of 100 feet by 1906, were the operation of erosion rather than of avulsion.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 266–282; Dec. Dig. §§ 44, 45.*]

4. NAVIGABLE WATERS (§ 45*)—LITTORAL RIGHTS—"AVULSION."

"Avulsion," which, if applicable to a case where soil is washed away from land of one owner without being deposited on that of another, is a sudden pushing back of the shore line due to, or effected by, a violent storm.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 279, 280; Dec. Dig. § 45.*

For other definitions, see Words and Phrases, vol. 1, p. 655.]

5. NAVIGABLE WATERS (§ 45*)—RIGHTS OF PUBLIC—PASSAGE OVER SHORE.

Where the foreshore, over which the tide ebbs and flows, held by a littoral owner under a patent, recedes as the result of an avulsion, the owner's boundary may not change, yet the public right of passage, which is of the same nature as the public right of navigation, is not lost, but is the same right over the new shore as over the old.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 279, 280; Dec. Dig. § 45.*]

6. EVIDENCE (§ 67*)—PRESUMPTION—CONTINUANCE OF CONDITION SHOWN BY PHOTOGRAPH.

In the absence of evidence to the contrary, the condition of piers, pavilions, and other encroachments upon a beach or shore, shown by photographs, will be deemed to have continued to the time of the trial of an action to enjoin such encroachments.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.*]

7. NAVIGABLE WATERS (§ 43*)—PUBLIC RIGHTS—RIGHTS OF PASSAGE OVER BEACH—OBSTRUCTIONS—"PURPRESTURE."

Structures, such as fences or barriers, inclosing a part of a beach between the upland and low-water mark, a pavilion and the platform connecting it with the pier, a roller coaster and machine horse railway, in so far as they encroached upon the beach or foreshore in front of the upland of private owners, and projected beyond the present mean high-water line, and interfered with the public right of passage between mean high-water and mean low-water marks, were "purprestures," which are a "clandestine encroachment or appropriation upon lands or water that should be common or public," and public nuisances which would be enjoined, allowing a pier and a walk constituting proper approaches, and a jetty constituting a protection both to the beach and to the upland, to remain, provided that a suitable and convenient means for public passage on foot and with vehicles should be maintained under or around them.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 104, 256–265; Dec. Dig. § 43.*

For other definitions, see Words and Phrases, vol. 7, pp. 5867, 5868; vol. 8, p. 7776.]

Action by the People of the State of New York against the Steeplechase Park Company and others for the removal of structures of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

permanent nature erected on the beach or foreshore. Judgment for plaintiff, enjoining the maintenance of certain structures, and allowing others to remain under conditions.

Thomas Carmody, Atty. Gen. (William A. McQuaid, Deputy Atty. Gen., of counsel), for the People.

Frank Obernier, of Brooklyn (Samuel S. Whitehouse, of New York City, of counsel), for defendant Huber.

Edward J. Byrne, of Brooklyn, for defendants Steeplechase Park Co. and others.

Hervey, Barber & McKee, of New York City, for defendant Hogg.

BENEDICT, J. This is an action by the people of the state of New York, through the Attorney General, for the removal of certain structures of a permanent nature erected on the beach or foreshore in front of the premises situated between Surf avenue and the Atlantic Ocean at Coney Island, which are occupied as an amusement resort known as Steeplechase Park and having a frontage on the shore of approximately 633 feet.

The defendant Emilie Huber owns the westerly portion of the upland adjacent to the foreshore, extending 297.70 feet from the westerly boundary line in an easterly direction. She claims title in fee to the beach in front of her upland under a patent from the state, which contains no restrictions whatever, but purports to convey a fee. The defendants Steeplechase Park Company own the central portion, extending for a distance of 148.63 feet easterly from the Huber parcel. They claim title to the beach in front of said premises under a patent from the state to Paul Weidman, which contains a restriction against erecting any structure which would interfere with the public's right of passage between high and low water marks. The defendants George C. Tilyou and Elizabeth Burgess Hogg own the next parcel of land to the eastward, extending a distance of 131.11 feet. This leaves a distance of about 56 feet, running from the easterly side of the premises last mentioned to the easterly side of the park, which is not owned by any of the defendants, although the defendants or some of them are in possession thereof. No grant of the water front has been made in respect of any of the premises in question, except as already stated.

The foreshore or beach is approximately 122 feet wide at the westerly side of the park, about 125 feet wide at a point in the middle of the park, and 133 feet wide at the easterly side of the park, thus giving an average for the strip of 126⅔ feet. It is alleged in the complaint and was established upon the trial that the beach or foreshore in front of the upland belonging to or leased by the defendants is fenced off and separated from the beach on either side of it, on the westerly side by a jetty or bulkhead, which is surmounted by a fence of pickets or palings, and on the top of which are strung several strands of wire, and on the easterly side by a fence about 10 feet in height, composed of spiles, posts, planks, boards, dead trees, and barbed wire. There is no opening or passageway through these obstructions between high and low water, and there is no means of access to this part of the beach, excepting through the uplands of the defendants and with

their consent, to obtain which payment of a fee is required. In other words, the beach at this point is treated by the defendants in the same manner with respect to use by the public as is the upland which they own or lease.

In addition to the defenses against the public use of the beach thus established, the defendants Steeplechase Company have constructed and now maintain several other permanent structures which are situated partly upon the upland and partly upon the foreshore, viz., a roofed open pavilion, and the platform connecting the same with the pier, the roller coaster, the machine horse railway, and the pier with the water pipe under it across the beach, and the walk on spiles known as "Tilyou's Walk." All of these structures are shown to rest upon and to be supported by spiles or posts driven into the sand of the beach and connected or tied together with cross-braces of wood or iron at various heights above the beach, and the plaintiffs contend that all these structures except the pier are unlawfully built and maintained by the defendants, or some of them, upon the theory that they prevent, obstruct, or interfere with the free use of the foreshore by the people of the state and constitute an unlawful invasion of the rights of the public freely to pass and repass along the beach or littoral.

It will not be necessary to go into a lengthy examination of the older authorities on the subject of littoral rights, nor is a historical review of their origin and growth needful, however interesting the subject may be, for we have had in this state in recent years two decisions by our Court of Appeals which provide a rule by which the case at bar may be decided. These cases are Town of Brookhaven v. Smith, 188 N. Y. 74, 80 N. E. 665, 9 L. R. A. (N. S.) 326, 11 Ann. Cas. 1, and Barnes v. Midland R. R. Terminal Co., 193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962. In the former case it was held that the defendant owner of the upland had the right to erect a pier or dock across the tideway and lands under water so as to make available his long-recognized right of access to the navigable water, and this notwithstanding a grant of the land under water to the plaintiff in fee. In the latter case it was held that the public had a right of passage over the land between high and low water marks, usually spoken of as the foreshore, and that the upland owner must exercise his right to build a wharf or dock in a reasonable manner, so as not to interfere unnecessarily with the public's right of passage. The Barnes Case was carried on appeal to the Court of Appeals by permission; the Appellate Division certifying to the Court of Appeals the following question:

"At the time this action was begun was there any right in the public to pass over the beach between high and low water mark at the defendant's summer resort known as Midland Beach?"

This question was answered in the affirmative. In that case the defendant claimed the foreshore under a patent; but it was held that the patent conferred no rights upon the defendant which it did not have as a littoral proprietor, and hence the case must be regarded as one not involving the question of rights under a patent.

[1] So, in the observations and deductions which I am about to make, I must be considered as speaking of tidal lands of the state for

which no patent has been issued. The Barnes Case recognized a public right of passage over all lands over which the tide ebbs and flows. A public right of passage includes, not only the right to pass on foot, but also, wherever it is physically possible, with vehicles, including vehicles drawn or propelled by horse or other motive power. In other words, as I interpret the Barnes Case, it recognizes that a beach between high and low water marks constitutes a sort of natural public highway, and, although it may not be subject to all the incidents of a regularly established public highway, it is subject to the right of the public to travel over it by all means used on the public highways of the state.

I also think the Barnes Case is authority for the proposition that the people hold the fee title to such tidal lands in their sovereign capacity in trust for the benefit of the public, or, in other words, that this right of public passage over tidal lands is of the same nature as the jus publicum of the ancient English common law, a term which has, I admit, been usually applied to the right of navigation upon navigable waters, but which, under the Barnes Case, seems also applicable to the right of passage over tidal lands. This right of passage, whether recognized by the old common-law writers and decisions or not, but which has been exercised from time immemorial over tidal lands, whether in public or private ownership, is of such a nature that it cannot be regarded as having had its origin in the jus privatum of the crown. Hence the only possible conclusion is that it is a part of the jus publicum, although it may not, perhaps, until recently have been judicially recognized. See R. I. Motor Co. v. City of Providence (R. I.) 55 Atl. 696.

Under the Brookhaven and Barnes Cases, furthermore, it would appear that the common-law distinction between jus privatum and jus publicum is not now recognized in this state. Thus in the Barnes Case it was said:

"It is clearly pointed out in the Brookhaven Case that the rigid rules of the common law of England relating to littoral and riparian rights are not adaptable in every particular to our political and geographical conditions; * * * that the jus privatum of the crown, by which the sovereign of England was deemed to be the absolute owner of the soil of the sea and of the navigable rivers, was totally inapplicable to the conditions of our colonies when the common law was adopted by them, and that this right, from the first settlement of our province, seems to have been abandoned to the proprietors of the upland, so as to have become a common right and thus the common law of the state. * * * Except in so far as the jus privatum of the crown has devolved upon littoral and riparian owners, that right now resides in the people in their *sovereign* capacity."

From this it would seem to follow that whatever rights the state retains in the tidal lands, whether originally derived from the jus privatum or the jus publicum, are now held by the state, not in a private or proprietory capacity, but as sovereign, and hence in trust for the public, the same as the king formerly held title to those rights in lands under water known as the jus publicum.

Coming now to the consideration of the claims of the defendants under the patents above referred to, it is not necessary to determine whether or not the state has power to grant tidal lands to private individuals or corporations, so as to extinguish this public right of pas-

sage. At common law the crown had no separate power to surrender the jus publicum, but could do so only in conjunction with the Parliament. People v. N. Y. & S. I. Ferry Co., 68 N. Y. 71, 77.

"Public grants to individuals under which rights are claimed in impairment of public interests are construed strictly against the grantee, for it is reasonable to suppose that if they were intended to have this operation, the intention would have been expressed in plain and explicit language." Id.

[2] So far as the Weidman grant is concerned, under which the defendants other than the defendant Huber claim, the public's right of passage is expressly reserved. The grant to the defendant Huber purports to give and grant unto her, her heirs and assigns, certain land under water and between high and low water mark, described by metes and bounds. It contains no habendum clause. There are no restrictions upon the grant; but on the other hand, there are no words to indicate any intention to surrender or extinguish the public right of passage. Hence I conclude that her grant does not operate to deprive the public of such right. I do not hold that the grant is void, but merely that it is to be construed as subject to the public right aforesaid.

[3, 4] The defendants claim that they are entitled to maintain the present structures on the foreshore, of which complaint is made, because the land whereon they stand was once all upland, and because the receding of the line of high water has, as they claim, been due to avulsion, and not to erosion. The defendants all claim their respective interests in the upland under certain colonial patents issued to the town of Gravesend. These patents bounded the land granted on the south side by the "Maine Ocean." This, of course, meant to high-water mark; and under well-settled rules of law the patentees and their successors in title acquire whatever might be added to the upland by accretion and would lose whatever might be taken away by erosion.

Accretion and erosion are gradual processes. Avulsion, on the other hand, if that term be applicable to a case where soil is washed away from the land of one owner without being deposited upon that of another (see Angell on Tide Waters [2d Ed.] p. 269; 3 Washburn on Real Property, § 1886; 1 Am. & Eng. Ency. of Law [2d Ed.] p. 471, note), is a sudden pushing back of the shore line due to or effected by a violent storm. The evidence shows that in 1855–56 high-water mark at the location in question was near the southerly side of Surf avenue; that thereafter there was an accretion until in 1900 high-water line was distant from Surf avenue from about 900 to 1,000 feet. Then it receded some 200 or 250 feet between 1900 and 1902. Between 1902 and 1906 about 100 feet were regained. Since 1906 the changes have been slight. These encroachments of the sea indicate to my mind the operation of erosion rather than that of avulsion.

There is, however, testimony of some sudden changes, only two of which are definitely fixed as to dates, one since the survey of the mean high-water line of 1913, as shown by plaintiff's Exhibit 12, and one in 1903 to 1904. It does not appear in either of these cases that the washing away of the land was perceptible to one standing by and watching the process, and I very much doubt if I would be justified on the evi-

dence in holding that there was at any time an avulsion. See Philadelphia Co. v. Stimson, 223 U. S. 605, 624, 32 Sup. Ct. 340, 56 L. Ed. 570 et seq.

[5] It is not necessary, however, to determine whether the high-water mark was forced back from where it was in 1900 to its position in 1913 by avulsion or erosion. Although, where the shore recedes as the result of avulsion, the boundary of the littoral proprietor may not change, the public has the same right of passage over the new foreshore as it had over the old—else an avulsion might cut off the public right of passage altogether. This will be yet more evident, when we consider that this public right of passage is of the same nature as the public right of navigation in navigable waters, which, all will agree, would not be lost by any change in the shore line or lines, however sudden. The practical result of the doctrine that title is not lost by avulsion so far as beach lands are concerned is that should the land reappear within the limits of the former boundaries the littoral proprietor may reclaim it. As authority for these propositions, see Mulry v. Norton, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206.

[6, 7] From the foregoing considerations it follows that the structures which encroach upon the beach in front of the defendants' upland other than the pier and proper approaches thereto, and possibly the jetty, are public nuisances, and should be abated as such. They are "purprestures," a term defined by Littleton as "clandestine encroachment or appropriation upon lands or water that should be common or public" (Co. Litt. 277b), because they encroach upon what, so far as the right of passage is concerned, is to be considered for practical purposes as a public highway. The public has the right to pass over the foreshore, between mean high-water mark and mean low-water mark, at any point, and at all times of day or night, on foot or in vehicles, and to do so on dry ground, except when the state of the tide makes this impossible, subject only to the right of the owner of the upland to maintain a pier or dock and suitable approaches. The photographs put in evidence on the part of the plaintiffs and the defendants clearly show that the defendants' structures seriously interfere with the public rights in this respect. Probably it would always be possible for persons in bathing suits to pass over the beach, outside of the obstructions, as is indicated in some of the photographs; but the defendants are not entitled to require the public to exercise its rights in that costume. So it might also be possible to drive about among the spiles used in the support of the defendants' structures with a dump cart; but the public is not limited to that means of vehicular traffic or agency of user.

It may be observed, in conclusion, that in the absence of evidence to the contrary the condition shown by the photographs must be deemed to have continued to the time of the trial, and the plaintiffs are entitled to a judgment according to the facts as they existed at that time.

Judgment will therefore be rendered for the plaintiffs, enjoining the defendants from maintaining the following structures, namely: The fences or barriers at either side of Steeplechase Park, which are owned

or used by any of the defendants in this action, the luncheon pavilion on the Huber property, and the platform connecting same with the pier, the roller coaster and machine horse railway, in so far as these structures or any of them project beyond the present mean high-water line, which will be decided to be the same as shown on plaintiff's Exhibit 12, unless on the settlement of the judgment it shall be made to appear otherwise. The pier may remain, but suitable means of free passage under or around it must be maintained, and the pipe underneath it must be removed, if it interferes with such passage at any state of the tide. The jetty at the westerly side of the Huber property, constituting, as it does, a protection both to the beach and the upland, may remain, provided that convenient means are provided for passing over it or around the landward end for foot passengers and vehicles, which passage must be left open for all persons freely to travel over. The walk known as "Tilyou's Walk" constitutes a proper approach to the pier, and may remain, provided that a suitable and convenient means for passage underneath it, by persons on foot and for vehicles at all states of the tide, is maintained.

Submit decision and judgment accordingly, giving notice of settlement. Requests to find may be submitted on or before October 6th.

(81 Misc. Rep. 654.)

COLORADO & S. RY. CO. v. BLAIR et al.

(Supreme Court, Special Term, New York County. July, 1913.)

1. PLEADING (§ 64*)—DUPLICITY—PARTIES—TRUSTEES.
A complaint for specific performance of a contract for the sale of corporate stock, which also joins therein trustees under a mortgage covering the stock, for the purpose of compelling them to execute releases from the mortgage, the execution of which is necessary to enable plaintiff to secure a clear title to the stock to be conveyed, states but a single cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134–137; Dec. Dig. § 64.*]

2. SPECIFIC PERFORMANCE (§ 127*)—PARTIES—NATURE OF RELIEF SOUGHT.
Where a decree requiring the execution of such releases had already been secured in an action against the trustees for that purpose, the execution and delivery of the releases were merely ministerial acts, which could be required in the action for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 406–411; Dec. Dig. § 127.*]

3. ACTION (§ 50*)—MISJOINDER OF PARTIES—INTERESTED PARTIES.
In equity the joinder of defendants who are interested in some phase of the action and are proper or necessary for a complete determination thereof does not constitute a misjoinder of causes of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511–547; Dec. Dig. § 50.*]

4. SPECIFIC PERFORMANCE (§ 106*)—PARTIES—BONDHOLDERS.
The holders of bonds secured by mortgage upon corporate stock, which the trustees under the mortgage have already been directed to release in an action brought for that purpose, are not proper parties in an action to compel the specific performance of a contract for the purchase

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the stock, in which the trustees are joined merely to secure the execution and delivery of the releases.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342–351; Dec. Dig. § 106.*]

5. RAILROADS (§ 169*)—MORTGAGES—POWERS OF TRUSTEES.

The agency of trustees for the bondholders of a railroad is a special, not a general, agency, and is limited to the powers conferred upon the trustees by the mortgage securing the bonds.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536–548; Dec. Dig. § 169.*]

6. RAILROADS (§ 169*)—MORTGAGES—POWERS OF TRUSTEES—RELEASE OF SECURITIES.

A clause in a mortgage securing railroad bonds, which authorized the trustees to release any portion of the premises covered thereby, not requisite for the use of the railroad, and parts of tracks, sidings, or roadway which have ceased to form any part of the railroad as operated, does not authorize the trustees to release stock of another railroad company owned by the mortgagor; and therefore the company cannot maintain an action for the specific performance of a contract for the sale of that stock upon the execution of a release thereof by the trustees.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536–548; Dec. Dig. § 169.*]

Action by the Colorado & Southern Railway Company against De Witt C. Blair and others to compel the specific performance of a contract for the purchase of corporate stock. Defendants' demurrer to the complaint sustained.

A. C. Rearick, of New York City, W. P. Clough, G. H. Dorr and Kenneth B. Halstead, both of New York City, for plaintiff.

Byrne & Cutcheon, F. W. M. Cutcheon, Wm. R. Begg, and Harrison Tweed, all of New York City, for defendants Blair & Co.

PAGE, J. This is an action to compel specific performance of a contract for the sale of certain shares of stock by the plaintiff to the defendants, who are copartners, doing business under the firm name and style of Blair & Co. The defendants have demurred to the complaint upon the grounds: (1) That there is a defect of parties defendant; (2) misjoinder of causes of action; and (3) that the complaint does not state facts sufficient to constitute a cause of action against them.

The complaint, after setting forth the status of the several parties, alleges that the plaintiff corporation executed two mortgages upon its property to secure the payment of certain bonds, of which mortgages the Central Trust Company was trustee for the bondholders, but later the Equitable Trust Company of New York was substituted as trustee under the first mortgage. It alleges that the Colorado Midland Company is a corporation of the state of Colorado owning and operating a certain railroad in that state; that certain bankers in New York acquired all the stock of the Colorado Midland Company, and entered into an agreement with the Central Trust Company whereby all the stock of the Midland Company was transferred to the Central Trust Company, which issued two beneficial interest certificates, each representing a one-half interest in the stock of the Colorado Midland

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company. One of these certificates was issued to the plaintiff and the other to the Denver & Rio Grande Railroad Company. The plaintiff immediately pledged its said certificate with the Central Trust Company, then trustee under its first mortgage, and a few years later assigned all its interest in the said stock and certificate to the Central Trust Company as trustee under its second mortgage, but subject to the lien of its aforesaid first mortgage.

The defendants, under the name of Blair & Co., on July 1, 1911, agreed to purchase the plaintiff's right, title, and interest in the stock of the Colorado Midland Company. By the said agreement it was provided that the—

"Colorado & Southern Railway Co. will forthwith upon the release of said beneficial certificate from the lien of said mortgage, by proceedings effectual in law and equity to accomplish such release, so that said certificate and all of the rights evidenced thereby shall be free and clear of all incumbrances created or suffered by the Colorado & Southern Railway Company, deliver to Blair & Co. said beneficial certificate duly indorsed in blank for transfer and an assignment to Blair & Co.," etc.

"Simultaneously with the delivery of said beneficial certificate as hereinabove provided, Blair & Co. will pay to the Colorado & Southern Railway Company the sum of one hundred and fifty thousand dollars ($150,000) in cash."

The contract contains further provisions that unless the stock be tendered to Blair & Co. within one year from July 1, 1911, Blair & Co. may, at their option, by notice in writing, terminate the contract, and, if the Colorado & Southern Railway Company after due effort made in good faith to obtain the release of the certificate from the liens of the mortgages shall be precluded from doing so by a final decree of court, the said Colorado & Southern Railway Company shall be relieved from making the tender and delivery thereof.

The plaintiff requested the trustees under the mortgages to release the certificates pursuant to their contract with Blair & Co., which was refused, whereupon the plaintiff, at the request of Blair & Co., instituted an action in the Supreme Court of New York county against the said trustees, in which it was decreed that the Equitable Trust Company, as trustee under the plaintiff's first mortgage, upon payment to it as trustee of the sum of $150,000, to be held upon the trusts declared in the said mortgage, should release the beneficial interest certificate from the mortgage and deliver it to the plaintiff, to enable the plaintiff to make delivery of the same to the purchaser. The decree likewise directed the Central Trust Company, as trustee of the second mortgage, to release the certificate from the lien of the second mortgage upon delivery to it of an instrument conveying to it the plaintiff's equity in the aforesaid $150,000.

The complaint further alleges that on June 25, 1912, the plaintiff procured releases from the trustees pursuant to the decree releasing the certificates from the liens of the mortgages, and tendered to Blair & Co. the beneficial interest certificate duly indorsed in blank for transfer, together with the releases from the mortgages aforesaid and an assignment to Blair & Co. of all the plaintiff's right, title, and interest in and to the stock of the Colorado Midland Company, and demanded of Blair & Co. the purchase price of $150,000, but Blair & Co. refused

to accept the tender and make payment. It is alleged that the plaintiff has always been and now is ready and willing and able to make and transfer to Blair & Co. a valid unincumbered title to the beneficial interest certificate, etc. Then follow allegations of facts to show that a money judgment would be inadequate and a demand for judgment that Blair & Co. be compelled to accept the plaintiff's tender and pay the purchase price and specifically perform their contract, and that the defendants Equitable Trust Company and Central Trust Company execute and deliver the releases aforesaid upon deposit with them of $150,000 and assignment of the plaintiff's interest therein.

[1, 2] I am of the opinion that the complaint states but a single alleged cause of action, namely, one against Blair & Co. for specific performance of their contract, and that the trustees under the mortgages are joined as proper parties in order to accomplish by a single decree a complete settlement of the matter. The relief asked for against them is incidental to the main purpose of enforcing specific performance, which cannot be done without the execution and delivery by the trustees of the releases demanded. A decree has already been entered in this court in a separate action, directing them to perform the said acts. The judgment roll in the former action is made a part of the complaint in this action in order to show that they are bound to perform the acts and to obviate the necessity of going into the merits of that question. The execution and delivery of the releases are merely ministerial acts which must be done in the course of the proper performance of the contract, and for this purpose alone the trustees are made defendants.

[3] It is well-settled law that in equity suits the joinder of defendants who are interested in some phase of the action and are proper or necessary for a complete determination thereof does not constitute a misjoinder of causes of action. Burns v. Niagara L. & O. P. Co., 145 App. Div. 280, 130 N. Y. Supp. 54; International Paper Co. v. Hudson River Water Power Co., 92 App. Div. 56, 86 N. Y. Supp. 736; Townsend v. Bogert, 126 N. Y. 370, 27 N. E. 555, 22 Am. St. Rep. 835; Hall v. Gilman, 77 App. Div. 458, 79 N. Y. Supp. 303.

[4] The holders of the bonds secured by the mortgages of the plaintiff to the Central Trust Company and Equitable Trust Company are neither necessary nor proper parties to this action. Neither the trustees nor the bondholders are parties to the contract which it is sought to have specially performed. In order to be able to perform that contract it was necessary for the plaintiff to secure the release of the certificate from the lien of the mortgages. In the prior action brought by this plaintiff against the trustees, the release from the lien of their mortgage of the beneficial interest certificate herein involved was decreed. Whether that decree is binding upon the bondholders so that a release from the trustees will be "effectual in law and equity," within the terms of the contract with Blair & Co., herein sought to be enforced, is a matter which must be determined in deciding whether or not the complaint states a cause of action against Blair & Co. If the former decree binds the bondholders, then they are not necessary parties to this action, as their rights in the matter have already been determined. If the former decree does not bind them because they were

not parties to the former action, then no cause of action is stated in this complaint against any of the defendants. The question, therefore, is not whether the bondholders are necessary parties to this action, but whether they should have been joined in the former action against the trustees. The demurrers on the grounds of defect of parties and misjoinder of causes of action are accordingly overruled.

In determining the sufficiency of the third ground of demurrer, that the complaint does not state a cause of action against the demurring defendants, the principal question involved is whether the title to the certificate tendered by the plaintiff to Blair & Co. was sufficient. This depends upon whether a release of the certificate from the lien of the mortgages, executed by the trustees pursuant to a decree of this court in an action in which the bondholders were not made parties, would bind the bondholders and be a release "effectual in law and equity" within the terms of the contract sought to be enforced. It is claimed by the plaintiff that the trustees in such an action represented the bondholders and had authority to bind them, and the bondholders, therefore, were not necessary parties.

[5] It must be conceded that in some cases the trustee of a railroad mortgage is the agent of the bondholders. His agency is not, however, a general but a special agency, and circumscribed by the terms of the instrument whereby the trust is created. As to all litigation or other matters clearly within the powers and duties conferred upon him by the mortgage, he represents and may act for the bondholders, and they are not necessary parties. The essential question in each case therefore is whether the matter determined is one in which the trustee is expressly or by fair implication authorized to act for the bondholders. If not, then no decree of court in any action in which the bondholders are not parties can affect their rights.

Short, in his work on Railway Bonds and Mortgages, says at section 275:

"A bondholder has a clear right to stand upon his contract, and the trustees have no power or authority to compel him to make a new and different one. * * * Nor has he the power to discharge, change, or compromise the security, which he holds as trustee."

In Thompson on Corporations (2d Ed. § 2593) it is said:

"In order to make the acts of the trustee binding on the bondholders, the trust deed or mortgage by its terms must show that the trustee was authorized to represent the bondholders."

Similarly, the Special Term of this court held in Clark v. St. Louis, Alton & Terre Haute Railroad Co., 58 How. Prac. 21:

"Where a deed of trust directs, in plain terms, in what particular securities funds coming into the hands of the trustees shall be invested and how, until so invested, they shall be held, the court cannot, by its judgment, defeat the intentions of the creator of the trust and the beneficiaries thereunder by directing different investments. Without the consent of those beneficially interested in the trust, investments directed to be made in first mortgage securities cannot be made * * * in those of an inferior lien. For the purpose of securing such change in investment, the trustees do not represent the beneficiaries, and an action to this end cannot be prosecuted in their names; the beneficiaries not being parties defendant, and having no opportunity to be heard in relation to the propriety of granting such relief."

In Miller v. Rutland & W. R. Co., 36 Vt. 452, at page 487, the Supreme Court of that state said:

"We do not hold, nor do we assent to the position taken in the argument by one of the counsel for the defendants, * * * that the trustees have, under their trust, any agency to discharge, change, or compromise the security which they hold as trustees. They are not general agents of the bondholders, but special, and limited to the legitimate purposes of the relation they sustain to the security."

It is clear therefore that no power to release or alter the security of the mortgage or to represent the bondholders in litigation for that purpose exists in the trustees unless it be conferred by the terms of the trust deed. Kerrison v. Stewart, 93 U. S. 155, 23 L. Ed. 843, and Baltimore City v. United Rys. & Elec. Co., 108 Md. 64, 69 Atl. 436, 16 L. R. A. (N. S.) 1006, relied upon by the plaintiff in support of its contention, are both cases which depend upon the peculiar state of facts therein disclosed, and have no bearing upon the general proposition of law. Kerrison v. Stewart was an action to declare a deed of trust for the benefit of creditors void as to a certain creditor. It was there held that, because the trustee was by the terms of the instrument allowed absolute and unqualified discretion in regard to the trust property, its sale and availability for the payment of the debts secured, the creditors could not interfere with him in regard to its management, and that he was intended to be made their representative in all matters relating to it. This is practically a holding that in that particular case the trustee became the general agent of the creditors. It has therefore no application to the facts of the case at bar or any substantially different state of facts. In the second case (Baltimore City v. United Rys. Co., supra) the question was whether the trustees represented the bondholders in an action to release certain property from the security. It was there found that the mortgage contained an express clause giving that power to the trustee, which clause was by reference incorporated into a second mortgage involved. The case is therefore not an authority for the general existence of such a power.

[6] In the case at bar the mortgage deed confers no express authority upon the trustee to change or release the security except that which is contained in article 11, which authorizes the trustee, upon the request of the mortgagor, to release from the lien—

"any portion of the mortgaged premises appurtenant to any line of railroad subjected to the lien hereof or acquired or held by the mortgagor for any purpose incidental to the operation thereon, which, in the judgment of the mortgagor, shall at the time of such release be no longer requisite for use for the purposes for which the same shall have been so acquired or used * * * and likewise any parts of the tracks, sidings or roadway, which may have been thrown out of use and ceased to form part of the railroads operated by the mortgagor. * * *"

The presence of this clause granting a strictly limited power of release demonstrates clearly that there was no intention to confer upon the trustees a general or in any way discretionary power in such matters. It would be impossible to bring the property, which is the subject of this action, within the description of property concerning which

the power is granted by the deed. I am therefore constrained to hold that the deed conferred no power upon the trustees to release the certificate from the lien of the mortgage, or to represent the bondholders in litigation to accomplish that result, and that as to them the decree authorizing and directing the trustees to execute the releases is not binding upon the bondholders. The complaint does not show that the plaintiff has tendered the certificate to the defendant free of the mortgage, and does not therefore state facts sufficient to constitute a cause of action. The demurrer is accordingly sustained, with costs. If the plaintiff desires permission to serve an amended complaint within 20 days, upon the payment of costs, such provision may be made in the interlocutory judgment.

Demurrer sustained, with costs.

(81 Misc. Rep. 685.)

WARNER v. MORGAN et al.

(Supreme Court, Special Term, New York County. July, 1913.)

1. CORPORATIONS (§ 285*)—CONTRACTS—VALIDITY—EMPLOYMENT OF GENERAL MANAGER.

Where the by-laws of a corporation authorized the directors to appoint such agents and employés as they deemed necessary and to fix their salaries and regulate their powers and duties, a contract made by the corporation for the services of a general agent to continue for ten years, if he should live and not be disabled, which services would be of great value to the corporation, was not ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1236–1239; Dec. Dig. § 285.*]

2. CORPORATIONS (§ 393*)—DISCRETIONARY ACTS—REVIEW BY COURT.

The discretionary exercise of corporate powers by a majority of the stockholders of a corporation in the execution of a contract which is not ultra vires nor a fraud on the minority stockholders is not reviewable by the courts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1574, 1575; Dec. Dig. § 393.*]

3. CORPORATIONS (§ 189*)—CONTRACTS—RIGHT TO EQUITABLE RELIEF.

Where, in a stockholder's action to set aside a contract, approved by vote of the stockholders, by which the corporation employed a general agent, the petition did not allege fraud or dishonesty, plaintiff was not entitled to equitable relief.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706–722; Dec. Dig. § 189.*]

4. CORPORATIONS (§ 189*)—ACTION BY STOCKHOLDER—LACHES.

Where, in a stockholder's action to set aside a contract by which the corporation employed a general agent, it appeared that plaintiff had notice of the contract before its ratification by the stockholders and that he delayed nearly two years and accepted dividends which had been greatly increased through services rendered under the contract, the action was barred by laches.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706–722; Dec. Dig. § 189.*]

Action by James Harold Warner against Edwin D. Morgan and another to set aside contracts and for an accounting. Judgment for defendants.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Richard Krause, of New York City, for plaintiff.

William W. Cook, of New York City (R. H. Overbaugh, of New York City, of counsel), for defendant Morgan.

Henry W. Hardon, of New York City (Charles F. Brown, of New York City, of counsel), for defendant Corralities Co.

GOFF, J. This is an action by a stockholder of defendant Corralities Company on behalf of himself and all the other stockholders of the said company who did not consent to the making of either of two contracts between defendants, the Corralities Company and Edwin D. Morgan, dated, respectively, December 7, 1910, and May 8, 1911, to set the said contracts aside and for an accounting by the defendant Edwin D. Morgan of the sums of money which he has received under the said contracts.

In 1900 Mr. Morgan became president of the Corralities Company, a Colorado corporation organized for raising cattle, and continued as such until December 7, 1910, when he resigned and the contract which is the subject of this action was made. When Mr. Morgan became president, the property of the company consisted of an uninclosed tract of land of about 900,000 acres in Chihuahua, Mexico, unproductive, poorly watered, and with an inferior breed of Mexican cattle. The company had a bonded indebtedness of $200,000, drawing interest at 8 per cent. per annum, upon which no interest had been paid, and its interest payment on current loans exceeded its annual profits from its business. During Mr. Morgan's administration the whole ranch was inclosed by a wire fence, numerous wells were driven, the grade of the cattle was improved at least 300 per cent., about 150,000 acres were irrigated, and all these improvements were paid for out of the receipts derived from the sale of cattle, and the corporation's indebtedness was not increased. The bonded debt was refunded and the holders of the old bonds with accrued interest exchanged them for new bonds bearing 4 per cent. interest, payable out of the income to be derived from the property. In 1910 the property was put upon a dividend paying basis, and in 1910, 1911, and 1912 dividends of 2 per cent., 6 per cent., and 6 per cent., respectively, were distributed. It is not denied that during Mr. Morgan's presidency the value of the property was greatly increased.

Upon Mr. Morgan's resignation as president on December 7, 1910, in order to retain his services the stockholders approved on April 11, 1911, at the annual meeting of the company, of a contract executed on the date of his resignation, which provided in substance that Mr. Morgan agreed to serve as general agent of the corporation for ten years, beginning with the year 1911, his duties to be substantially the same as those performed by him as president; and the company agreed to pay him (a) 15 per cent. for the first year and 7½ per cent. for the remaining 9 years of the gross receipts of the company from the sale of live stock; and (b) 10 per cent. of the price at which the whole or any part of the properties of the company should be sold, if sold during said 10 years, and, in case of no sale or only a partial sale being made during 10 years, 10 per cent. of the appraised value of the properties and

any addition or improvements thereto, and it was stipulated that if no sales were made the appraised value of the property should be $2,000,000, and that in case of his death, resignation, or incapacity that said 10 per cent., or $200,000, should be paid to Mr. Morgan or his estate at the time of such death, resignation, or incapacity; and (c) 7½ per cent. of the gross receipts of the company from the sale of farm products, to be paid only, however, in case the receipts from such sale exceeded the cost thereof and 15 per cent. in addition. This contract was modified by a contract executed May 8, 1911, and approved by the stockholders at the annual meeting on April 9, 1912, as follows:

(a) As to the commission to be paid upon the sales of live stock, it provided:

"That in any of said years, when 6 per cent. is not earned or paid on the preferred stock of the company, said commission for that particular year payable to him in accordance therewith shall be only such proportion of such commission for that particular year as the dividend actually earned or paid on the said preferred stock during that year shall bear to 6 per cent., and, if no dividend is earned or paid on the preferred stock in that particular year, then no commission shall be paid to him for that particular year."

(b) In reference to the 10 per cent. commission to be paid upon the sales of the property of the company it provided:

"That said 10 per cent. commission shall not be paid to said Morgan if he resigns within two years from the date of this agreement; and provided further that in case he shall resign at any time between December 7, 1912, and December 7, 1915, then said Morgan shall be paid such proportion of said 10 per cent. commission as the period from the date of this contract to the date of his resignation shall bear to the period of ten years."

The plaintiff claims that this amended contract is ultra vires and unfair. It is not alleged in the complaint that the contract is fraudulent nor collusive nor ultra vires, but by amendment on the trial the plaintiff was permitted to add an allegation of ultra vires. The plaintiff's contentions cannot be sustained.

[1] In the first place the contract was plainly within the powers of the corporation. A corporation which must act through agents has power to employ a general manager. That it may agree to pay him for his services is too clear for argument. Article 3 of the by-laws of the Corralities Company provides that:

"The directors shall have power to appoint such agents and employés of the company as they may deem necessary, and to fix their salaries and regulate other powers and duties."

The plaintiff bases his argument on the assertion that the provision in Mr. Morgan's contract for the bonus of 10 per cent. on the value of the property is a "gratuity" and a "gift" of the corporation's money and relies on the case of Beers v. New York Life Ins. Co., 66 Hun, 75, 20 N. Y. Supp. 788. In that case an action was brought by the former president of the defendant to recover the first quarterly payment of a salary agreed to be paid him under a contract executed at the direction of the company's board of trustees. The plaintiff for many years prior to February 10, 1892, had been president of the defendant company. At a meeting of the board of trustees held on February 8, 1892, at which meeting the board accepted his resignation as president, to

take effect on February 10, 1892, the board authorized an agreement whereby his services in an advisory capacity were to be secured during the remainder of his life upon half pay, viz., at an annual salary of $37,500. Such a contract was made, but the contract, so far as the plaintiff was concerned, was "so far as strength and health might permit," and it should be particularly noticed that all the negotiations leading up to the contract were permeated with the idea that the contract was based upon past services, and the very recitals of the contract itself contain the words, "a proper recognition of such services." This contract was held ultra vires. But the Beers Case is obviously different from that at bar. In the Beers Case the corporation was attempting to provide a salary for a retiring president, not for services to be continued as president, but for such services as might be required, if any. The contract did not depend upon Beers' ability to render any service to the company. The payment to Beers, therefore, was not in consideration for services and was a mere "gift" or "gratuity" and ultra vires. But in the case at bar the corporation is contracting for the services of a general agent to continue for ten years, if he lives and is not disabled. The services to be rendered are of a character which, according to the conceded experience of upward of two years, will be of great value to the corporation. There is nothing in the record to show that Mr. Morgan's compensation was designed as remuneration for past services. The plaintiff argues that the payment on Mr. Morgan's death or incapacity might have been made at any time after January 1, 1911, when the contract took effect, and thus before he had rendered any service. That is true. But it is true of all contracts for hiring when part of the consideration is the insurance of the employé against death or incapacity. The same result attends the common type of contract providing for the payment of a cash or stock bonus to an employé upon entering upon his employment. No case has been found suggesting that compensation of either sort, as part of the consideration to be paid by the employer, is ultra vires. While it is true that on January 1, 1911, the $200,000 might have become payable to Mr. Morgan's estate in case of his death or incapacity on that day, he is now, after a lapse of two years and a half, still living and rendering services to the company, and the plaintiff's contention has become a mere moot point. So also as to the plaintiff's contention that Mr. Morgan might resign at the end of five years and then be entitled to $200,000, just as much as though he continued his services for the full ten years under the contract; that time has not arrived and the event has not occurred. Even if there be merit in this contention, it is prematurely brought and at present wholly academic.

[2, 3] There are a number of cases in the reports where a court has given relief to a minority stockholder complaining of the payment of what were found to be excessive salaries to corporation officers, but these generally were cases either where salaries had been fixed by directors only, without the approval of stockholders, or where salaries had been fixed with the *fraudulent* purpose of coercing the minority by distributing profits in the form of salaries and not as dividends. Where the contract presents only the question of discretion in the ex-

ercise by stockholders of corporate powers, that question is not reviewable by the court.

In Flynn v. Brooklyn City R. R. Co., 158 N. Y. 493, on page 507, 53 N. E. 520, on page 524, the court says:

"As a general rule courts have nothing to do with the internal management of business corporations. Whatever may lawfully be done by the directors or stockholders, acting through majorities prescribed by law, must of necessity be submitted to by the minority, for corporations can be conducted upon no other basis. All questions within the scope of the corporate powers which relate to the policy of adminstration, to the expediency of proposed measures, or to the consideration of contracts, provided it is not so grossly inadequate as to be evidence of fraud, are beyond the province of the courts."

In Continental Ins. Co. v. New York & Harlem R. R., 187 N. Y. 225, 79 N. E. 1026, affirming 103 App. Div. 282, on page 301, 93 N. Y. Supp. 27, on page 39, the court below says:

"A determination by the majority is binding upon the minority of the stockholders unless there is evidence that the act complained of was ultra vires or fraudulent, so that there was an intention of all concerned, including the majority of the stockholders, to defraud the nonassenting stockholders or the corporation, and that the scheme would result in a serious injury to them or to the corporation. To justify the interference of a court of equity, the majority of the stockholders must have been parties to a fraud which would result in an injury to the corporation or the minority stockholders."

In Gamble v. Queens County Water Co., 123 N. Y. 91, on page 99, 25 N. E. 201, on page 202 (9 L. R. A. 527), the court says, by Peckham, J.:

"To warrant the interposition of the court in favor of the minority shareholders, * * * a case must be made out which plainly shows that such action (of the majority) is so far opposed to the true interests of the corporation itself * * * that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities of profitable results to arise. * * * This is no business for any court to follow."

In Colby v. Equitable Trust Co., 124 App. Div. 262, on pages 266, 267, 108 N. Y. Supp. 978, on page 981, affirmed without opinion 192 N. Y. 535, 84 N. E. 1111, the court says:

"When the plaintiff became interested in the Equitable Trust Company, he did so with full knowledge of the fact that the statute commits to the majority stockholders the right to select its officers, dictate its policy, and control its management. If the acts of the majority do not meet with his approval, he has no legal ground of complaint unless he can show facts which, in effect, amount to a fraud against him or bad faith on the part of the majority. A court of equity will interfere in the management of a corporation at the solicitation of a minority stockholder only when his complaint is based upon some illegal or unauthorized act of the majority to his prejudice."

In Leslie v. Lorillard, 110 N. Y. 519, on page 532, 18 N. E. 363, on page 365 (1 L. R. A. 456), the court says:

"In actions by stockholders, which assail the acts of their directors or trustees, courts will not interfere unless the powers have been illegally or unconscientiously executed, or unless it be made to appear that the acts were fraudulent or collusive and destructive of the rights of the stockholders.

Mere errors of judgment are not sufficient as grounds for equity interference, for the powers of those intrusted with corporate management are largely discretionary."

In Schwab v. Potter Co., 129 App. Div. 36, on page 40, 113 N. Y. Supp. 439, on page 442, the court says:

"It is beyond controversy that an act clearly within the powers of the board of directors of a corporation and of the majority of its stockholders will not be interfered with, in the absence of fraud, for the business of the corporation must be conducted by itself and not by the courts."

In the case at bar the plaintiff does not allege fraud or dishonesty and in his argument expressly disclaimed any such charge. There is therefore, in the light of the authorities, no ground for equity to interfere.

For services now continuing about two years and a half, Mr. Morgan has received about $32,000. Due to the Mexican disorders it has become problematical whether he will receive much, if any, current salary during the remainder of his ten years of service. It may turn out that his only other compensation will be $200,000 at the end of ten years, the equivalent of about $125,000, present value, if paid in a lump sum when the contract began. And it cannot reasonably be claimed upon all the evidence of Mr. Morgan's services to the company and his acknowledged success and ability in handling its affairs that such compensation is excessive. This court is of the opinion that the interest of all the stockholders, including the plaintiff, requires that the contract herein questioned should be sustained. The contract is exceptionally favorable to the company, since it relieves it from the payment to Mr. Morgan for current services except out of current profits remaining after payment of interest and dividends.

[4] Finally the plaintiff's laches should be a bar to this action. The original contract, since modified to the advantage of the company and the stockholders, took effect January 1, 1911. The plaintiff had notice of it before it was ratified by the stockholders at their meeting in April, 1911. So long as the company paid dividends under Mr. Morgan's management, the plaintiff contentedly received them. The action was not begun until December 5, 1912, and after the revolution in Mexico had made the payment of dividends inexpedient. In other words, this action was delayed until Mr. Morgan had rendered services for nearly two years under the contract, had admittedly through his efforts added greatly to the value of the company's property, and after the position of all the parties to this action had become materially changed. Having notice of the contract, it was the plaintiff's duty to act promptly if he believed that he was aggrieved. Vigilantibus non dormientibus æquitas subvenit.

Judgment for the defendants, dismissing the complaint, with costs to each defendant.

Judgment for defendants, with costs.

(81 Misc. Rep. 664.)

MORAN et al. v. VREELAND et al.

(Supreme Court, Special Term, New York County. July, 1913.)

1. CORPORATIONS (§ 320*)—DIRECTORS—NONFEASANCE—NATURE OF LIABILITY.
Liability of directors of a corporation for nonfeasance is purely a legal one for damages due to the corporation, and hence stockholders as such have no capacity to sue therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426–1431, 1433–1439; Dec. Dig. § 320.*]

2. CORPORATIONS (§ 320*)—DIRECTORS—NONFEASANCE—STOCKHOLDERS—RIGHT TO SUE.
Stockholders of a corporation may sue in equity to enforce the rights of the corporation against directors and others guilty of having depleted, wasted, or misappropriated the corporation's property only after the corporation or its legal representatives have refused to commence and continue the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426–1431, 1433–1439; Dec. Dig. § 320.*]

3. CORPORATIONS (§ 320*)—STOCKHOLDERS—SUIT AGAINST DIRECTORS.
Where stockholders have been forced to sue in equity for nonfeasance and breach of duty of directors, and the corporation and its representatives have refused to sue, the stockholders may continue the suit and obtain complete relief, though the corporation itself might have maintained an action at law therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426–1431, 1433–1439; Dec. Dig. § 320.*]

4. CORPORATIONS (§ 331*)—TRANSFER OF ASSETS—LEASE—SUIT AGAINST DIRECTORS—COMPLAINT.
Where all the property of a corporation was delivered to two other corporations under a lease, a complaint against directors of the lessees failing to allege that they had been guilty of any affirmative act of misappropriation, or that any property of plaintiff's corporation had come into their possession and been wasted or converted by their acts and the complaint as to them charging mere nonfeasance, it did not state a cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1448, 1449; Dec. Dig. § 331.*]

5. CORPORATIONS (§ 341*)—LIABILITY OF DIRECTORS—RIGHT TO SUE.
Where stockholders of a lessor street railroad corporation sued the directors of the lessee corporations to recover for loss of the leased property, they could not recover on the theory that the contract of defendant directors with their respective corporations as to their duties inured to plaintiff's benefit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1479–1484; Dec. Dig. § 341.*]

6. CORPORATIONS (§ 357*)—DIRECTORS—NONFEASANCE—STOCKHOLDERS' SUIT—PARTIES—RECEIVERS.
In a stockholders' suit to recover damages against directors of other corporations to which the assets of plaintiff's corporation had been leased, the receivers of the lessee corporations having no connection with the default alleged were not proper parties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1500, 1501; Dec. Dig. § 357.*]

7. ACTION (§ 50*)—JOINDER—PARTIES.
A stockholders' suit against directors to recover for nonfeasance and loss of the property transferred to other corporations under lease alleged

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a cause of action for defendants' failure to repair the road belonging to plaintiffs' corporation, pay taxes, assessments, and license fees, and to refund or repay the bonded indebtedness of the corporation. *Held*, that those defendants who were not directors at the time when such repairs should have been made or taxes paid, could not be affected by such cause of action, and hence their demurrer to the complaint for improper joinder of causes of action would be sustained, as such causes did not affect all the parties to the suit.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511–547; Dec. Dig. § 50.*]

Action by Anson B. Morgan and others, as stockholders of the Central Park, North & East River Railroad Company, against Herbert H. Vreeland and others. On demurrers to complaint. Sustained in part, with leave to file an amended complaint as to certain of the defendants within 20 days.

Strong & Mellen, of New York City, for plaintiffs.

James L. Quackenbush, of New York City, for defendants Anderson, Fahnestock, Meade, Gannon, Warren, Smith, Guggenheim, Shonts, Belmont, Vreeland, T. F. Ryan, Sayre, Moorehead, Berwind, and Robinson.

MacFarland, Taylor & Costello, of New York City, for defendant Crimmins.

Cravath & Henderson, of New York City, for defendants Schiff and Cravath.

William M. Coleman, of New York City, for defendants Root and Starrett.

PAGE, J. This is an action by the plaintiffs, as stockholders of the Central Park, North & East River Railroad Company, hereinafter called the Central Company, to compel the defendants to account for the property of that company which, it is alleged, was under their management and control during a number of years. There are 35 individual defendants, comprising the men who have been directors of the Central Company, the Metropolitan Street Railway Company, and the New York City Railway Company, or of at least one of the said companies, at various times from 1892 until 1912. The Central Company is joined as a defendant for the reason, as alleged, that a demand was made by the plaintiffs upon that company that it commence and prosecute this action, and it has refused and neglected so to do, for which reason the plaintiffs are suing on behalf of themselves and all other stockholders of the Central Company similarly situated. The defendants have demurred separately to the complaint, the principal grounds of demurrer being: First, that the complaint does not state facts sufficient to constitute a cause of action; second, misjoinder of causes of action; third, defect of parties defendant; fourth, that the plaintiffs have not legal capacity to sue. The issues of law raised by the several demurrers have been brought on for argument as contested motions under section 976 of the Code of Civil Procedure.

The complaint alleges: That the Central Company was the owner of franchises, rights, and privileges from the year 1860 until November 14, 1912, and laid and maintained certain street railway lines in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the city of New York, and was possessed of certain real and personal property and franchises pursuant to an act of the state Legislature and resolution of the common council of the city of New York. That on or about December 1, 1872, the Central Company issued bonds for the payment of $1,200,000, payable December 1, 1902, bearing interest semiannually at 7 per cent. per annum secured by a mortgage to the Farmers' Loan & Trust Company as trustee upon all the "property, premises, rights, privileges, and franchises" of the said Central Company, in which mortgage it was provided that, if default should be made in the payment of principal or interest of the said bonds for 60 days, the said trustee should foreclose the mortgage, and there was a further provision for payment of all future taxes, assessments, and liens upon the property by the Central Company. That on October 14, 1892, the Central Company leased all of its property and franchises, except its franchise to be a corporation, to certain companies which were finally merged into the Metropolitan Street Railway Company, hereinafter called the Metropolitan Company, which company entered into possession and operation thereof. That on February 14, 1902, the Metropolitan Company leased all of the said property and franchises of the Central Company to the New York City Railroad Company, hereinafter called the City Company, and that the City Company assumed all the obligations of the lease of October 14, 1892, and entered into possession and control of the property and franchises of the Central Company. That the lease of October 14, 1892, provided, among other things, that the lessee should have the exclusive right to manage the demised property, determine rates, charge and collect tolls, and appropriate the same to its own use, and to exercise all the powers and authority of the lessor, and all of its rights and easements convenient and necessary to the construction, maintenance, and management of the railroads. For the purpose of enabling the lessee to enjoy the said property and privileges the lessor appointed the lessee its attorney irrevocable to do all things in the furtherance of the objects set forth in the lease in the name of the lessor, but at the expense of the lessee. That the lease of October 14, 1892, contained a further provision that all the debts and liabilities of the lessor are assumed by the lessee and—

"whenever any of the funded debt of the party of the first part [Central Company] shall become due and payable, the party of the first part shall upon the request of the party of the second part [lessee] provide for the renewal thereof by the issue or renewal of bonds in the customary form, and upon like request shall secure the same by mortgage or mortgages upon all its property and franchises."

That neither the Metropolitan nor the City Company, which succeeded to and assumed the rights and liabilities of the Metropolitan Company under the said lease, ever requested the Central Company to provide for the renewal of the funded debt of $1,200,000 or any part of it. That during 1893 and thereafter until July 11, 1908—

"all corporate action of defendant Central Company was absolutely controlled and dictated, as well as every and all action on the part of its board of directors, by the Metropolitan Company * * * and the City Company; substantially the same individuals, all being defendants herein, constituted and were the directors and officers of the Central Company and the Metropolitan

Company from on or about October 14, 1892, until on or about February 14, 1902, and thereafter of the Central Company, Metropolitan Company and City Company."

That the defendants as directors of the three companies failed to provide for the renewal, refunding, or payment of the said bonds and mortgage, and allowed it to remain outstanding and overdue for a long period. That on March 21, 1902, the Metropolitan Company issued its refunding bonds secured by a mortgage to the Morton Trust Company as trustee, which was a lien upon its rights as lessee under the Central lease, and in July, 1902, the directors of the Metropolitan Company adopted a resolution requesting the said trustee under its refunding mortgage to certify and deliver to the Metropolitan Company $1,200,000, face amount, of the said refunding bonds of the Metropolitan Company against the deposit with the trustee of $1,200,000 in cash to be used by it in taking up the entire issue of Central Company bonds above mentioned. That the $1,200,000 cash was so deposited with the trustee and was used by it to purchase the Central Company bonds which were stamped:

"Nonnegotiable. Held in trust for the purposes declared in the refunding mortgage of the Metropolitan Street Railway Company."

It is alleged that in an action brought by the Farmers' Loan & Trust Company to foreclose the Central Company mortgage it was adjudged and determined that the deposit of the Central Company bonds and stamping of them as aforesaid was not a payment of the bonds, and that they remained an outstanding obligation of the Central Company and secured by its mortgage of December 1, 1872. It is further alleged that the defendants, in violation of the terms of the lease with the Central Company, allowed the property of that company to become out of repair, and a large part thereof to be lost and destroyed, and allowed taxes, assessments, and license fees to remain unpaid. There is an allegation that the defendants were skilled in such matters and well knew the result of their neglect and mismanagement. That as a result of the above the mortgage of the Central Company to the Farmers' Loan & Trust Company was foreclosed on December 16, 1911, and all its property sold to one Edward Cornell for $1,673,000, subject to a large amount of unpaid taxes and other incumbrances.

Then follows an allegation that in 1907 both the Metropolitan and City Companies went into the hands of receivers in insolvency, and the receivers under direction of the court refused to adopt the Central Company lease, and ceased to operate its railroad on August 6, 1908, and turned over to the Central Company all of its property which could be identified, which included no cars or equipment, and consisted of merely the real estate and tracks, with a little office furniture and some records. That as a result the Central Company has been deprived of its property, and burdened with large debts, and had its property returned in a dilapidated condition, to its damage in the sum of $2,000,000.

The relief demanded is that the defendants and each of them be required to account with respect to the administration of the trusts reposed in them as directors, and under said leases, that their liabil-

ity to the Central Company and its stockholders be determined, and that a judgment be entered against them severally requiring them to pay to the Central Company the value of all its property lost or wasted and all damages sustained by reason of their neglects, nonfeasances, and breaches of trust.

The demurring defendants may be divided into two classes, namely, those who were directors of the Central Company at the time of and subsequent to the falling due of the bonds of that Company on December 1, 1902, and those who were never members of the board of directors of the Central Company, but are being sued as directors of the Metropolitan and City Companies.

[1] As to the first class, those defendants who were directors of the Central Company, the demurrers on the ground that the complaint does not state facts sufficient to constitute a cause of action must be overruled. The cause of action set forth is not strictly one for an accounting, for the reason that it is not alleged that any specific property of the corporation came into the hands of the Central Company directors for which they are accountable. On the contrary, it appears that all the property of that company was lawfully delivered over to the Metropolitan and City Companies pursuant to the lease of October, 1892. The allegations of the complaint merely set forth a liability on the part of these directors for negligence in failing to enforce the terms of the lease, failing to compel the refunding or payment of the bonded indebtedness of the company, the payment of taxes, fees, and assessments upon its property, and the proper maintenance of the road and equipment. These acts were acts of nonfeasance giving rise to a purely legal liability for damages. O'Brien v. Fitzgerald, 6 App. Div. 509, 39 N. Y. Supp. 707, affirmed on opinion below 150 N. Y. 572; Asphalt Const. Co. v. Bouker, 150 App. Div. 691, 694, 135 N. Y. Supp. 714.

[2] But these plaintiffs as stockholders have no standing in a court of law to maintain such an action. It is only after the refusal of the corporation or its legal representatives to commence and continue the action that the stockholders may come into equity as the equitable owners of an undivided share of the assets of the corporation and enforce the rights of the corporation against the directors or any others who have depleted, wasted, or misappropriated its property and to this end they may prosecute any cause of action whether legal or equitable. People v. Equitable Life Assurance Society, 124 App. Div. 714, 734, 109 N. Y. Supp. 453. It has been frequently held in this state that a court of equity, after it has once acquired jurisdiction of the action will compel directors to answer in damages for their failure to properly protect and care for corporate assets, notwithstanding the fact that an action at law for the same damages might have been maintained. In Bosworth v. Allen, 168 N. Y. 157, 167, 61 N. E. 163, 165 (55 L. R. A. 751, 85 Am. St. Rep. 667), which was an action by a corporation against its directors for an accounting of property in their possession and control which was misappropriated and wasted by them in conspiracy with others, the Court of Appeals held, Mr. Justice Vann writing:

"Through an action for an accounting a court of equity has power to discover and fix the value of all assets improperly withheld pursuant to the conspiracy, and of all property lost and damages caused by the wrongful acts of the defendants, and to compel them jointly and severally to pay the aggregate amount over to the plaintiff. * * * The defendants violated their duty as trustees, and equity will award complete relief in a single action for all the consequences of such violation, even if a part thereof might be had in an action at law."

[3] Similarly in the case at bar the plaintiffs have been forced to come into equity for their relief, and their action against the directors of the Central Company to compel them to answer for their negligence and breach of duty will be sustained in equity under the allegations of the complaint, though an action at law for the same relief might have been maintained by the corporation whose stockholders they represent.

[4] The demurrers of those defendants who were never directors of the Central Company, but are sued as directors of the Metropolitan and City Companies, are sustained. I am of the opinion that as to them the complaint does not state facts sufficient to constitute a cause of action. The relationship between the Central Company and the Metropolitan and City Companies was that of lessor and lessee. The acts set forth in the complaint were breaches of the lease and covenants between these corporations, by reason of which an action would lie against the lessee companies by or in the name of the lessor. It might even be maintained that the Metropolitan and city companies occupied a fiduciary relationship toward the Central Company; but it is quite a different matter to charge the directors of those companies with personal liability to the lessor for breaches of the lease. They owed no duty to the Central Company or to its stockholders. A director's relationship to his corporation is that of a quasi trustee, for which reason he is obliged to use extraordinary diligence in managing its affairs, and may be answerable in damages for his negligence in failing to act when action on his part was necessary and prudent. But as to third parties a director is merely the agent of his corporation. His title and possession of the property which he controls and his acts are all those of the corporation which he represents as agent. Like any agent, he may be held liable to third parties for his torts and crimes; but he does not personally assume the duties which his corporation owes to others, and where he has assumed no duty by contract or otherwise he is not answerable for his nonfeasance to any but his principal, the corporation of which he is the servant. It is not alleged in the complaint that any of the directors of the Metropolitan or City Companies have been guilty of any affirmative act of misappropriation, or that any property of the Central Company has come into their personal possession and been wasted or converted. The specific acts complained of, and for which redress is demanded, are all acts of nonfeasance in failing to renew the bonds of the Central Company, failing to pay taxes and assessments, and failing to repair the road and equipment and maintain it in good order. The only obligation which the Metropolitan or City Companies owed to the Central Company

to perform these acts arose out of their lease and covenants so to do. The directors of the lessee companies were not parties to the lease. They assumed no obligation to the lessor by contract. Neither they nor their principals, the lessee corporations, owed any duty to the Central Company independently of the contract, so far as the plaintiffs are concerned.

[5] The plaintiffs have attempted to spell out a cause of action against these directors for their nonfeasance by bringing the case within the rule of Lawrence v. Fox, 20 N. Y. 268, holding that one, not a party to a contract made for his benefit, may sometimes sue and recover the benefits which he was intended to reap. The doctrine of Lawrence v. Fox, however, has been strictly limited to actions in contract, where the contracting party in whose right the action is brought owed a corresponding duty to the beneficiary. The present action is not an action to recover from the directors of the Metropolitan and City Companies damages for breach of their contract with the corporations made for the benefit of the Central Company. No such contract was ever made by these defendants, and the duty which they owe to their corporation to care for and manage its property is distinct from, and not commensurate with, the obligations assumed by the lease of October, 1892, which the plaintiffs are attempting to enforce. The cases cited are accordingly not in point.

In the other cases relied upon by the plaintiffs, in which third parties were held liable with directors to account for the corporate property, either the element of conspiracy is present to connect the acts of the parties with each other, which is here lacking, or some affirmative act of misfeasance is shown. Gray v. Fuller, 17 App. Div. 29, 44 N. Y. Supp. 883; Bosworth v. Allen, supra. No precedent has been called to my attention to support the present action against the directors of the Metropolitan and City Companies as such, and upon theory and reason it cannot be sustained under the allegations of the complaint.

[6] It only remains to consider the other grounds of demurrer set forth by the directors of the Central Company. As to the third ground alleged, defect of parties, in that the receivers of the Metropolitan and City Companies should have been joined as defendants, the demurrers are overruled. The only cause of action stated in the complaint is one against the directors of the Central Company for their negligence and breach of duty. The receivers of the Metropolitan and City Companies have no connection with such an action and would not be proper parties.

[7] The demurrers on the ground that the plaintiffs have no legal capacity to sue are overruled. The complaint alleges that a demand was made upon the corporation that it commence and maintain the action, and that the corporation neglected and refused so to do. This is admitted by the demurrer. After the said refusal of the corporation, the right of these plaintiffs to bring the action accrued at once, and fixed their capacity to sue beyond question.

The only remaining ground of demurrer alleged is that causes of action have been improperly united. Though in an action in equity

great latitude is permitted in combining causes of action against various defendants in order to prevent multiplicity of suits, and by bringing together all the parties to a transaction or connected series of transactions do complete equity and justice in a single action, there are certain fundamental rules which must not be violated. It is every man's right not to be involved in the litigation of issues with which he has no connection. It is accordingly held that:

"Whether the action be at law or in equity, the causes of action must affect all of the defendants, although it is not essential in equity that they shall all be affected alike, and those affected by all of the causes of action, as well as those affected only by one or more, may properly demur upon this ground. O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 76 N. E. 1082; Nash v. Hall Signal Co., 90 Hun, 354, 35 N. Y. Supp. 940; Nichols v. Drew, 94 N. Y. 22; Stanton v. Missouri Pac. R. R. Co., 2 N. Y. Supp. 298; Sayles v. White, 18 App. Div. 590, 46 N. Y. Supp. 194, etc." People v. Equitable Life Assurance Society, 124 App. Div. 714, at page 729, 109 N. Y. Supp. 453, at page 465; Code Civ. Proc. § 484.

The complaint in this action sets forth a cause of action for failure of the defendants to repair the road, pay the taxes and assessments, pay license fees, and refund or pay the bonded indebtedness of the corporation. The dates when the duty to repair as to various portions of the road arose are not set forth; neither are the dates when the taxes and assessments and fees accrued and were unpaid. It is a matter of common knowledge, however, that those obligations accrued independently from year to year. The dates at which the various defendants were members of the board of directors of the Central Company are set forth, from which it appears that they were not all directors during the entire period complained of. It is apparent, therefore, that those defendants who were not directors of the company at the time when certain repairs should have been made or taxes fell due or at any time thereafter would not be affected by any cause of action for neglect or failure in regard to them. It also appears that the bonds of the Central Company which the plaintiffs claim should have been refunded or paid, and upon which claim the main cause of action is based, did not become due until the year 1902; but the defendants Pearson and Beattie ceased to be directors of that company in 1901. They could not, therefore, be affected or interested in that cause of action set forth. As the causes of action joined do not affect all the parties to the suit, the demurrers of the defendants on that ground must be sustained. Code Civ. Proc. § 484; Nichols v. Drew, 94 N. Y. 22.

Leave to plaintiffs to serve an amended complaint within 20 days upon payment of $10 costs to such defendants, directors of the Central Company, as are retained. Complaint dismissed as to the directors of the other companies, who were not also directors of the Central Company, with $10 costs.

Ordered accordingly.

(81 Misc. Rep. 678.)

BURGER v. ROBINSON et al.

(Supreme Court, Special Term, New York County. July, 1913.)

PARTNERSHIP (§§ 302, 304*)—TERMINATION—RIGHTS OF PARTNERS.

Plaintiff and defendant R., having agreed to form a partnership, finally organized a corporation, and immediately after the articles were signed secured a long-term lease, to be assigned to a corporation then being organized. Thereafter R. elected to continue the business without plaintiff, and R. availed himself of the lease and certain machinery, for the value of which plaintiff was also liable; he having no participation in the profits of the business. *Held*, that plaintiff was not bound indefinitely to continue liable on such claims, and that R. would be required to secure a release of plaintiff's liability on the instruments jointly executed by them, or give an undertaking to protect plaintiff against such liability and permit a withdrawal of plaintiff's contribution of capital.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 699, 701, 702; Dec. Dig. §§ 302, 304.*]

Suit by William Burger against Morris Robinson and others. Decree for complainant.

Boudin & Liebman, of New York City, for plaintiff.

Chas. Stein, for defendants Robinson and Schmidt.

Harold C. Mendelson, of New York City, for defendant American Laundry Machinery Co.

DELANEY, J. The complaint avers that heretofore, and on or about the 1st day of May, 1912, the plaintiff and the defendant Morris Robinson agreed to become copartners upon certain terms and conditions between them agreed; that in pursuance of the said agreement the plaintiff and the defendant Morris Robinson did go into the said steam laundry business under the firm name and style of White Swan Laundry Company, and continued therein until the present day; that in pursuance of the said agreement the plaintiff contributed to the common fund of the said copartnership divers sums of money amounting in the aggregate to over $3,000, and that the plaintiff has complied with all the terms and conditions of the said agreement on his part to be performed; that in pursuance of the said agreement, and in order to properly carry on the same, the plaintiff and the defendant Morris Robinson obtained a lease of the premises wherein said copartnership business was to be and is conducted, which said lease was executed by the Ittner Realty Company as landlord, and to the plaintiff and the defendant Morris Robinson as tenants, and in further pursuance of the said agreement plaintiff and defendant Robinson purchased and installed in said premises a steam laundry plant, etc. The complaint then alleges a conspiracy to defraud; that the alleged conspirators are in possession of the business and property of the alleged copartnership, and have been guilty of acts prejudicial to the business and plaintiff's alleged rights as a partner, etc.

The essential facts adduced on the trial were as follows: In the latter part of April, 1912, plaintiff and the defendant Robinson had several conversations looking to an agreement to enter into a copartnership. These conversations terminated with an understanding that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

they should have a conference with a lawyer, who they intended would draw the necessary papers; for it was their understanding that the agreement should be in writing according to the forms of law. The plaintiff herein suggested the lawyer, and the defendant accepted the suggestion. When the parties called on the lawyer, accompanied by their relatives or friends, a discussion took place as to the terms of their agreement, and then the question arose as to the advantages of a corporation over a copartnership for their business, and it was finally agreed that a corporation should be formed. Articles of incorporation were drawn and signed. Immediately plaintiff and defendant Robinson set about securing a lease of suitable premises for the proposed business, and made contracts for the purchase and installation of machinery, thus jointly and severally incurring liability therefor. This course was adopted to expedite preparations pending the fulfillment of the various acts necessary to complete the incorporation. The plaintiff, it was understood, was to furnish $6,000 of the necessary capital, and the defendant Robinson $2,000. The capital to be furnished by the defendant Robinson was paid in and spent on the preparation for business almost at once. The plaintiff deposited in a bank to the joint account of himself and defendant Robinson $2,700 of the capital which he agreed to furnish; but shortly thereafter, having announced his alleged grievance, he would not allow this money to be used in the business then being formed, except on conditions which he endeavored to impose on defendant Robinson. This money still remains in bank. It would appear that the plaintiff had become distrustful of the corporation method, and resolved that the copartnership method, originally spoken of, should be adopted instead. Generally speaking, after that time the plaintiff insisted, from first to last, that he would accept no other arrangement. He seems to have regarded the agreement to incorporate as a nullity, and to believe, or feign to believe, that he had the right to reject it, for he insisted on having the business arrangement in the form it was contemplated when first discussed. He did not take this stand, however, until several days after the incorporation had been agreed on, and in the meantime the defendant Robinson, on the faith of the arrangement for the formation of a corporation, had incurred a large personal liability for machinery, etc., and had contributed all his agreed share of the capital of the proposed company, and it had been spent in the interest of the proposed business. With the exception of some trifling sums in cash and a month's rent, afterwards paid to prevent dispossession by the landlord, the plaintiff had contributed nothing which had been employed in the business.

In the earlier days of the disagreement several efforts were made to adjust their differences so that they might proceed with the business; but, as these efforts were fruitless, a proposition was made to release the plaintiff from all liability on the several contracts into which he and Robinson had entered, and to permit him to withdraw the money deposited to the joint account, and to pay him $250 for the fees of a lawyer whom the plaintiff had brought into the case for his own purpose. Although claiming himself the victim of a fraud, plaintiff refused the proposition, because he claimed that the lease which the defendant Robinson had secured was a valuable one

and he wished a share in its value. He claimed that a fraud had been perpetrated on him, but was not content to disavow it and claim restitution. The evidence clearly established that there never was an agreement of copartnership. The final conference on the subject, when articles were to be signed, resulted in the adoption of the corporation plan, and both signed the articles of incorporation. The ground on which the action is brought is fraud, alleged to have been committed on the plaintiff by the defendants Robinson and one Schmidt and a lawyer not a party to this action, who the plaintiff claims conspired together. The lawyer in question never knew or met either plaintiff or defendants before the day when it is alleged the fraud was committed, and was the very man selected by the plaintiff to draw the papers desired. The conspiracy alleged is based on the fact that the lawyer in question, at the first meeting of the parties during the course of the conference, had a seemingly reasonable excuse to leave the room at the same time as the defendant Robinson left it and returned with him a few minutes later; that shortly thereafter the suggestion of incorporation was made, and that plaintiff was then misled by the lawyer's advice to adopt the corporation plan.

Plaintiff claims that he was ignorant of the law on the subject, and trusted in the advice given, and thereupon adopted the plan suggested. There is nothing in the proof that shows any act from which an inference of conspiracy could be made up to this time. So far as this occurrence of the simultaneous absence from the room of the lawyer and Robinson for a few minutes is concerned, surely it cannot raise an inference that any conspiracy had been concocted. The plaintiff claims that he was misguided as to the law by the lawyer; but, except that he did not afterward like the arrangements made, I do not see that, even if this were true, he suffered any harm, and ten days or more transpired before he made objection. Then he forbade any further pursuit of the plan to incorporate. A confusion followed the attempt of the plaintiff to prevent further prosecution of the incorporation, and, no doubt, many informal and injudicious acts were done by the parties; but these were largely occasioned by the misconception by the plaintiff of his rights and the obstinacy with which he insisted on having arrangements to his liking or not at all. There was no claim of any fraud, it would seem, until the suspicions of the plaintiff were in some way aroused by the belief that his control was not as absolute as he may have desired it to be.

Robinson seemingly tried to adjust himself to the awkward situation created by the plaintiff, not always with good judgment or decision; but his money was invested, and, on plaintiff's failure to contribute his share to the enterprise, Robinson had to procure $7,000 in order to get the business on its feet. Once the business was begun, he seemed to elect to conduct it by himself as his own and for his own benefit, apparently considering the conduct of the plaintiff as a repudiation of his agreement. It seems to me plaintiff failed to live up to his contract, tried to defeat it, and refused to be released with what he had invested returned to him. Robinson's attitude is that of one who did not understand the situation in which he was placed.

He was sometimes vacillating, like one not knowing how to act; but he seemingly strove to prevent a loss of all he had, and finally acted as if he regarded the plaintiff as having broken the agreement to form the corporation, and that on that account he was entitled himself to conduct the business as his own. Effort was made to give the subsequent acts of Robinson the appearance of fraud, but the only pertinent question at this stage of the inquiry was: Was the agreement to incorporate the result of a fraud perpetrated on the plaintiff?

The lease which these parties entered into negatives the plaintiff's claim of an agreement of copartnership. Its second sentence reads:

"Lease to be assigned to a corporation now being created and organized, of which tenants are the principal stockholders."

It is dated May 8, 1912, and was executed by both plaintiff and the defendant Robinson. What occurred after this trouble began is set up by plaintiff as grievances for which he claims redress; but he in a great measure occasioned these situations, and cannot, I think, justly complain. There never was a copartnership, and plaintiff has therefore failed to prove the essential allegations in the complaint. It is true that there were many episodes in the course of the business of this imperfectly formed company which might justify extended consideration, if any conspiracy such as alleged had been shown, or if the plaintiff had been the victim of deception, inducing him to agree to form a corporation; but, under the circumstances, they do not affect the merits of the questions raised herein.

However. it seems to me that the defendant Robinson has elected to regard the plaintiff as having induced him to enter into an agreement and then as having failed to live up to it. This election to continue the business without the plaintiff has resulted in Robinson's continuing to avail himself of the long-term lease and certain machinery, for the value of which the plaintiff is liable, and in order to adjust the equities of the situation, plaintiff, having no participation in the responsibilities or the profits of the business, should not be compelled to continue indefinitely answerable on these claims and helpless against Robinson's possible default. Robinson should therefore be required to secure a release of plaintiff from all liability on the several instruments jointly executed by them, or, if that cannot be obtained, then he should protect the plaintiff by a sufficient undertaking, and should also permit the plaintiff to withdraw the $2,700 in bank to their joint account.

Submit findings and decision embodying these provisions. Complaint dismissed as against the defendants Schmidt and the American Laundry Machinery Company, with costs.

Complaint dismissed as against defendants Schmidt and American Laundry Machinery Company, with costs.

(81 Misc. Rep. 636.)

MURRAY v. NEW YORK TELEPHONE CO.

(Supreme Court, Special Term, Onondaga County. July, 1913.)

1. TELEGRAPHS AND TELEPHONES (§ 33*)—GRANT OF FRANCHISE—IMPOSITION OF CONDITIONS.

Under Transportation Corporations Law (Consol. Laws 1909, c. 63) § 102, providing that underground electric lines may not be laid without obtaining permission of the common council of the city in which the proposed works are located, and the charter of the city of Syracuse (Laws 1893, c. 531), providing that no telephone wires shall be placed in conduits without first obtaining the consent of the common council of the city, the city of Syracuse may, on granting a franchise to a telephone company to construct subways in the streets of the city, impose conditions as to the rates to be charged telephone subscribers.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 33.*]

2. TELEGRAPHS AND TELEPHONES (§ 33*) — ESTOPPEL TO DENY CORPORATE POWER.

A telephone company, which has accepted a franchise to construct subways in the streets of a city, cannot question the power of such city to impose a condition as to the rates to be charged telephone subscribers.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 33.*]

3. TELEGRAPHS AND TELEPHONES (§ 33*)—TRANSFER OF FRANCHISES—DUTIES AND LIABILITIES OF SUCCEEDING COMPANY.

A telephone company, succeeding to the franchise of another telephone company to construct subways in the streets of a city, is bound by conditions in the grant of the franchise as to rates charged subscribers.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 33.*]

4. TELEGRAPHS AND TELEPHONES (§ 33*)—RATES—CONDITIONS IN GRANT OF FRANCHISE—POWERS OF PUBLIC SERVICE COMMISSION.

In view of Public Service Commission Law (Consol. Laws 1910, c. 48) § 91, subd. 1, providing that all charges shall be just and reasonable, and no more than allowed "by law or order of the Commission," and subdivision 4, providing that the act shall not be construed to prevent a telephone company from carrying out contracts already made, a telephone company is not relieved from a condition in its franchise requiring it to furnish telephonic service at a specified rate by having filed with the Public Service Commission a schedule calling for a greater rate.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 33.*]

5. TELEGRAPHS AND TELEPHONES (§ 33*)—RATES FOR TELEPHONIC SERVICE—RESTRAINING VIOLATION OF FRANCHISE.

An appeal to the Public Service Commission, under Public Service Commission Law (Consol. Laws 1910, c. 48) § 97, is not an exclusive or an adequate remedy to prevent a telephone company from violating a provision of its franchise limiting its rates for telephonic service, and hence does not prevent a telephone subscriber from resorting to injunction.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 33.*]

6. TELEGRAPHS AND TELEPHONES (§ 33*)—RATES FOR TELEPHONE SERVICE—CONDITIONS IN GRANT OF FRANCHISE.

In 1887 the city of Syracuse granted a franchise to a telephone company to operate within the city on condition that a suitable and adequate telephone service should be given and that no more than a specified rate should be charged for a period of six years. In 1897 the city granted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a supplementary franchise for the construction of subways, subject to the condition that the former rates should not be increased. *Held*, that the rate as fixed by the franchise of 1887 must be continued, though more modern and approved appliances, such as metallic circuits and long-distance facilities, have been installed subsequent to the grant of the franchise in 1887.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 33.*]

7. TELEGRAPHS AND TELEPHONES (§ 33*)—RATES FOR TELEPHONIC SERVICE—PRACTICAL CONSTRUCTION OF FRANCHISE.

The fact that a telephone company for a period of about seven years charged a rate for telephonic service in excess of that fixed in its franchise ordinance, and that during such period its right to make such charge was not contested, did not constitute a practical construction of the ordinance in favor of its right to increase its rate.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 33.*]

Action by Dwight H. Murray against the New York Telephone Company. Injunction granted.

Baldwin & Magee, Ray B. Smith, and William Rubin, all of Syracuse, for plaintiff.

Charles T. Russell, of New York City, and William Nottingham, of Syracuse, for defendant.

EMERSON, J. The Central New York Telephone & Telegraph Company on January 24, 1887, was granted a franchise by the common council of the city of Syracuse to construct, equip, and maintain a telephone plant, with necessary poles, cables, and wires, through, upon, and under the streets, squares, and public places in said city, upon condition, among other things, that said company should without delay install and equip a suitable and adequate telephonic plant in and for said city of Syracuse, and furnish all of its customers and patrons therein with the most modern and approved instruments and appliances for prompt, efficient, and satisfactory telephonic communication. The franchise fixed the central office or exchange of said company at the building known as the Wieting Block, and contained the further condition that for the period of six years from February 1, 1887, unless the company should in the meantime be required by law or municipal ordinance to put its system of wires underground, the total annual charge and expense of each customer or patron of the company for one full and complete set of instruments, with a separate and independent wire from the central office and for unlimited use within the boundaries of said city should not exceed the sum of $48, payable quarterly, for all stations within a radius of one-fourth mile from said central office.

The telephone company accepted said franchise with the conditions aforesaid, and proceeded to construct and equip a telephonic plant and lines in said city, and the same was completed with all reasonable dispatch. At the time this telephonic plant was completed and put into operation the art of telephoning was substantially in its infancy, and the instrumentalities then in use were, when viewed in the light

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of subsequent improvements, quite crude and undeveloped. The method of telephonic communication then in vogue was what was known as the ground return system; each end of the wire being grounded and the earth being used for the return circuit. As a part of the equipment each subscriber was furnished with a magneto upon his instrument, by means of which his call bell was rung, and the electrical energy was supplied by means of batteries at each subscriber's station. While this grounded system could not be utilized to any great extent for long-distance telephoning, it worked for some time comparatively well for local service. But with the advent of trolley cars, electrical lighting, and the multiplication of uses to which in modern times electricity has been applied, disturbances arose, largely due to excess currents of electricity in the ground, causing noises upon the wires, cross-talk between the wires, and sometimes affecting the instruments themselves, so much so as to cause the annunciator to drop down and thus indicate calls from patrons for the use of their line, resulting to a considerable extent in a meaningless confusion of signals and oftentimes shutting off the subscriber, when he called for a telephone connection, for the reason that his signal was already down. To overcome the difficulties which thus arose the common return ground wire system came in vogue about the year 1892. This change was effected by doing away with individual batteries and installing a central energy station from which electricity was supplied, and by discarding entirely the use of the ground for return circuit and installing in its place a common return wire, with which each station was connected, which wire was grounded near the central energy plant for the purpose of disposing of the surplus electricity which it gathered up on its return. These difficulties were largely eliminated by the use of this common return ground wire system, but not entirely, and in the progress of the art the next improvement was the metallic circuit system, which first came in use about the year 1894 and has proven a complete remedy. The metallic circuit system is created by discarding the return ground system entirely and by running a pair of wires, usually twisted together, from the central energy plant to the subscriber's station, whereby a complete metallic circuit is created.

The displacement by the latter system of the ground return and the common return ground wire system seems to have been slow, as the record shows that in August, 1897, there were in use 1,631 grounded circuits to 89 metallic circuits, of which about 25 were nonpaying, all of which were listed and utilized for long-distance telephoning, and for that purpose being supplied with a solid back transmitter, instead of the old Blake transmitter then in use upon the grounded circuits.

The rates for ordinary telephone service had not increased since the franchise of 1887 was granted, and the same remained at $48 a year within the quarter of a mile radius on August 2, 1897, save that for the metallic circuits on which the long-distance phones were then in use the company was then charging the sum of $80 per year.

In the year 1897 the telephone company contemplated placing all of its subscribers upon metallic circuits, and because of the vast increase

in the telephone business it became necessary to provide a subway for that purpose. The company thereupon petitioned the common council of the city for a franchise to that end, and on August 2, 1897, such a franchise was granted, permitting the company to construct and maintain a subway underneath the surface of the several streets and public squares for the uses of said company, subject, however, among other things, to the condition that said company should not increase its present rate for telephone service. This franchise and the conditions annexed were accepted by the telephone company, and it proceeded to excavate and construct the subway in question, and to build a building on Montgomery street, in which were installed the essential appliances for metallic circuit service; the same consisting mainly of a new distributing switchboard and power plant. The Montgomery street building was completed and occupied by the company about January 1, 1899, and on January 26, 1899, it announced a public opening of the new exchange. Steps were then taken by the company to substitute the metallic circuit service with apparatus for long-distance telephoning in place of the old ground service, which was largely accomplished by replacing the old Blake transmitter with the solid back transmitter so called. To this end the telephone company employed agents or solicitors to interview the subscribers, and procured their consent to the change, and by dint of such exertions, through persuasion in some cases, and by threats to remove the instruments and discontinue their telephone service in other cases, the grounded service was rapidly eliminated and the subscribers placed upon metallic circuits with long-distance telephone service. Contracts for this improved service were procured to be executed in the manner above stated, which fixed the maximum charge within the one-fourth mile radius at the sum of $80 per year. The effect was that, in addition to the local service previously enjoyed by this change in system, subscribers acquired a long-distance telephone service at their stations, and, as the telephone company belonged to the Bell system, so called, this long-distance service covered substantially all of the United States east of the Rocky Mountains.

On January 1, 1898, at the time the telephone company took possession of its new plant, there were 80 metallic and 1,649 grounded circuits in their telephone system. Thereafter the work of changing to metallic circuits proceeded with such rapidity that on January 1, 1902, there were 1,830 metallic and 177 grounded circuits; on January 1, 1905, there were 4,689 metallic and 28 grounded circuits; and on January 1, 1906, there were 6,946 metallic and no grounded circuits in operation.

Notwithstanding the changes thus made, the telephone company still made some contracts at the old rate. Among these contracts was one made with the plaintiff on July 25, 1905, for telephone service on a direct one-party line with metallic circuit for the sum of $48 per year, said contract to run one year and thereafter until terminated on ten days' notice. This contract specified upon its face that it was a special physician's rate.

The defendant, the New York Telephone Company, having in the meantime become the owner of all the stock of the Central New York

Telephone Company, the latter company was on September 21, 1909, by proceedings duly had under the Stock Corporation Law, merged in the former, and all of the property of the latter was duly conveyed to the former corporation. Since said merger the defendant has been the only telephone company furnishing service in said city of Syracuse.

The plaintiff is a physician and surgeon in said city, having his offices in the University Block, which is within the one-fourth mile radius mentioned in the franchise of 1887. As such physician and surgeon a telephone service is necessary in his business, and he has had the same since the year 1885. In August, 1897, such service was furnished by the Central New York Telephone Company, which was prompt, efficient, and satisfactory. This service was continued at the rate of $48 per year until 1900, when the company demanded an increase to $83 a year, which plaintiff declined to pay, and his telephone was removed from his offices. The plaintiff thereafter used an independent line until July, 1905, when the contract above mentioned was made with said company, which was continued down to January, 1912. At the latter date the plaintiff was notified by defendant that he must thereafter pay at the rate of $60 a year or his contract would be terminated. The plaintiff notified the defendant that he would sign a contract for the increased rate under protest as to rates, which he did on January 30, 1912. This contract called for sum of $60 per year, payable in monthly installments, and under this contract the plaintiff paid for the months of February and March, 1912. Not having paid the $5 due for the month of April the company notified him on April 18th that if it was not paid by April 23d his service would be suspended. The plaintiff paid this sum, and later on paid a like sum for the month of May, all of which payments were made under protest at the time.

On May 20, 1912, the plaintiff served a notice on defendant that he elected to terminate the agreement aforesaid, but stated that he was willing to pay $48 a year, payable quarterly in advance, and would sign a contract to that effect. This the defendant refused to accede to, and threatened to remove the telephone from the plaintiff's premises. The plaintiff then served a written demand on defendant that it furnish him one full and complete set of instruments, with a separate and independent wire from the central office to plaintiff's rooms in University Block, with appliances for prompt, efficient, and satisfactory telephonic service and communication within the territorial limits of said city upon a grounded line circuit or any service equally as prompt and efficient as that which was furnished by the Central New York Telephone Company on August 2, 1897, and he thereupon made a tender of the sum of $12 for the first quarterly payment in advance. The defendant declined to accept the payment or to furnish the service requested, and again threatened to remove the telephone from the plaintiff's premises on June 1, 1912. The plaintiff thereupon brought this action to restrain such removal, and procured a temporary injunction to that effect, which has been continued by stipulation during the pendency of this action without prejudice to the rights of either party to this litigation.

[1, 2] At the threshold of this investigation the question arises as to the power of the common council in granting the franchises to exact the conditions in question. As to this there would seem to be no room for doubt. Granting that, as far as streets and highways are concerned, the franchise of a telephone company is derived from the Legislature, the right to occupy squares and public places is nowhere conferred by legislative grant. This power can only be exercised by municipal authority, and where a telephone company petitions for the same the granting of the right is sufficient consideration to uphold such restrictions and conditions as are imposed by the municipality and are accepted by the company. Henceforth the company is estopped from insisting upon want of authority to impose the condition. Rochester Telephone Co. v. Ross, 125 App. Div. 76, 83, 109 N. Y. Supp. 381, affirmed 195 N. Y. 429, 88 N. E. 793; New Union Tel. Co. v. Marsh, 96 App. Div. 122, 89 N. Y. Supp. 79; Barhite v. Home Telephone Co., 50 App. Div. 26, 63 N. Y. Supp. 659; Farnsworth v. Boro Oil & Gas Co., 76 Misc. Rep. 37, 134 N. Y. Supp. 348; City of Buffalo v. Frontier Tel. Co., 203 N. Y. 589, 96 N. E. 1112.

Especially is this so as to the franchises of 1897, authorizing the construction of a subway and conduits, when we consider the provisions of chapter 483, Laws of 1881, since incorporated in section 102 of the Transportation Law (Consol. Laws 1909, c. 63), to the effect that underground electric lines could not be laid without obtaining permission from the common council of the city where it was proposed to lay the wires. Matter of New York Independent Telephone Co., 133 App. Div. 635, 645, 118 N. Y. Supp. 290, affirmed on opinion below 200 N. Y. 527, 93 N. E. 1126.

In this regard the charter of the city of Syracuse fully accords with the limitations contained in the act of 1881, as by chapter 531, Laws of 1893, amending said charter, it is provided that no telephone wires should be placed in conduits without first obtaining the consent of the common council of that city. Under this statutory authority the power to exact the conditions in question is undoubted. City of Buffalo v. Stevenson, 207 N. Y. 258, 100 N. E. 798.

[3] So also it would seem to be entirely clear that these conditions are binding upon the defendant as the successor in interest of the Central New York Telephone Company, and that for a refusal to abide by the terms thereof any inhabitant of the city whose interests were affected could maintain an action for a prohibitory or mandatory injunction. Pond v. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504, affirmed 143 App. Div. 70, 127 N. Y. Supp. 582; Davis v. Zimmerman, 91 Hun, 489, 492, 493, 36 N. Y. Supp. 303; Wright v. Glen Telephone Co., 112 App. Div. 745, 746, 99 N. Y. Supp. 85; Sterne v. Metropolitan Telephone & Telegraph Co., 19 App. Div. 316, 46 N. Y. Supp. 110; Howard v. City of Buffalo, 151 App. Div. 198, 122 N. Y. Supp. 1095, 135 N. Y. Supp. 303; McEntee v. Kingston Water Co., 165 N. Y. 27, 58 N. E. 785; Bremer v. Manhattan Ry. Co., 191 N. Y. 334, 337, 84 N. E. 59; Joy v. St. Louis (C. C.) 122 Fed. 524, affirmed 138 U. S. 1, 47, 50, 11 Sup. Ct. 243, 34 L. Ed. 843; Richman v. Consolidated

Gas Co., 186 N. Y. 209, 78 N. E. 871; Public Service Com. v. Westchester St. R. R. Co., 206 N. Y. 210, 99 N. E. 536.

[4] Nor were the conditions exacted in granting said franchises at all modified or released by the action of defendant in filing with the Public Service Commission the rate of $60 per year for the service which is demanded by plaintiff. In accepting these conditions the defendant incurred contract obligations to that extent, and could not on its own initiative avoid those obligations by filing with the Public Service Commission a contrary rate. That the Public Service Commission's Law (Consol. Laws 1910, c. 48) did not intend any such anomalous result is manifest by subdivision 1 of section 91, which provides that all charges shall be just and reasonable and no more than allowed by law *or order of the commission,* and subdivision 4 of the same section, which provides that the act shall not be construed to prevent a telephone company from carrying out contracts already made. Laws 1910, c. 673, § 91.

And, indeed, were it otherwise, the statute in this regard would be in plain violation of the Constitution. Simons Sons Co. v. Maryland Telephone & Telegraph Co., 99 Md. 173, 57 Atl. 193, 63 L. R. A. 727; City of Superior v. Douglass County Telephone Co., 141 Wis. 363, 122 N. W. 1023; Walla Walla City v. Walla Walla Water Co., 172 U. S. 2, 9, 19 Sup. Ct. 77, 43 L. Ed. 341.

I do not regard the case of Chesapeake & Potomac Telephone Co. v. Manning, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144, as at all antagonistic to the views above expressed. That case did not involve any contractual liability arising from the acceptance of a franchise, but was based entirely upon the power of Congress arbitrarily to fix the rates for telephone service without inquiry into the reasonableness of the same.

[5] Nor do I think an appeal to the Public Service Commission was an exclusive or even an adequate remedy in this case. The functions of that commission are of a legislative character, and their duty when complaint is made as to rates is to determine the reasonableness of the same and to fix the amount of such rates upon a reasonable basis, having regard to just and fair returns for the property invested. Public Service Commissions Law (Laws 1910, c. 673), § 97; People v. Public Service Com., 153 App. Div. 130, 138 N. Y. Supp. 434.

The rights of the plaintiff in this case do not arise out of the failure of defendant to adopt reasonable rates, but out of the contract obligation of defendant, which neither the Public Service Commission nor even the Legislature itself has power to modify or restrict. Nor do I find that the Commission has anywhere been invested with judicial power to declare and enforce contract rights. On the contrary, the act itself provides that, if the Commission shall be of the opinion that a telephone company is failing or omitting to do that which is required by law, it shall direct an action to be brought in the Supreme Court to prevent such violation either by mandamus or injunction. That the Public Service Commission would be powerless to grant relief in this case is manifest from the decision in Public Service Commission v. Westchester St. R. R., 206 N. Y. 209, 99 N. E. 536, where

the Commission itself brought an action to restrain the violation of a contract right of the nature of the one now before the court. Being without power to enforce its judgment, except by appeal to the courts, it is clear that a proceeding before the Public Service Commission would not furnish an adequate remedy at law, even though the Commission had jurisdiction of the matter in question.

[6] This now brings us to the crucial question in this case, and that is whether the acts of the defendant constitute a violation of the conditions contained in the franchise of 1897. By that franchise the defendant's predecessor bound itself not to increase its then existing rate for telephone service, and in order to determine whether the defendant has violated the franchise we must first consider what the parties understood to be the then existing rate for telephone service. In determining this question we must bear in mind that the two franchises must be construed together, as they are both part and parcel of the authority under which defendant and its predecessor proceeded. From the franchise of 1887 we learn that its purpose was to provide for a suitable and adequate telephone service in and for the city of Syracuse and adjacent country, and the agreement of the telephone company was to furnish a suitable and adequate telephonic plant for said city and to furnish all of its customers and patrons with the most modern and approved instruments and appliances for prompt, efficient, and satisfactory telephonic communication. The company further agreed that for the period of six years the total annual charge to each patron within a one-fourth mile radius from the central office for one full and complete set of instruments with a separate and independent wire for unlimited use should be the sum of $48. At the time this franchise was granted all of the telephones were constructed on the grounded circuit system; but this system was later supplanted by the common return ground wire system, which was principally in use at the time the franchise of 1897 was granted. Down to that time the rate fixed in the franchise of 1887 had not been changed, except that, the existing system having been found imperfect for long-distance telephoning, the company had installed a limited number of metallic circuits equipped with solid back transmitters, instead of the old Blake transmitter, which furnished a long-distance telephone service for each patron on such metallic circuit at his individual station. This service was listed by the telephone company as long-distance subscribers, and for the same the company first made a charge of $100 per year, which later was reduced to $80 and then to $60 per year.

The number of grounded circuits or common return ground wire circuits in operation at that time was about 1,600, all of which were substantially devoted to local telephoning, and, so far as the evidence discloses, furnished at that time prompt, efficient, and satisfactory telephone service. The number of metallic circuits, each furnished with a long-distance transmitter, then in operation, was about 75 or, in other words, about 95 per cent. was devoted to the local service and a little less than 5 per cent. to the long-distance service.

These, then, were the conditions which existed when the franchise of 1897 was granted, and as the declared purpose of the franchises

was to furnish a local service, and as the great prevailing service at the time was of a local character, the inevitable conclusion must be that this was the service which the parties had specifically in mind when the condition against increasing the then existing rate for telephone service was embodied in the franchise. But it is said that with the progress of time, and the multiplication of the uses of electricity, the old grounded circuit and common return ground wire system became impracticable, and therefore the telephone company was obliged to replace the same with the metallic circuit system, which, with the use of the solid back transmitter, places all the patrons on the long-distance list, and, therefore, the defendant is entitled to charge the long-distance rate which existed when the franchise was granted.

The answer is that the defendant has no right to place any subscriber on the long-distance list and charge him long-distance prices without his consent. Granted that it was necessary for the defendant and its predecessor to replace the old grounded system with the metallic circuit, this was no more than the company was obliged to do by the franchise of 1887. Under that franchise the obligation existed to furnish customers with the most modern and approved instruments and appliances for prompt, efficient, and satisfactory telephonic communication. This was not satisfied by merely installing in the first instance such instruments and appliances, but the purpose was to keep up the efficiency of the service, and to that end it was a continuing obligation upon the company to keep up with all advancements and improvements in the art and to avail itself of the same when necessary to prompt, efficient, and satisfactory telephonic communication. True, the company was not bound to install a long-distance telephone transmitter for a local customer, unless such a transmitter was essential to prompt, efficient, and satisfactory local service; but if a change to the metallic circuit system became necessary, in order to give good local service, the obligation to make the change rested upon the company in virtue of the original franchise.

Again, the defendant contends it has not raised the rate for telephone service, because the present rate for long-distance telephoning was in existence when the franchise was granted. In other words, the defendant contends that at that time there were two kinds of service furnished by the company, one of a local character and cheaper grade, and the other of a long-distance character, for which a higher price was charged, and they contend that the mere elimination of the cheaper grade and putting all the subscribers upon the higher and more expensive service is not increasing the rates for telephone service within the meaning of the franchise. I do not so understand the case. Suppose a railroad corporation receives a franchise to operate a line of railroad on condition that passengers shall not be charged more than two cents a mile for transportation. The company installs a line of common coaches for transportation, in which it charges two cents per mile, and also installs a line of Pullmans, for which service it charges three cents per mile. Later on the company withdraws all the common coaches, and thus drives all of the passengers into Pullman coaches, for which service it compels them to pay three cents

per mile. Would any one hesitate to denounce this as a violation of their franchise?

The case thus supposed seems to be an absolute counterpart to the one here presented. While I do not find that this question has before arisen in this state, the views above expressed find confirmation in the decisions of some of our sister states. In the case of the Chicago Telephone Co. v. Illinois Manufacturers' Association, 106 Ill. App. 54, 62–65, a bill was filed to enjoin the Chicago Telephone Company from exacting a greater rate than $125 per year for telephone service, as fixed by the terms of the city ordinance, and from removing the telephone appliances and apparatus from complainant's place of business, and from cutting off his telephone service. It was held that the company had no right to raise its rates because it had improved the service by substituting metallic circuits for the grounded wire system that was in vogue when the ordinance was passed granting the franchise; that the metallic circuit was but an improvement of telephone service over the grounded line system; that the restriction in the ordinance meant that the company should not increase the rates which it was charging when the ordinance was passed for telephone service, and that the telephone service intended was not the particular service then being rendered, but was as well any improved telephone service which the company might thereafter adopt and put in use whatever might be the appliances and instruments used to improve it and make it more efficient and satisfactory than the service in use when the franchise was granted; that the words "telephone service" meant a service by an organized apparatus and, whatever changes might be made therein by the addition of wires, apparatus, or appliances for the purpose of rendering it more efficient, it was still a telephone service within the meaning of the ordinances after the change as before; that the word "telephone" constituted a generic term, having reference generally to the art of telephoning as an institution, but more particularly to the apparatus ordinarily used in the transmission as well as reception of telephone messages; that, as generally accepted, the meaning of the word was an organized apparatus as an institution and not as a single instrument.

In the case of People v. Chicago Telephone Co., 220 Ill. 238, 77 N. E. 245, an information in the nature of a quo warranto was filed by the people of the state of Illinois against the Chicago Telephone Company for the purpose of declaring a forfeiture of the franchise of the company and also of its rights to exercise such franchises in the public streets of the city under an ordinance passed January 4, 1889, on the ground that the company had misused and abused its franchise by demanding and receiving unlawful rates for telephone service. In this case an ordinance had been passed by the city of Chicago, and accepted by the telephone company, which granted permission to the company to construct and maintain, repair, and operate its lines of wires in the public streets, by means of underground conduits in parts of the city and by means of poles and wires in other parts, upon condition, among other things, that the company should not increase to its present or future subscribers the rates for telephone

service then established. It was held that the telephone service named in the ordinance meant the general telephone service furnished by the company during the period of the grant, and not merely the kind of service with the kind of appliances and equipments which was furnished when the ordinance was passed; that the words "telephone service" included any improved service adopted by the company; that improved transmitters, receivers, switchboards, and metallic circuits are the means and appliances for such telephone service, and nothing else; that under the ordinance, while the company could not be required to adopt improvements in its service or equipments or to keep up with the general progress of the business, yet, if it saw fit to adopt improvements and furnish a better grade of telephone service, it could only have the benefit of the ordinance granting it the right to use the public streets by complying with the terms of the ordinance and not increasing the rates. It was accordingly held that where the grounded circuit was in use at the time the ordinance was passed, which was afterward changed to a metallic circuit, this did not give the company a right to increase the rates for such improved telephone service. See, also, to like effect, Central Union Telephone Co. v. Bradbury, 106 Ind. 1, 9, 5 N. E. 721; Johnson v. State, 113 Ind. 143, 15 N. E. 215; Central Union Telephone Co. v. State, 118 Ind. 194, 206, 19 N. E. 604, 10 Am. St. Rep. 114; Simons Sons Co. v. Maryland Telephone & Telegraph Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

[7] The suggestions of defendant's counsel that a practical construction results from the long delay in contesting the increased rates, and also that the public are estopped by acquiescing in the same, are so fully met by the decisions in the Illinois cases that nothing further need be said upon the subject.

It follows that the plaintiff is entitled to a prohibitive injunction enjoining and restraining the defendant from discontinuing its telephone service at the plaintiff's office, and from removing therefrom the telephone instruments and appliances requisite to such telephone service, and also to a mandatory injunction commanding the defendant to furnish the plaintiff at his office in the University Block, city of Syracuse, one full and complete set of telephone instruments, with a separate and independent wire from the central office for unlimited use within the boundaries of said city, together with such improvements on the same as have been adopted by defendant and are in general use for its local service, and to furnish to plaintiff a telephone service as prompt, efficient, and satisfactory as that which was furnished him by the Central New York Telephone & Telegraph Company on August 2, 1897, upon payment or tender to defendant of the sum of $48 per annum, payable quarterly in advance, together with costs.

Findings may be prepared in accordance with the foregoing opinion, and, if not assented to, the same may be settled before me on five days' notice.

Judgment accordingly.

(158 App. Div. 911)

PHELAN v. NEW YORK, N. H. & H. R. CO.

(Supreme Court, Appellate Division, Second Department. September 23, 1913.)

APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT AGAINST WEIGHT OF EVIDENCE.

Where there is a sharp conflict in the evidence, and serious question as to the credibility of the witnesses, the verdict will not be disturbed as against the weight of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

Appeal from Trial Term, Westchester County.

Action by Richard Powers Phelan against the New York, New Haven & Hartford Railroad Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

Argued before JENKS, P. J., and BURR, CARR, RICH, and PUTNAM, JJ.

I. R. Oeland, of Brooklyn, for appellant.

Thomas J. O'Neill, of New York City (L. F. Fish, of New York City, on the brief), for respondent.

PER CURIAM. While we look upon this case as a close one, both upon the law and the facts, we think that the question of the defendant's negligence cannot be disposed of as one of law. Nor do we think that, considering the sharp conflict of evidence, and the serious questions of credibilty which arose upon the trial, we should be justified in setting aside the verdict of the jury as against the weight of evidence.

The judgment and order should be affirmed, with costs.

(158 App. Div. 489)

TERRANOVA v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. September 23, 1913.)

MASTER AND SERVANT (§ 115*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

Where a servant, engaged in re-covering a roof with tin, fell through the roof when decayed timbers supporting it gave way, and it appeared that the defect was apparent from inside the building, but not from where he was working, the injury was caused by the failure of the employer to furnish a safe place for work, and not by a danger created by the work the servant was doing, and the master was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 205, 206; Dec. Dig. § 115.*]

Appeal from Trial Term, Kings County.

Action by Michael Terranova against the City of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, STAPLETON, and PUTNAM, JJ.

James D. Bell, of Brooklyn (Frank Julian Price, of Brooklyn, on the brief), for appellant.

Nelson L. Keach, of New York City, for respondent.

STAPLETON, J. The plaintiff, a laborer in the employ of the defendant, was set to work to help a tinsmith re-cover, with tin or corrugated iron, the roof of a shed on defendant's property. The roof was made of lumber. A section of the lumber was inadequate to bear the strain of plaintiff's weight in addition to the materials which he was carrying, and it gave way. Plaintiff fell through to the ground and sustained injury. The evidence tended to show that the lumber was decayed, and that the decay was observable from the reverse side, within the shed. The tinsmith, who weighed about as much as the plaintiff, had with safety walked on the spot through which the plaintiff afterwards fell.

The defendant was obliged to use ordinary care and diligence in giving the plaintiff a reasonably safe place to work, and the plaintiff was entitled to believe that the defendant discharged that duty. The defective condition was not apparent to ordinary observation from plaintiff's point of view. It was discernible from within the shed by proper inspection on the part of one charged with the affirmative duty of ascertaining the condition before providing it for the use of a workman.

This is not a case where the prosecution of the work made the place and created the danger. The plaintiff was not assigned to demolish or reconstruct the roof. He was engaged to aid in re-covering it with tin or corrugated iron, and the place furnished in which to do the work was the roof itself. The place was presented to the plaintiff, not prepared by him. His work was not, generally, to aid in repairing a defective structure, but, specially, to re-cover an established roof, which he could assume to be sound in the absence of a visible defect, the dangerous nature of which an ordinary laborer could comprehend.

We think it was within the province of the jury, upon the evidence appearing in the record, to attribute the injury to the sole negligence of the defendant. McGuire v. Bell Telephone Co., 167 N. Y. 208, 210, 211, 60 N. E. 433, 52 L. R. A. 437; Kranz v. Long Island Railroad Co., 123 N. Y. 1, 5, 25 N. E. 206, 20 Am. St. Rep. 716. See Gates v. State, 128 N. Y. 221, 226, 28 N. E. 373.

The judgment and order should be affirmed, with costs. All concur.

(82 Misc. Rep. 219)

In re SINNOTT'S WILL.

(Surrogate's Court, New York County. September 26, 1913.)

1. WILLS (§ 486*)—ACTION TO CONSTRUE WILLS—SURROGATE—JURISDICTION.
The Legislature by the acts conferring power upon the surrogate to construe wills intended to invest him with the power and jurisdiction to consider appropriate extrinsic evidence.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1016–1022; Dec. Dig. § 486.*]

2. COURTS (§ 27*)—GENERAL GRANT OF JURISDICTION.
A general and unrestricted grant of jurisdiction usually implies and carries with it powers necessary to make the jurisdiction effectual.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 84–87; Dec. Dig. § 27.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. WILLS (§ 194*)—REVOCATION—DISPOSITION OF PROPERTY.
The subsequent sale by testatrix of a house and lot which she had previously devised upon trust for her son operated as a revocation of such devise.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 481–489; Dec. Dig. § 194.*]

4. WILLS (§ 858*)—RESTRICTION OF RESIDUARY CLAUSE.
Where testatrix devised to one of her sons a house and lot, and to the other the remainder of her property, thus approximately equally dividing her property between them, the devise of the remainder was not a true residuary gift, but rather in the nature of a specific legacy or devise; and hence, if there is a revocation or failure of the devise of the house and lot, it will not go to such residuary legatee or devisee, but pass to those entitled under the statute governing descents from an intestate.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2173–2183; Dec. Dig. § 858.*]

In the matter of the probate of the will of Mary A. Sinnott, deceased. On objections of Edward Sinnott. Will construed.

John F. Clarke, of Brooklyn, for John J. Sinnott, executor.
William C. Wolf, of New York City, for Edward Sinnott.

FOWLER, S. This cause involves the construction of a will entitled to probate in a proceeding where construction is properly justiciable under the Code of Civil Procedure. The testatrix left two sons her surviving, her only next of kin and heirs at law. By her will she devised the house and lot known as No. 508 West Thirty-Seventh street, borough of Manhattan, to her executor in trust, to receive and collect the rents and to apply the net profits of the same for the benefit of her son Edward during the life of his wife, and upon the death of cestui que vie remainder to Edward, if then living, in fee, and if not remainder over, etc. The precise nature of the remainders contained in the limitation in trust it is not now essential to consider at length. Subsequently to making her will it appears that testatrix in her lifetime sold the said house and lot so devised for the benefit of Edward, taking back a mortgage to secure a part of the purchase money, about $16,000 in all. The will contained a residuary clause giving all the rest, residue, and remainder of the estate to her son Dr. John J. Sinnott, the executor.

In behalf of Edward Sinnott it is claimed that the proceeds of the sale of the house mentioned, some $16,000, are to be held by the executor under the trusts limited for the benefit of Edward. In behalf of the executor it is argued, on the other hand, that the sale of the house and lot in question by testatrix herself in her lifetime operated as a revocation of the prior devise in trust for the benefit of Edward, and that the proceeds of such sale consequently go to the executor, Dr. Sinnott, under the residuary clause of the will now presented for construction. As the house and lot represented the moiety of the estate of testatrix, or at least the only provision for Edward, if the construction of the executor prevails it may result in Edward's receiving no share of his mother's estate or benefit therefrom unless another rule, which I shall advert to later, is applicable.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

When the surrogate was invested with power and jurisdiction to construe a devise or testamentary gift, doubtless his powers were intended to be those of prior courts of construction in this state. In a proper case extrinsic evidence elucidating construction and receivable by such other courts of construction may be considered, I think, by the surrogate when called on to construe a will. I have had occasion to make this intimation in other cases of construction coming before me. Matter of Raab, 79 Misc. Rep. 185, 139 N. Y. Supp. 869; Matter of Swartz, 79 Misc. Rep. 388, 395, 396, 139 N. Y. Supp. 1105. This precise point, however, hardly arises with precision here, and I will not now dwell on it, as the sale of the house and lot referred to and the condition of the estate of testatrix are conceded, as I understand, by the parties to this controversy. At least it is the evident desire of the parties before me that the surrogate shall consider such extrinsic facts and I am willing to promote this desire in so far as I have the power so to do, so as to put at an end the necessity of further litigation.

[1] My own conception is that the Legislature by the acts conferring a power to construe intended to invest the surrogate with the power and jurisdiction to consider appropriate extrinsic evidence in a case of construction.

[2] A general and unrestricted grant of jurisdiction usually implies and carries with it powers necessary to make the jurisdiction effectual.

[3] The immediate and pressing question in this cause is whether the sale by testatrix of the property devised on trusts by her prior will was intended to revoke such devise for the benefit of her son Edward. If so, she may have disinherited her son. Prior to the Revised Statutes a wise chancellor would, I think, have endeavored to prevent if possible such a harsh result of a merely constructive revocation of a devise for the benefit of a son. Statute which long has been the popular remedy for public ills is sometimes unexpectedly rigid and harsh in directions not foreseen by its draftsmen. This is an objection to meddlesome legislation. Has the statute in this instance materially changed the prior law relative to an implied revocation by reason of a change in the situation of the testator's estate after the execution of a will? This is the first question to consider.

Prior to the Revised Statutes the old law relating to implied or presumptive revocations—sometimes termed "acts in law"—was not wholly satisfactory. The important alterations made by the Revised Statutes, however, related mainly to express revocations. In respect of implied revocations the reviser's intention was to settle doubts arising by reason of conflicting decisions rather than to change materially the prior law, which was founded on the highest equity and the result of the deliberate consideration of many great and distinguished chancellors of both this state and England. See reviser's notes to the R. S. In respect of the law of implied or constructive revocations the Revised Statutes were, I think, more of a codification than a reform. The sections of the Revised Statutes in question are now transferred to the "Decedent Estate Law" (Consol. Laws 1909, c. 13, §§ 25–41), and receive, of course, the same construction accorded to the Revised Statutes when in force.

The sections of the statute now applicable to this matter before me are sections 39 and 40, Decedent Estate Law (formerly 2 R. S. [1st Ed.] 65, §§ 47, 48). Prior to the enactment of any of these statutory provisions, if a testator alienated a thing he had previously devised or bequeathed, the devise or specific bequest was thereby presumptively revoked both at law and in equity, for the testator had himself put it out of his power to confer a title by will on his devisee or legatee to the testamentary gift. The difficulty with the old law was not that a complete alienation was always held to operate as a revocation, for that was inevitable, but that the slightest subsequent dealing by the testator with the thing devised too often vitiated or revoked the prior devise. See 1 Powell on Devises, 547; Lovelass on Wills, 352. The Revised Statutes intended to change this last condition of the law, but after that revision, as before it, a complete alienation by testator of a thing devised or bequeathed operated presumptively to revoke such devise or bequest. McNaughton v. McNaughton, 34 N. Y. 201, 203.

The hardship of the settled rule that an alienation by testator of a thing devised often defeats the only provision for a testator's child has induced the court to seize hold of any consideration which rebuts the implication of revocation by a sale of the thing bequeathed or devised. If there is a conversion of realty, for example, directed by the will, or if the gift is not specific, it is held that the gift is not revoked by the sale of the thing devised or bequeathed. McNaughton v. McNaughton, 34 N. Y. 201, 203, 205; Brown v. Brown, 16 Barb. 569.

It will be observed that in this instance the devise is to trustees, which shows an intention on the part of testatrix to create a trust for the benefit of her son Edward, and it is asserted in his behalf a trust of about half of her estate, as the house and lot in question then amounted to about half of her estate. I am not quite sure that sufficient extrinsic evidence has been given to show that this was then the precise condition of the estate. That it is true, in fact, is conceded by counsel, and if necessary this matter could doubtless be reopened and the situation of the estate at the time of the devise and sale proved to me, so as to make the record on this point clearer.

Where a trust for a son is created by a will, the subsequent alienation of the property to be held in trust should not be construed as a revocation of the trust itself if it is possible to reach another conclusion. A whole will is not revoked by the mere alienation of one thing devised. Vandemark v. Vandemark, 26 Barb. 416. In most of the cases cited to me it will be observed that the element of trust in the devise was wanting, and the revocation by alienation concerned devises not on trusts. I have searched the books, in order to find some authority to the effect that devises on trusts were not always revoked by testator's subsequent alienation of the property devised on trusts, and to support the inference that where there was an evident intention to create a trust for a son the intention would be executed non obstante the testator's subsequent sale of the thing devised to a trustee. There is some remote support of such a principle in the chancery books (Rider v. Wager, 2 P. Wms. 3327), but I find nothing directly

in favor of so general a principle. In Hodges v. Green, 3 Russ. 28, it was held that a subsequent conveyance to trustees to sell for the benefit of testator's debts was not a revocation of a prior will, because it declares that the surplus money arising from the sale shall be the personal estate of testator. This is a somewhat remote recognition of the equitable principle I had in mind. But, unfortunately, it is held that where there is a substantial alteration by testator in his lifetime of estates which he had previously devised in trust the devises on trusts are revoked under the general rule, notwithstanding the trusts. Lowndes v. Norton, 33 L. J. Ch. 583; Leigh v. Norbury, 13 Ves. 340; Philson v. Moore, 23 Hun, 152, 155. The hardship of the rule or the possible intention of testatrix is no reason for a failure to apply a rule of law. Beck v. McGillis, 9 Barb. 35, 59.

In this case now before me I fear that there is no escape from the conclusion that the subsequent sale of the house and lot by testatrix operated to revoke the devise to trustees for the benefit of Edward. In order to make out in this case an intention to create a trust by the testatrix it is necessary to establish that some res or property was intended to pass to the trustee. Hickok v. Bunting, 67 App. Div. 560, 562, 73 N. Y. Supp. 967. Here the difficulty is that the testatrix must be taken to have herself subtracted, as it were, the property devised on trusts, and thus is to be taken as herself revoking the trust. Thus the element of trust does not prevent in this instance the revocation by operation of law of the legal estate to trustees.

We are all familiar with the principle that equity prevents the defeat of a legacy revoked by reason of a mistake of fact, and this is manifestly most just; but this principle has no application here, even if the enlarged surrogate's jurisdiction in cases of construction extends so far as to enable him to apply it in a proper case, which I doubt. No effort has been made in this cause to show a mistake of fact on the part of testatrix—so this point is not now here.

[4] But another question does arise here, viz., do the proceeds of the subsequent sale of the thing devised pass exclusively to the son John under the so-called residuary clause? I take it that it is a general principle of law that, when it is apparent that a testatrix did not intend property to pass under a residuary clause, it or its avails will not so pass. This was substantially the conclusion reached, I think, in the Matter of Dowd's Will, 8 Abb. N. C. 118, and it seems a very just conclusion of a surrogate of this state. Results precisely contrary to the obvious intent of a testatrix, as evidenced by the face of her will, should not be effectuated by the court if it is possible to prevent them. Here testatrix on the face of her will made no difference between the amounts to accrue to the benefit of each of her two sons; but, unfortunately, by an alienation of the thing devised for the benefit of one of them, she in law is to be taken as having revoked one of the contemplated gifts. Is it then to be taken also in law that the consequence of this probably misunderstood act on her part inures to the sole benefit of her other son? Courts of justice are not inclined to defeat obvious intentions of testators by the application of technical rules. In Pierrepont v. Edwards, 25 N. Y. 128, 131, it was intimated that the solution of every case on a will depends on particular cir-

cumstances, and there is in that case, evident in the opinion, a freedom exercised in the strict application of technical rules in the interest of justice. The decision in effect is, as I interpret it, that technical rules must be applied only as and when it is just. Otherwise the purport of the decision just cited is not in point here.

The lapse or revocation of legacies or devises does not always cause such legacies or devises to pass under the residuary clause to the residuary legatee. Attorney General v. Johnstone, Ambler, 577; Springett v. Jennings, 6 Ch. 333; Patching v. Barnett, 28 W. R. 886, 889; In re Mason, Ogden v. Mason [1901] 1 Ch. 619, 628. In short, it is a general rule of construction that if the words of a will show that the testator intended the residuary bequest to have a limited effect the presumption in favor of the residuary legatee is rebutted. Suppose, for example, a testator having an only son devises or bequeaths to his son the bulk of his estate with the statement "that if anything remain, which is doubtful, the residue shall go to a faithful servant of his family," and the devises and bequest to the son prove void on technical grounds, would it be just that the servant take all? In such a case the residuary is treated as a specific legacy or devise, and "there is no true residuary gift (per Jessel, M. R., in Blight v. Hartwell, 23 Ch. D. 218, 222)." Of general equitable doctrines Jessel was a very great master, and his pronouncements are always entitled to be highly regarded as those of a philosophic and exact foreign jurist of high distinction. Nor do I think that the rules applicable in our own courts have departed from the equitable principles of construction just indicated. If they have I shall certainly make haste to follow them, as I am in duty bound to do, regardless of bad consequences in this particular case. The hard and fast rules concerning lapsed and void legacies and devises which pass under general and unrestricted residuary clauses are always founded on the presumed intention that the testator did not wish to die intestate, and that everything not really devised and bequeathed should go to his residuary devisee or legatee. It strikes me as most unjust to stretch this general rule so as to embrace this case before me, since there is something here to rebut the presumption that all was to go to John under this will.

In King v. Woodhull, 3 Edw. 79, the exception I have announced was, as it seems to me, recognized by the vice chancellor of this state, as it is in other adjudications of weight. Matter of Benson, 96 N. Y. 510, 48 Am. Rep. 646; Kerr v. Dougherty, 79 N. Y. 327; Stephenson v. Ontario Orphan Asylum, 27 Hun, 383; Goodwin v. Ingraham, 29 Hun, 221; Adams v. Massey, 184 N. Y. 62, 73, 76 N. E. 916. While Matter of Hoffman, 201 N. Y. 247, 94 N. E. 990, refers to the partial failure of a residuary bequest, some general expressions of the opinion seem also to be in line with the principle of the prior cases I have before noticed. I conceive that the numerous adjudications which carry void or lapsed legacies to a residuary legatee are founded on the single assumption that the gifts to the residuary legatee are not circumscribed by expressions contained in other parts of the will. When the residuary gift is so circumscribed, the residuary legatee is not allowed to take. In that case the residuary clause is not a "true residuary gift."

The ground upon which I prefer to rest my judgment in this matter is that the situation of the clause containing the testamentary gifts to her son John shows that this so-called residuary clause of the will before me was not a "true residuary gift," to use the expression of the eminent master of the rolls, before quoted, but rather in the nature of a specific legacy or devise to John. It is in this case just as if testatrix had said, "I give to John all of my estate except the house and lot given to Edward." While a residuary clause is not required to be in any particular form or place (Morton v. Woodbury, 153 N. Y. 243, 47 N. E. 283), yet its context and situation may be resorted to for the purpose of construction and to ascertain the intention of testatrix. I am unable at the moment to elaborate a more extended review of the adjudications on the points involved, but I am satisfied that their reasoning in the end justifies the conclusion I would reach.

My conclusion, in short, is that the proceeds of the sale of the house and lot originally devised for the benefit of Edward were not intended by testatrix to benefit John and that they should be held to pass as in the case of an intestacy. By this construction Edward will receive only one-quarter of the mother's estate and John three-quarters. This, however, saves something for Edward. Settle decree accordingly.

(81 Misc. Rep. 579.)

In re HIGGINS' ESTATE.

(Surrogate's Court, Cattaraugus County. July, 1913.)

1. COURTS (§ 201*)—PROBATE COURTS—INCIDENTAL JURISDICTION—STATUTORY PROVISIONS—"ASCERTAIN."

A will created four trust funds for the widow and three children of the testator, and provided that on the death of any of them the principal of the fund should fall into the residuary estate. The widow gave a voluntary assignment of an undivided two-ninths interest in the residuary estate to the eldest son, and she and the son entered into a contract in which they expressed a desire that the assets of the estate should be kept intact, and directed the executors of the will to transfer them to a holding corporation to be organized for that purpose, in which the parties were to hold stock in the proportion of their respective interests. Thereafter the son died, and the trustees instituted proceedings for an intermediate settlement of their accounts as to the trust fund of which he was the beneficiary. *Held*, that Code Civ. Proc. § 2472a, authorizing the surrogate, upon a judicial accounting or proceedings for the payment of a legacy, to ascertain the title to any legacy or distributive share, when construed in the light of the previous legislation extending the jurisdiction of that court, gave the surrogate jurisdiction to construe the assignment and the contract creating the corporation; the word "ascertain," which ordinarily means simply to become apprised of the existence of an undisputed fact, being used in that statute as the equivalent of "hear, try, and determine."

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 86, 87; Dec. Dig. § 201.*

For other definitions, see Words and Phrases, vol. 1, pp. 530, 531.]

2. WILLS (§ 740*) — RIGHTS OF LEGATEES — ASSIGNMENTS OF LEGACY — CONSTRUCTION.

The assignment to the son transferred to him an interest in the principal of the trust fund of which he was beneficiary, and which, by the ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

press terms of the will, was vested in the assignor as a part of the residuary estate subject to the terms of the trust, notwithstanding the insistence of the assignor that it was not her intention to transfer such fund.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1888–1895; Dec. Dig. § 740.*]

3. WILLS (§ 740*)—AGREEMENTS BETWEEN LEGATEES—CREATION OF HOLDING CORPORATION.

The contract creating a holding corporation required a transfer of the interest of the son in the trust fund to the corporation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1888–1895; Dec. Dig. § 740.*]

4. WILLS (§ 743*)—AGREEMENTS BETWEEN LEGATEES—CREATION OF HOLDING CORPORATION—EFFECT.

Where the agreement for the transfer of the residuary estate to the corporation had been fully consummated before the death of the son, except for the formal transfer of the funds upon the termination of the trust, it was not necessary for the executrix of the son, who, as wife, had joined in that contract, to execute any formal transfer of such funds, since equity regards as done that which ought to be done.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1907–1910; Dec. Dig. § 743.*]

5. TRUSTS (§ 303*)—PROCEEDINGS FOR SETTLEMENT—NATURE OF PROCEEDING.

The proceeding for the settlement of the trustees' account was not an action by the holding corporation to enforce a contract for its benefit, but the settlement of a controversy between the widow and the executrix of the son, in which the corporation was interested only as a recipient of the fund, and to which it was not a necessary party.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 420; Dec. Dig. § 303.*]

Proceedings for the intermediate judicial settlement of the accounts of the testamentary trustees under the will of Frank Wayland Higgins, deceased. Account settled as filed.

Hastings & Larkin, of Olean, for accounting trustees.

John K. Ward, of Ellicottville, for widow, Kate C. Higgins, F. Harrison Higgins, Josephine Higgins Hovelaque, and the Higgins Co.

Edgar G. Pratt, of Redlands, Cal., for Elizabeth B. Higgins, individually and as special guardian for Katherine H. and Lucia C. Higgins, infants.

Philip Carpenter, of New York City, for Elizabeth B. Higgins, as executrix of the last will and testament of Orrin Thrall Higgins, deceased.

DAVIE, S. Frank Wayland Higgins, late of the city of Olean, died in February, 1907, leaving a will dated August 6, 1904, which was admitted to probate February 18, 1907. Letters testamentary were thereupon issued to N. V. V. Franchot and Frank L. Bartlett, the executors therein named, who have fully administered upon the estate and procured a final judicial settlement of their accounts as such executors on the 18th day of November, 1908.

The testator left him surviving his widow, Kate C. Higgins, two sons, Orrin T. and F. Harrison Higgins, and one daughter, Josephine Higgins Hovelaque, all of full age, his only heirs at law and next of

kin. The son Orrin, being a resident of California, died September 12, 1912, leaving a will, which was duly admitted to probate in that state, and letters testamentary were issued thereon to his widow, Elizabeth B. Higgins. He left him surviving, besides his widow, two minor daughters, Katherine H. and Lucia C. Higgins.

Aside from several general legacies, the will creates six distinct trusts, one of $50,000 for the widow and each of the three children, one of $4,000 for the benefit of Emily Higgins, and one of $10,000 for the maintenance and beautifying of the public park in the city of Olean on the north side of the Higgins homestead. The petitioners, Franchot, Bartlett, and Smith, were appointed trustees, and the executors were directed to set apart and turn over to them, as soon as practicable, from the funds of the estate, a sufficient amount to constitute the trusts so provided for, which was accordingly done. The income derived by the trustees from the investment of each of the $50,000 trusts was directed to be paid by them to the respective beneficiaries during their lives. The residue of the estate was given to the widow absolutely.

On the 21st day of May, 1907, Kate C. Higgins, the residuary legatee, executed, acknowledged, and delivered to the son Orrin T. an instrument in writing, of which the following is a copy:

"Know all men by these presents, that whereas, I, Kate C. Higgins of Olean, in the state of New York, am possessed of an estate as residuary legatee and devisee of my late husband, Frank Wayland Higgins, which I am desirous of settling in part on my son, Orrin Thrall Higgins, in order that he and his issue may to some extent be provided for out of the estate of his late father.

"Now, I, the said Kate C. Higgins, in consideration of the love and affection which I bear to my said son, and in further consideration of the sum of one dollar ($1.00), lawful money of the United States, to me paid before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, do bargain, sell, assign, transfer, and set over unto my said oldest son, Orrin Thrall Higgins, two-ninths of the residuary estate which came to me from his father, the late Frank Wayland Higgins, whether such residuary estate be real, personal, or mixed, my intention being that my said son, Orrin Thrall Higgins, shall be vested now and at the present time by virtue of this instrument, with two-ninths of the said residuary estate, to have and to hold the said two-ninths unto the said Orrin Thrall Higgins, his executors, administrators, and assigns, forever.

"I further covenant to and with the said Orrin Thrall Higgins that I will, pursuant to the premises, make, execute, and deliver any further deeds, covenants, and conveyances which may be requisite or necessary, in law or in equity, effectually to vest in him or his heirs or assigns the title to his portion of the real estate received by me as residuary legatee aforesaid, and hereby intended to be transferred and set over unto him.

"In witness whereof, I have hereunto set my hand and seal this 21st day of May, in the year of our Lord 1907. Kate C. Higgins. [L. S.]

"In presence of Harry A. Hinckley, Notary Public."

On the 25th day of November, 1908, the widow, Kate C. Higgins, and the son Orrin entered into a contract in writing, reciting the making of the assignment above quoted, and further stating that it was not desired or deemed advisable for the executors to exercise the power of sale given them by the will or to convert the stocks and securities constituting the residuary estate into money, but that they should turn the same over as specified in such agreement, and further

reciting that the said parties were then procuring the organization of a corporation under the laws of the state of Minnesota, to be known as the Higgins Company, with an authorized capital stock of $500,000, and that the province and functions of such corporation were to "take, acquire, own, and hold all of the residuary property and estate which shall come to the parties hereto under said will, it being deemed to be advisable by the parties hereto that such property should remain and be kept intact for the present," and which said agreement, after such recitals, contained the following provision:

"Therefore, for a valuable consideration by each to the other in hand paid, the receipt whereof is hereby acknowledged, it is mutually covenanted and agreed between the parties hereto that all of the property and estate, both real and personal, which shall belong to and become a part of the residuary estate under the twenty-second paragraph of the will of the said Frank W. Higgins, shall be jointly by the parties hereto, or by the said executors, transferred or conveyed to the said Higgins Company, and in payment therefor the parties hereto shall accept and take capital stock of the said Higgins Company, the party of the first part to have and receive seven-ninths and the party of the second part to have and receive two-ninths of such capital stock, as representing her or his interest in the property so transferred and conveyed, and either party hereto shall, upon request of the other, execute all such writings, transfers, conveyances, or assignments as may be necessary to so transfer or convey such interest, and to carry into effect the terms of this agreement. This agreement shall apply to and bind the heirs, executors, administrators, and assigns of the respective parties hereto."

The wife of the son Orrin, by a writing at the end of such agreement, approved of the same and agreed to join with her husband in the execution of any deed necessary to carry such agreement into effect, and for the purpose of conveying any contingent dower right she might have in such property.

The incorporation of the so-called Higgins Company was perfected by the filing of the requisite certificate in the office of the secretary of state of the state of Minnesota, November 10, 1908, and in the office of the register of deeds of St. Louis county, Minn., November 11, 1908, pursuant to the provisions of chapter 58 of the Revised Laws of the state of Minnesota for the year 1905. The incorporators named in the certificate were Kate C. Higgins, Orrin T. Higgins, Frank L. Bartlett, N. V. V. Franchot, and Allen B. Williams, who also constituted the first board of directors. Thereupon all of the real estate belonging to the residuary estate was duly conveyed to the Higgins Company, and all the securities, aside from those set apart to create the several trust funds, were actually delivered and turned over to the corporation. A single share of stock was issued to each of the directors, Franchot, Bartlett, and Williams, for the sole purpose of qualifying them to act as directors, and such portion of the balance of the capital stock as the parties deemed expedient in the proportion of two-ninths and seven-ninths was issued and delivered to Orrin and Kate C. Higgins, respectively; the balance of the capital stock being retained and held in the nature of treasury stock.

It is asserted on behalf of the residuary legatee that the assignment of May 21, 1907, did not transfer to Orrin T. any interest in the principal of this trust fund; that it only gave to him an undivided two-ninths interest in such portions of the residuary estate as were then

actually in the possession and under the control of the residuary legatee. On the contrary, the executrix of the Orrin T. Higgins will claims that by virtue of such assignment her husband became the owner of a two-ninths interest in this fund, and that such interest was not transferred to the Higgins Company by the contract of November 25, 1908, and that she is now entitled to such interest in money. These are the questions for determination upon this accounting. They must be determined in order to make the proper disposition of the securities constituting the trust fund. These conflicting claims can only be determined from a construction of the two contracts above referred to in connection with the provisions of the will of the decedent. Has the Surrogate's Court jurisdiction upon this accounting to make such construction?

[1] The Surrogate's Court is one of limited jurisdiction. It possesses no powers or authority other than those specifically conferred or necessarily inferentially granted. Section 2472 of the Code of Civil Procedure defines the general jurisdiction of the Surrogate's Court, and section 2481 specifies in detail its incidental powers. It has been frequently held that under the provisions of these two sections the Surrogate's Court had no jurisdiction to determine controversies of the character suggested, such questions being exclusively within the province of a court of general jurisdiction. Matter of Union Trust Co., 175 N. Y. 304, 67 N. E. 614; Matter of Wagner, 119 N. Y. 28, 23 N. E. 200. But section 2472a of the Code was enacted and became operative September 1, 1910, providing as follows:

"The Surrogate's Court has also jurisdiction upon a judicial accounting or a proceeding for the payment of a legacy to ascertain the title to any legacy or distributive share, to set off a debt against the same and for that purpose ascertain whether the debt exists, to affect the accounting party with a constructive trust, and to exercise all other power, legal or equitable, necessary to the complete disposition of the matter. He must order the trial of any controverted question of fact of which either party has constitutional right of trial by jury and seasonably demands the same."

What is the meaning and scope of this new section? In statutory construction where the phraseology of the act is ambiguous and indefinite, the legislative intent must be derived, not only from the phraseology itself, but from the surrounding circumstances and conditions inducing the legislation. Statutes should be construed and interpreted according to the nature and most obvious import of the language employed, without resorting to strained or forced construction for the purpose of limiting or enlarging their operation, having in mind the purpose evidently sought to be accomplished. In the past much delay and serious inconvenience in the administration of estates have been experienced in consequence of the limited powers of the Surrogate's Court. Conflicting claims to distributive shares have often arisen, making it necessary to delay proceedings in that court to await the ultimate determination of such controversies by a court of general jurisdiction. This situation has occasioned multiplicity of litigation, increased expense, vexatious procrastination, and accentuated the necessity for conferring upon Surrogates' Courts the same power and authority possessed and exercised by the former Chancery

Courts in their supervision of the administration of decedents' estates. The tendency of modern legislation has been to meet this demand to some extent. Year after year the jurisdiction of Surrogates' Courts has been enlarged. For illustration, by the provisions of chapter 595 of the Laws of 1895 these courts were given jurisdiction to hear, try, and determine disputed claims against estates upon the stipulation of the parties. By the amendment to section 2624 of the Code these courts were authorized, in connection with the probate of a will, to determine the validity, construction, and effect of any provision of the will, whether it related to real or personal estate. Many other instances might be cited.

It must be conceded that it was the design of the Legislature in the enactment of section 2472a to enlarge to some extent the then existing jurisdiction of Surrogates' Courts. In construing the phraseology of this section it is evident that it is somewhat inartistically drawn. Standing alone it might be difficult of interpretation and application. The use of the word "ascertain" in the first paragraph is somewhat unfortunate. The word "ascertain," in its commonly accepted signification, means simply to become apprised of the existence of an undisputed fact, and in this instance to learn who the conceded legatees and distributees were. Surrogates' Courts have always possessed that power as a necessary incident to distribution. It was evidently the intent to give these courts by the provisions of this new section some greater authority than that of merely ascertaining some existing fact. It has used the term "ascertain" as equivalent to "hear, try, and determine," and for that purpose it is provided that the Surrogate's Court "shall exercise all other powers, legal and equitable, necessary to a complete determination of the matter," and, in order that the provisions of this act should not contravene any constitutional right of trial by jury, the concluding sentence provides for a jury trial in a proper case, when seasonably demanded. The precise scope of this new legislation, however, is a subject of controversy. The Law Reform Association of the City of New York maintains that its effect is to give to Surrogates' Courts the right "to exercise all powers, legal or equitable, necessary to the complete disposition of the accounting." N. Y. L. J. April 28, 1911. On the contrary, in Matter of Clyne, 72 Misc. Rep. 593, 131 N. Y. Supp. 1090, the surrogate holds that the only additional power conferred by this section is the right to determine the title to a legacy or distributive share, to set off a debt against the same, to ascertain whether the debt exists so as to affect the accounting party with a constructive trust in regard to the same. The words "shall exercise all other powers, legal and equitable," etc., are not susceptible of general application, but relate simply to the determination of the title to a legacy or distributive share and the offsetting of debts against the same.

In Matter of Cary, 77 Misc. Rep. 602, 138 N. Y. Supp. 682, the question involved was the determination of the validity of a contract for voluntary settlement and distribution of the assets of the estate, entered into between the executor and the residuary legatee, where the latter asserted that the execution of such contract was procured

through fraudulent representations in regard to the extent of the estate. The Surrogate's Court held that under the provisions of section 2472a it had power to determine that question. Other questions were involved in that case, and, while the decision of the surrogate was affirmed by the Appellate Division, such affirmance was without opinion and, therefore, affords no light upon the question of the construction of this new section.

Without entering upon any academic discussion of the possible general scope of this new section, it will be held that for the purposes of this accounting the Surrogate's Court has jurisdiction to construe the two contracts in controversy and to determine who now holds the title to this trust fund.

[2] Did the assignment of May 21, 1907, above quoted, transfer to Orrin T. Higgins any interest in the principal of this trust fund? It is strenuously insisted on the part of the residuary legatee that it was not her design or intention in executing this voluntary transfer to her son to give him any interest in the principal of the trust fund of which he was then enjoying the income, or in the principal of either of the other trusts created for the benefit of the other children; that the purpose of such assignment was to transfer a two-ninths interest in that portion of the residuary estate which had then come into her possession and under her control, and nothing more; and in this connection attention is called to the following phraseology of the first paragraph of the will.

"Upon the death of any child the principal fund of $50,000.00 so set apart for the use of the one so dying *shall become* a part of my residuary estate."

The difficulty with such condition, however, arises from the fact that the legal signification of the term "residuary estate" has become well understood, and it must be assumed that the testator knew the meaning of the term when he employed it in his will, and that Mrs. Higgins comprehended its import when she used it in the assignment. The will provides that:

"All the rest and remainder of my property of whatever name, nature or kind, I give, devise and bequeath unto my wife, and I do further direct and declare that the several principal sums or trust funds which have been herein directed to be set apart shall constitute a part of the residuary estate unless otherwise directed, and be paid to the residuary legatee and devisee upon the happening of the event which shall terminate the rights of the beneficiaries to the use and income of such principal sums respectively, and I hereby declare such residuary legatee and devisee to have a vested right and interest in and to such principal sum immediately upon my decease, subject, however, to the use and income as hereinbefore provided."

The title to the principal of this fund was not held in abeyance or given to the trustees, but vested absolutely in the residuary legatee upon the death of the testator and the probate of his will; it was bequeathed directly to her in her capacity of residuary legatee. Her title to the principal is not impaired by the fact that the earnings of this fund were to be paid to the son during his lifetime. The provisions of the assignment are extremely specific, certain and definite. It transfers to the son absolutely a two-ninths interest in the entire residuary estate, of whatever it might consist, whether real, personal, or mixed.

In view of the specific characterization by the testator of the principal of this fund as a part of his residuary estate, and in view of the fact that the provisions of the assignment apply to every portion of the residuary estate, whether in possession or reversion, no substantial reason can be discovered for sustaining the contention of the residuary legatee in the particular mentioned. It must accordingly be held that upon the execution and delivery of the assignment the son became the absolute owner of an undivided two-ninths interest in the principal of this $50,000 trust fund.

[3] The remaining question relates to the effect of the contract of November 25, 1908. Does that contract provide for the transfer of the two-ninths interest in the trust fund to the Higgins Company? It is apparent from the recitals in this agreement that both Kate C. and Orrin T. Higgins were desirous of preventing the conversion of the property constituting the residuary estate into money. They express a wish that the executors should not exercise their power of sale over the real estate, nor their authority for the disposition of the personal securities, but that they should transfer the same to the holding corporation—the Higgins Company. The object of the formation of the corporation was to create a method of preserving and holding intact the valuable properties and securities constituting the residuary estate. All these considerations applied to the securities constituting the trust fund, as well as to the other portions of the residue. The agreement, by its terms, makes no distinction between the trust fund and that portion of the residuary estate which had then actually come into the possession of the residuary legatee. It must be held that this agreement, providing, as it does, that "it is mutually covenanted and agreed between the parties hereto that all the property and estate, both real and personal, which shall belong to and become a part of the residuary estate," should be assigned to the Higgins Company, does in fact provide for a transfer of Orrin T. Higgins' two-ninths interest in this $50,000, fund, and that such agreement had been fully consummated in every detail prior to the death of Orrin T., except the formal transfer of the funds constituting the trust estate as soon as the same were released from the operations of such trust.

[4] When we consider the fact that this two-ninths interest in the large residuary estate approximating in value nearly $1,000,000 was given to the son Orrin T., without any other consideration than that of love and affection, and that he voluntarily became a party to the contract of November 25, 1908, for the sole purpose of conserving and protecting the residuary estate, it can hardly be said now that the position of the executrix of his will in demanding payment of the two-ninths of this residuary estate to her in money is either just, equitable, or conscionable. The proposition is axiomatic that equity will consider that done which ought in good faith to be done. It is not necessary for the executrix of the Orrin T. Higgins will to execute any formal transfer of this two-ninths interest of the trust fund to the Higgins Company. Such transfer was effected by the contract of 1908. All that remained to be done after the death of Orrin T. in order to effect a complete performance of that contract in every de-

tail was the turning over to the corporation of such securities as constituted the trust fund. By the provisions of that contract Orrin T. had parted with and surrendered his rights to the possession of any portion of the securities constituting the trust fund and agreed to accept stock of the Higgins corporation equivalent to and in lieu of his two-ninths interest in the same. Such stock is all that he could have demanded or recovered at any time after the execution of such agreement, and his personal representative is not entitled upon this accounting to recover anything more.

[5] It is, however, vigorously asserted on behalf of the executrix of the Orrin T. Higgins will that the Higgins Company was not a party to the agreement of November 25, 1908; that no privity exists, in consequence of such agreement, between the corporation and Kate C. or Orrin T. Higgins or his legal representative, and that the corporation has no standing in this proceeding to enforce performance of this agreement, and in this connection numerous authorities are cited, especially Embler v. Hartford Steam Boiler Ins. Co., etc., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512, where it is said:

"Under the rules of the common law, giving a right of action upon the engagement or promise of a party, the cause of action is vested in the person with whom, or to whom, the engagement, or the promise, is made. An exception is allowed in the case of a third party, for whose benefit a contract is made, when he may be allowed to bring an action in his own name. In such a case, however, it must appear that, when the contract was made, some obligation, or duty, was owing from the promisee in the contract to the party to be benefited. It is not sufficient that the performance of the contract may benefit a third person. It must have been entered into for his benefit and the promisee must have a legal interest that it be performed in favor of the third person."

Also Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916, where it is said:

"Unless she [the plaintiff] had an interest in the performance of the contract there was no consideration therefor, as a promise for the benefit of a third person must not only be supported by a sufficient consideration, but the one furnishing it must have a legal interest in the performance of the promise."

In each of these cases, as well as in the other cases cited, the action was brought by the third party to enforce for his own benefit the provisions of a contract to which he had never become a party; but these authorities have no application to the present controversy. The Higgins Company is not an active litigant in this proceeding. No necessity existed for citing it upon this accounting. Its attitude is simply that of a recipient of such sums as may be turned over to it pursuant to the contract of November 25, 1908. The actual controversy is between Kate C. Higgins and the representative of the Orrin T. Higgins estate.

The purposes for the organization of the Higgins Company have already been referred to. They are set forth specifically in the agreement of November 25, 1908. It was organized merely as a holding company, for the purpose of managing and conserving the residuary estate, of which Kate C. owned seven-ninths and Orrin T. the other two-ninths. They were the only persons interested and the owners of

the capital stock. No other interests have intervened, and no stock of the corporation has been issued to any other parties, aside from nominal amounts in order to properly qualify the requisite number of directors of the corporation. The corporation has no assets other than the property constituting the residuary estate. The entire transactions had between the executors, Kate C. and Orrin T. Higgins after the making of the agreement of 1908 relating to the residuary estate were so had for the purpose of consummating such agreement in every particular.

The corporation was perfected November 11, 1908, and on December 1st of the same year the executors transferred to Kate C. and Orrin T. property of the value of $429,666. Kate C. and Orrin T. immediately thereupon transferred the same property to the corporation. In order to make the stock fully paid for in cash the corporation issued and delivered to Kate C. its check for $334,180 and likewise its check to Orrin T. for $95,480. Thereupon Kate C. and Orrin T. immediately executed and delivered to the company their respective personal checks for like amounts and received in exchange therefor, Kate C. Higgins 2,156 shares, and Orrin T. Higgins 616 shares. Thereupon Kate C. transferred one share of her stock to each Allen B. Williams, Frank L. Bartlett, and N. V. V. Franchot, for the purpose of qualifying them to act as directors. On the 11th day of January, 1909, the executors transferred to Kate C. and Orrin T. other property of the aggregate value of $188,325, and on the same day Kate C. and Orrin T. transferred the same identical property to the Higgins Company. The company thereupon issued and delivered to Kate C. its check for $146,475 and to Orrin T. its check for $41,850. They each in turn, on the same day, drew their respective personal checks to the company for like amounts, and thereupon 945 shares of the capital stock were issued to Kate C. and 270 shares to Orrin T.

On the 22d day of October, 1910, the executors transferred to Kate C. and Orrin T. Higgins 400 shares of the capital stock of the Exchange National Bank of Olean for $84,000, and on the same day Kate C. and Orrin T. transferred this stock to the Higgins Company, and thereupon the corporation issued to Kate C. its check for $65,333.33 and to Orrin T. its check for $18,666.67, and they in turn issued and delivered their checks, respectively, to the corporation for like amounts. The total authorized capital stock of the corporation was $500,000, and $450,000 of such stock was issued to Kate C. and Orrin T. as above stated.

Thereafter the executors transferred directly to the corporation $227,250 worth of other property, for which the corporation paid the executors directly, and the executors have accounted for the same upon their judicial settlement, and it does not appear that any of the capital stock of the corporation was issued to either Kate C. or Orrin T. in consequence of the last-mentioned transfer of assets.

The above facts are referred to for the purpose of explaining the details of the various transactions resorted to by Kate C. and Orrin T. Higgins and by the executors for the purpose of carrying into effect the provisions of the contract of 1908, and it will be seen that $50,000 of the authorized capital stock of the corporation has not yet been

issued, but is held by the corporation as treasury stock, and in view of the fact that Kate C. and Orrin T. Higgins were the owners of the entire capital stock of the corporation, it is of little consequence just what portion of the capital stock was actually issued to them, as their interest in the unissued or treasury stock is defined by the contract; that is Kate C. seven-ninths and Orrin T. two-ninths. The capital stock issued to them represents the entire assets of the corporation, aside from the nominal amounts issued to the directors, as above stated.

This review of the situation clearly shows that the contract of 1908 was not purely executory in its character; that in effect it did transfer to the Higgins Company the respective interests of Kate C. and Orrin T. in the entire residuary estate. It was fully executed in every detail, except as already stated, to the turning over of the assets constituting the trust fund in question, and the title to such trust fund was in effect transferred to the corporation by that agreement.

It must accordingly be held that both Kate C. and Orrin T. Higgins, by virtue of the provisions of the contract of 1908, had in effect transferred all of their interest in the residuary estate to the corporation, and that the $50,000 remaining in the hands of the trustees and set apart as a trust fund for the benefit of Orrin T. Higgins, such trust having now expired in consequence of his death, should be delivered by the trustees to the Higgins Company.

It appears that a small amount of income had been derived from the trust fund prior to the death of Orrin T. Higgins which had not been paid over to him by the trustees. Such sum, as shown by the account filed herein, should now be paid by the trustees to the executrix of the Orrin T. Higgins will, and the income which has been derived from the investment of said trust fund since the death of Orrin T. Higgins should be paid by the trustees to the Higgins Company.

No objections whatever are filed or made to the trustees' accounts of receipts and disbursements or to their proceedings in any particular. Accordingly, the decree to be made herein will provide that their accounts be judicially settled as filed.

Decreed accordingly.

(82 Misc. Rep. 346)

In re ZIEGLER.

(Surrogate's Court, New York County. October, 1913.)

1. ADOPTION (§ 3*)—NATURE OF PROCEEDING—STATUTORY ORIGIN.
The adoption of children and their rights of inheritance depend wholly upon statute, as the common law did not recognize adoption.
[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 1, 2; Dec. Dig. § 3.*]

2. ADOPTION (§ 1*)—NATURE OF PROCEEDING—NOT CONTRACTUAL—"STATUS."
The adoption of children, their rights of inheritance, and the abrogation of the relation are governed by the law of status, and not of contracts; such "status" is a condition in life determined by law and not by act of the parties; and its rights and its abrogation depend on authority

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the state, and not upon the contract or consent of the parties, except as required by statute.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 15; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 7, pp. 6646, 6647.]

3. ADOPTION (§ 3*) — STATUTORY PROVISIONS — CONSTRUCTION — SUBSTANTIAL COMPLIANCE.

Statutes authorizing the adoption of children and the abrogation of the relation, like other statutes in derogation of the common law, are to be strictly construed, and the mode prescribed must be substantially complied with.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 1, 2; Dec. Dig. § 3.*]

4. ADOPTION (§ 16*)—ABROGATION OF RELATION—JURISDICTION OF SURROGATE COURT.

Proceedings for the abrogation of an adoption are distinct from the adoption proceedings, and the power given the Surrogate Court, under Laws 1896, c. 272, to abrogate adoptions may be exercised notwithstanding the adoption was made in a proceeding before a justice of the Supreme Court.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 27, 28; Dec. Dig. § 16.*]

5. COURTS (§ 472*)—CONCURRENT JURISDICTION—IN GENERAL.

Different courts may exercise concurrent jurisdiction relative to the same matters, where the Constitution or statutes so provide.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 442, 451, 465, 619, 1199–1202, 1204–1224, 1247–1259; Dec. Dig. § 472.*]

6. ADOPTION (§ 16*)—REVOCATION—CONSENT OF PARTIES—MOTHER DIVORCED FOR ADULTERY.

Under Laws 1896, c. 272, § 66, providing that to abrogate an adoption the parties whose consent to an original adoption would be necessary must appear and give their consent, the consent of the mother, who had been divorced for adultery, was unnecessary, as Laws 1896, c. 272, § 61 (Consol. Laws 1909, c. 14, § 111), does not require the consent to adoption of a parent divorced for adultery.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 27, 28; Dec. Dig. § 16.*]

7. ADOPTION (§ 2*)—CONSTITUTIONAL LAW (§ 145*)—OBLIGATION OF CONTRACTS—ABROGATION OF ADOPTION OF CHILD.

The inhibition against laws impairing the obligation of contracts has no reference to adoption, or to abrogation of the relation, as such matters are not contractual.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 2; Dec. Dig. § 2;* Constitutional Law, Cent. Dig. §§ 279–281, 285, 414, 417, 421–428; Dec. Dig. § 145.*]

Petition by Florence Louise Ziegler to set aside the abrogation of her adoption by William Ziegler and Electa M. Ziegler. Denied.

Patton & Patton, of New York City (James D. Wallace and Harry S. McCartney, of counsel), for petitioner.

Swan & Moore and William J. Underwood, all of New York City (John M. Bowers, of New York City, of counsel), opposed.

FOWLER, S. This is a proceeding to vacate and set aside, and to decree to be null and void and without force and effect, certain abrogation proceedings taken before the late Surrogate Abner C. Thomas,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

one of the surrogates of this county, and the consent of the said surrogate to the abrogation of the adoption of the petitioner.

The course of the adoption and abrogation proceedings, in so far as it is necessary to consider them, is as follows: On January 30, 1896, Hon. Roger A. Pryor, then one of the justices of the Supreme Court of the state of New York, duly made an order whereby Florence Louise Brandt and her brother William Conrad Brandt were legally adopted by the late William Ziegler and Electa M. Ziegler, his wife. The said Florence L. Brandt and William C. Brandt were then both under 12 years of age, and were children of George Washington Brandt and Anna Hutting Brandt, his wife, who were both nonresidents of this state. William and Electa M. Ziegler were residents of the city, county, and state of New York. George Washington Brandt was the half-brother of the late William Ziegler, who was childless, and a man of large estate. The order of adoption was based upon an agreement duly executed by the said William and Electa M. Ziegler before Mr. Justice Pryor on the 30th day of January, 1896, and the consent of the said George Washington Brandt and Anna H. Brandt, duly executed by George Washington Brandt on the 22d day of April, 1895, in Chicago, and by Anna H. Brandt on the 18th day of February, 1895, in Brussels, in the Kingdom of Belgium.

The abrogation of such adoption was based upon an agreement whereby the several parties thereto mutually consented, covenanted, and agreed to and with each other that the aforesaid original adoption be abrogated as to Florence Louise Brandt; that William Ziegler, Electa M. Ziegler and Florence Louise Ziegler relinquished each to the other the relation of parent and child and all rights acquired by said adoption, and which may have arisen by operation of law or otherwise by reason of said adoption; that George W. Brandt reassume the relation of parent and father to Florence Louise Ziegler; that said adoption be abrogated, pursuant to law and the statute, and that said Florence Louise Ziegler reassume her original name, Florence Louise Brandt, and that George W. Brandt reassume the relation of father to said minor. This instrument was duly executed before Hon. Abner C. Thomas, surrogate, on the 31st day of March, 1902, by William Ziegler, Electa M. Ziegler, George W. Brandt, and Florence Louise Ziegler. Surrogate Thomas made upon said agreement the following indorsement:

"I, Abner C. Thomas, one of the surrogates of the county of New York, do hereby consent to the abrogation of the adoption of Florence Louise Ziegler by William Ziegler and Electa M. Ziegler, New York, March 31, 1902. Abner C. Thomas, Surrogate."

At the time this abrogation took place Florence Louise Ziegler was 16 years of age. On the 30th day of March, 1895, George Washington Brandt had obtained a decree of divorce from Anna H. Brandt on the ground of her adultery, which decree provided that said George Washington Brandt should have the care, custody, control, and education of the children, Florence Louise Brandt and William Conrad Brandt, without any interference on the part of the defendant, the mother by nature of the said Florence Louise. William Ziegler has since died.

This present proceeding to annul the abrogation of the adoption of Florence Louise was instituted by the filing of a petition by said Florence Louise, who is now over 21 years of age, and the citation of Electa M. Ziegler, William Ziegler, Jr., George Washington Brandt, Anna H. Haney, formerly Anna H. Brandt, the mother by nature of petitioner, and the executors of the estate of William Ziegler, deceased.

The late William Ziegler died testate, seised and possessed of a very great estate. Had he died insolvent or penniless it may be taken for granted that the present proceeding for the annulment of the abrogation of adoption would not have been instituted. As it is, the present proceeding is supported and opposed by counsel for all the parties with great thoroughness and learning. If, however, the proceeding is legally or well founded, its ulterior motive, whatever it may be, is inconsequential.

The petitioner claims, in substance, that the abrogation of her adoption is invalid for various reasons, which I shall proceed briefly to consider. It is asserted in behalf of petitioner that the adoption, having been once effected, was in the nature of a contract between the parents by nature and the adoptive parents, and even the child itself; this being so, that it required the consent of the mother by nature to abrogate such contract of adoption, notwithstanding that the father by nature had, before the act of abrogation, divorced the petitioner's mother by nature and had himself consented to the abrogation in question. Such a contention requires in limine our consideration of the relation which acts of adoption and emancipation from adoption now occupy in the law of the land. I shall first consider whether such acts are related in fact to our law of contract or to the law regulating status. If they are governed by the law of contract, or even by analogies taken out of the law of contract, it is claimed that the proceeding to abrogate the adoption required the consent of the petitioner's mother by nature, she having been a party to the act of adoption. If the status of an adopted child is fixed by the state and not by the act of the parties, other principles will, I think, govern or influence the solution of the present application.

[1] It is well recognized that the common law contained no provision for the adoption of children. From Bracton to Blackstone there is no recognition by the common law of such an artificial augmentation of the family relation or of a succession by adopted children. In Anglo-Saxon law it was otherwise; but the practice of the Saxons disappeared speedily in England, and Kent's Commentaries on American Law disclose that the common law, received and in force in this country, took no notice of adoption as a legal act. Adoption of children and the rights of intestate succession by adopted children are due in this state to statute. Matter of Thorne, 155 N. Y. 140, 143, 49 N. E. 661; Matter of McRae, 189 N. Y. 142, 81 N. E. 956, 12 Ann. Cas. 505. The first statute of this state permitting or regulating the adoption of children was chapter 830, Laws of 1873, which was amended by chapter 703 of the Laws of 1887 so as to confer rights of succession in the event that the adoptive parent died intestate. The substance of these and other similar acts will now be found consolidated in the "Domestic Relations Law." The artificial augmentation of the

legal institution known in law as the "family" is now reasonably complete in the state of New York, and is fully recognized by the statutes or organic acts of the state. Without such acts the common-law or contract does not sanction an attempt to create the relation of parent and child by adoption.

[2] It is the state, and not the parents by nature and by adoption, which creates the new status of a child by adoption. The rights and obligations of the adoptive parent and of the adopted child are due wholly to the statute of the state. The prerequisites for adoption are subordinate to the authorization or imprimatur of the state. When the state has sanctioned the adoption, the new status of parent and child is ipso facto complete. It seems reasonable to assume that a status created by the state may be altered or abrogated by the state only. Whenever a new status is created by the state the old jurisprudence affords only analogies; it is rarely decisive in such matters as this now before me. Counsel for petitioner are very explicit on this point, and frankly state in their brief "that the issues presented by this record logically and directly lead into practically virgin territory in the domain of jurisprudence."

In the early Roman law the continuation of the family invested adoption with great importance. Consequently we find the law concerning adoption thoroughly worked out in that system. The briefs of counsel in this matter before me make good use of analogies offered by the Roman law, and their arguments are profound and instructive. That adoption was treated in the post-Justinianian law as an act regulating status and not as one dependent on their law concerned with obligations is, I think, to be conceded. In other words, rights of property with the Romans followed the particular status of a child by adoption, and were not regarded as attaching to the child by reason of any mere agreement to adopt him. The civilians recognized that it was the Roman law which regulated the rights of the adopted child. Gaius, for example, states very clearly that adoption takes place in two ways: By the people's authority (populi auctoritate) and by the power (imperium) of the magistrate, the prætor for example (G. 1, 98). Here, obviously, there was no room for an application of the Roman law regulating obligations or contract. But I recall that it was acutely said by an English writer of some distinction that the later Roman law regarded the family from the legal rather than the moral point of view. The thesis of this writer was that the common law, in this particular, developed on moral and not on legal conceptions. It may be so. In any event, I fear that analogies drawn from Roman law are with us to be applied with caution when they concern our family law. I have not therefore attempted to follow counsel in all the intricacies of Roman analogies.

But it is apparent to me that whenever adoption is recognized by a state, the relation of parent and child comes to be created, as in Roman law, in two ways, by birth and by adoption, and that one is made the legal equivalent of the other. There is no doubt in my mind that adoption properly belongs to our law concerned with status, as a relation of parent and child cannot be effected by contract alone. In Roman law arrogation and adoption certainly belonged to the public law, jus pub-

licum, since they affected status and involved an alteration in the composition of the family (Ortolan, 581). Savigny, in his great work on Jural Relations, treats adoption and arrogation as affecting status. Status can be determined only by the state and not by agreement of the parties. Let me define what is meant by "status." Whenever a condition in life is determined by law, and not by act of the parties, it is correctly denominated a "status" in jurisprudence, and even in the terminology of the common law itself, as I find from adjudged cases. While the law of status tends to become less and less important in modern jurisprudence, it remains of significance in some instances. Status, recognized by law, is the basis of rights. The status of an adopted child, for example, is the basis of his legal rights against his adoptive parents. When his rights are invaded it is not the contract of adoption he resorts to, but to his status as the child of his adopted father. So the duties and rights of the adoptive father are determined by the law of status and not by contract. Burnes v. Burnes, 137 Fed. 781, 797, 70 C. C. A. 357.

Under all systems of law which recognize adoption of children, emancipation from parental power and control, or an abrogation of the artificial relation, is also recognized and is treated as an act by operation of law and not as an act of the parties to the adoption. In other words, the state alone can determine when the relation of parent and child ceases. If these very general principles which I have announced are accurate in our jurisprudence, the force of the petitioner's contention that the consent of her mother by nature to the act of abrogation was inherently necessary will be perceived to be somewhat diminished.

[3] That there must be a substantial compliance with statutes authorizing the adoption of children or the abrogation of such adoption I have no doubt. Statutes in derogation of the common law or statutes altering a status recognized by the common law are always to be strictly construed. So when a statute directs the mode in which a legal act shall be effected there must always be a substantial compliance shown. These are common principles which need no citation of authority. It is complained by petitioner that her mother by nature failed to consent, not to the act of adoption which took away the child of such mother, but to the act annulling or abrogating such adoption and restoring the child to the original parental control. This is no hardship on the mother by nature. In this instance it is essential to note that the mother by nature had after the act of adoption, but before the act of abrogation, been divorced from the natural father of the child. The decree of divorce purports to deprive such mother by nature of all future parental control or authority. Ipso facto, to some extent, her right to oppose or consent to the act of abrogation in question had ceased and become invested solely in the father by nature. This inference both the decree of divorce and the statute of this state, to which I shall refer, seem to support. It is now claimed in this proceeding in behalf of petitioner that the consent of her mother by nature was essential to the act of abrogation, notwithstanding that such mother was divorced and deprived of parental control and authority by the decree of a competent court.

[4, 5] It is also claimed by petitioner that the Surrogate's Court had no power or jurisdiction in the proceeding to abrogate an adoption, because such adoption was made or declared in a proceeding taken before a justice of the Supreme Court of the state of New York. Of the jurisdiction of this court I entertain no doubt. The proceeding to abrogate an adoption was a new or independent one, quite distinct from the proceeding to adopt. Separate courts may be concurrently invested with similar jurisdictions if the statutes or Constitution so provide, and the law did so provide. In such proceedings either court is the minister of the state.

The first law of this state giving the power of adoption and abrogation of adoptions to courts was chapter 830 of the Laws of 1873, which conferred the power on the county judge of the county in which the person adopting resided. The judges of the Court of Common Pleas rightfully exercised the jurisdiction conferred upon the county judges. Matter of Morgan, 56 N. Y. 629. The Constitution of 1894 abolished the Court of Common Pleas from and after January 1, 1896. Article 6, § 5, however, provided that "the jurisdiction now exercised by the several courts hereby abolished shall be vested in the Supreme Court." Therefore the order of adoption made on January 30, 1896, by Hon. Roger A. Pryor was valid and legal. (This is not disputed by any of the parties to this proceeding.) The act giving this power to the county judge was repealed by chapter 272 of the Laws of 1896, which went into effect October 1, 1896, and which conferred the power of allowing and confirming an adoption and the consenting to an abrogation of adoption on the county judge or the surrogate of the county where the foster parent or parents resided, thus in fact continuing the power in the county judges and for the first time conferring it upon the surrogates. This act by its general terms, and by not reserving to the Supreme Court the power of abrogation, conferred the power on the surrogates and county judges to abrogate adoptions made by the Supreme Court. It was competent for the Legislature to pass this law, and this court will not undertake to say that it had not the constitutional power to do so.

[6] The consent of Anna H. Haney, the divorced wife of George Washington Brandt, and the mother by nature of petitioner, was unnecessary to make the act of abrogation valid, nor was she a necessary party to the proceeding taken to effect the abrogation of the adoption in question. When the petitioner was adopted on January 30, 1896, the adoption statute then in force in New York was chapter 830 of the Laws of 1873. Section 8 of this law provided as follows:

"Section 8. The person adopting a child, and the child adopted, and the other persons whose consent is necessary, shall appear before the county judge of the county in which the person adopting resides, and the necessary consent shall thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be adopted and treated, in all respects, as his own lawful child should be treated."

The following section provided that the judge, if satisfied, should make an order directing that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting, and that such child shall take the name of the person adopting, and that

the two shall thenceforth sustain towards each other the legal relation of parent and child. Section 13 provided as follows:

"But no child shall hereafter be adopted except under the provisions of this act, nor shall any child that has been adopted be deprived of the rights of adoption, except upon a proceeding for that purpose, with the like sanction and consent as is required for an act of adoption under the eighth section hereof; and any agreement and consent in respect to such adoption, or abrogation thereof hereafter to be made, shall be in writing, signed by such county judge or a judge of the Supreme Court," etc.

Chapter 830 of the Laws of 1873 was amended by chapter 703 of the Laws of 1887, which act amended section 10 of the Law of 1873 in respect to the right of inheritance, etc. In 1888 an amendment was made to section 8 of the act of 1873 dispensing with the appearance of the parents before the county judge when they did not reside in the same county as the foster parents. Laws 1888, c. 485. The Law of 1873 was repealed by chapter 272 of the Laws of 1896, which law went into effect on October 1, 1896, and conferred the power on County Courts and the Surrogate's Courts of making orders in adoption and abrogation proceedings. This latter act, known as the "Domestic Relations Law," is now incorporated in the Consolidated Laws as article 7 of chapter 19 of the Laws of 1909. Section 61 of this last act (of 1896), which enumerated the persons whose consent was necessary to an adoption, provided in subdivision 3 thereof that:

"The consent of a parent who had abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, is unnecessary."

Section 62, which is entitled Requisites of Voluntary Adoption, in subdivision 1 provides:

"The foster parent or parents, the minor and all the persons whose consent is necessary under the last section, must appear before the county judge or the surrogate of the county where the foster parent or parents reside, and be examined by such judge or surrogate, except as provided by the next subdivision."

The exception referred to therein was a provision that the attendance before the county judge or surrogate was not necessary where a parent or person or institution having the legal custody of the minor resided or was located in some other state or county.

Section 66 of chapter 272, Laws of 1896, the law in force at the time of the "abrogation" proceeding, provided that only the persons whose consent would be necessary to an original adoption must appear before the county judge or surrogate, and they must execute their consent and agreement on an application for an abrogation of adoption. Therefore it follows that the mother who had been divorced because of her adultery, not being necessarily present, her consent was not necessary. Either this is a casus omissus or else an inexact manner in the section of the statute providing that the parents shall agree to reassume such relation. It was obviously intended by the lawmaking power that where there was only one person whose consent was necessary, only that person should agree to reassume the relation of parent. At least this is a rational construction of the statute, and to

my mind no other construction of even an ambiguous statute should ever be made. That the consent of the mother by nature to the act of abrogation was not essential is, I think, supported by the implications of the opinion rendered in Matter of MacRae, 189 N. Y. 142, 81 N. E. 956, 12 Ann. Cas. 505.

[7] Before concluding, let me advert generally to the substance of a position argued by petitioner's counsel with great emphasis, viz., that the adoption being matter of contract between the parents by nature and adoption, the Legislature had no power to enact a law which impairs such contract without the consent of all the parties to the original adoption. The federal inhibition against laws impairing the validity of contracts had, in my judgment, no reference to adoptions or the abrogation of adoptions. I have endeavored to show that adoption is an act of the state itself, and not a contract between the natural parents and the adoptive parents. A status created by the state may be altered by the state in any way it sees fit. In my judgment the consent of the parent, either adoptive or by nature, is not by our jurisprudence indispensable to an act abrogating an adoption, unless the state itself makes such consent an indispensable prerequisite. This the state has not in this instance done.

The application of the petitioner should be denied. Settle decree accordingly.

(82 Misc. Rep. 228)

In re HAYNES' WILL.

(Surrogate's Court, New York County. September 30, 1913.)

1. INSANE PERSONS (§ 94*)—APPOINTMENT OF SPECIAL GUARDIAN—RIGHT TO TRAVERSE.

Where the proponent of a will alleged that the daughter of the testatrix was mentally incompetent, although she had never been so adjudicated, and the surrogate, under the authority conferred by Code Civ. Proc. § 2527, had appointed a person upon whom the citation to the daughter should be served, the daughter has the right to appear and traverse the allegation of her incompetency, since that section of the Code, interpreted in the light of the policy and history of the law, and of Code Civ. Proc. § 2528, which provides that a person of full age may, unless judicially declared incompetent, prosecute or defend in the Surrogate's Court, will not be construed to deny to such person a right to be heard in a proceeding affecting her liberty or estate.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 164, 165; Dec. Dig. § 94.*]

2. INSANE PERSONS (§ 94*)—APPOINTMENT OF SPECIAL GUARDIAN—BURDEN OF PROOF.

Where such a traverse is made, the burden is upon proponent to establish his allegation of incompetency beyond all peradventure.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 164, 165; Dec. Dig. § 94.*]

3. INSANE PERSONS (§ 94*)—APPOINTMENT OF SPECIAL GUARDIAN—REFERENCE.

In such a case, a reference to determine the issue would not be conclusive upon a trial of the heir's competency in the Supreme Court, and therefore will not be granted by the surrogate.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 164, 165; Dec. Dig. § 94.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. HUSBAND AND WIFE (§ 205*)—MARRIED WOMEN'S PROPERTY ACTS—OPERATION—EQUITABLE RELIEF.
The statutes making the estates of married women sole, both at law and in equity, do not prevent the granting of equitable relief in cases where the estate is endangered by an improvident husband.
[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 744, 748–755, 970; Dec. Dig. § 205.*]

5. INSANE PERSONS (§ 94*)—APPOINTMENT OF SPECIAL GUARDIAN—VACATION OF APPOINTMENT.
Where an heir, who was alleged by the proponent of a will to be incompetent, so that the citation was served upon a special guardian appointed by the court, appeared and traversed the allegation of incompetency, the surrogate had jurisdiction to vacate the appointment of the special guardian and to permit the heir to contest the will in person.
[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 164, 165; Dec. Dig. § 94.*]

6. WILLS (§ 220*)—RIGHT TO CONTEST—PROVISIONS FAVORABLE TO CONTESTOR.
The wisdom of the provisions of the will, even when for the contestor's benefit, is not sufficient reason for denying the right to contest.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 532–537; Dec. Dig. § 220.*]

7. INSANE PERSONS (§ 94*)—PROCEEDINGS FOR PROBATE—APPOINTMENT OF SPECIAL GUARDIAN—MOTION TO STRIKE ALLEGATIONS.
Where the appointment of a special guardian for an heir alleged to be incompetent was vacated upon her traverse of the allegations and the affidavits in support thereof, the allegation of incompetency, if made in good faith, will not be stricken out; since it was the basis for action by the court authorized under the Code.
[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 164, 165; Dec. Dig. § 94.*]

In the matter of the will of Annette Wagner Haynes. Motion by an heir of a testatrix to vacate an order of the Surrogate appointing a special guardian for such heir to receive service of citation, and also to strike out of the petition for probate an allegation that the heir is mentally incompetent. Order vacated, but allegation not stricken.

Halstead H. Frost, Jr., of New York City (James W. Osborne, of New York City, of counsel), for the motion.
Edward H. Lockwood, of New York City, for proponent.
Elwood J. Harlam, of New York City, special guardian.

FOWLER, S. This motion is of grave importance, as it goes to the surrogate's jurisdiction of a common proceeding in this court pursuant to the Code of Civil Procedure. When proponent of a will has reason to believe that a party entitled to be cited is incompetent, a resort to the method pursued here is common practice in this court. In this proceeding the daughter of testatrix thus alleged to be incompetent now comes into court and traverses the aforesaid allegation of the proponent's petition, and by affidavits supporting the traverse presents a serious question of fact for my determination. Is she or is she not incompetent? Counsel for the motioner also question the power of the surrogate to make an order designating a special guardian or thus to deprive a party of a right to appear in person or by counsel in such a proceeding as this. The gravity of the question at-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tracted my attention on the argument, and I have reserved my decision for some time in order to examine it with due deliberation.

It is a very singular fact in this proceeding that after a somewhat earnest and extended oral argument, the briefs submitted to me on either side, and for the special guardian as well, do not cite a single adjudication; four briefs without a citation are unusual in this court. The contentions of the briefs are made up of unsupported general propositions, and yet some of these are of serious intrinsic weight in view of a long practice in this court, which may tend to deprive a party in this court of a substantial right.

[1] I take it that the right of a person to be heard in any proceeding affecting his liberty or estate is incontestable in our jurisprudence, and from the earliest times the common law and the course of the legislation in common-law states has guarded sedulously the right of persons accused of incompetency of any kind to traverse the inquisition or other proceeding in the nature of one de lunatico inquirendo. I cannot think for an instant that the comparatively recent legislation embodied in the Code of Civil Procedure and affecting this court's jurisdiction over incompetents was intended to introduce any revolutionary principle in respect of proceedings affecting the estates or persons of those asserted to be incompetents.

For my own satisfaction I have again examined the statutes of this state relating to proceedings against persons alleged to be of unsound mind, from the very beginning of our independent government, and, indeed, statutes enacted before that epoch, and I must say that I have found them entirely consistent with the ancient common-law principles of liberty and with the right to contest such proceedings established in common-law countries. The statutes in the main are re-enactments of provisions found in older statutes or in the text of the common law itself.

Under the old jurisprudence the chancellor, not ex virtute officii, but under the sign manual as representing the crown, had jurisdiction, or the right of administration, of the estates of incompetents. It is necessary to notice that it was always made a question whether the chancellor or even the crown had such jurisdiction until after an inquest found which involved the finding of a jury. It is, however, unnecessary to review at length the ancient practice on this subject, as it is sufficiently apparent in the older books of authority. We find the statutes of this state immediately after our independence of the crown supplied to the chancellor the want of a delegation by sign manual, and invested him as chancellor, and ultimately the county courts as well, with a jurisdiction over those mentally incompetent. Chapter 12, Laws of 1788; 2 J. & V. 196; 1 R. L. 147. This legislation crept into the Revised Statutes (2 R. L. 52) and ultimately into the Code of Civil Procedure. After the year 1846 the Supreme Court succeeded ultimately to the general jurisdiction of the chancellor over incompetents. At all times the ancient practice in such matters in this state corresponded very generally with the practice of the Chancery Court known to the common law. 2 Barb. Ch. Prac. 226 et seq., and particularly the decisions.

While it was always necessary to proceed to an inquisition by commissioners and a jury "venire facias juratores" in a contested proceeding to establish lunacy, yet chancery seems at times to have taken cognizance of mental incompetency without such formal adjudication. In Nelson v. Duncome, 9 Ves. 211, the master of the rolls took occasion to review the law on this very point, authorizing chancery to appoint a guardian for one alleged to be incompetent and yet not so formally adjudicated. It will suffice to point out that the master of the rolls affirmed the power of the court to protect those who were mentally incompetent, even though no regular adjudication to that end had been found. It is only necessary to indicate that the recent legislation of this state, to which I shall refer, goes no farther than this decision. It seems to me that the framers of the statutes authorizing the surrogates to designate persons to receive citations and to appoint special guardians for alleged incompetents must have had this very distinction in mind. Chapter 693, Laws of 1872; sections 2527, 2530, C. C. P. I do not find, as asserted by the motioner's counsel, that section 2528, Code of Civil Procedure (providing that a party of full age may, unless judicially declared incompetent to manage his affairs, prosecute or defend in this court in person), is inconsistent with the power conferred on this court by the other sections of the Code and designed to protect persons incompetent but not judicially so declared. A careful analysis of the various sections of the Code will show, I think, that they apply and are intended to apply to different states of fact. But I will not dwell on this point as it is not now here.

[2, 3] This brief review of the general state of the law brings me to the real point in this matter. Of the general right of the party, who is alleged to be incompetent by a proponent of a will, to appear here in person or by attorney and traverse the allegation that he is incompetent I have no doubt. It would, as I stated before, be inconsistent with the general principles of our jurisprudence if it were held otherwise. An appointment made on a false or erroneous suggestion of the mental condition of a party may be vacated by the court making it, and I so hold. The issue of fact is very plain in this matter, but the proponent has not established his contention beyond all peradventure as he should do. That a reference on such an issue could be made to take and report the testimony of the witnesses under oath is possible. But references to report a state of facts would not be conclusive if the same issue were regularly brought to trial in the Supreme Court, and I am disinclined to useless or novel references of doubtful utility.

[4] While the safety of the lady's estate from machinations of her husband may be and I think is in question, as asserted by the proponent, I doubt whether this is the proper forum or the method employed in this matter is the proper method to defeat them. If the proponent choose to institute a proceeding or action in the Supreme Court to have the heir at law of testatrix adjudicated incompetent, the way is open and, no doubt, proper relief may be procurable in that historic and extended jurisdiction. I have never thought that the extent of equitable relief even was a canon closed by Lord Eldon, as

often said in the books. To my mind, equity is still a living organon and not a dead one. The statutes making estates of femes covert estates sole both at law and in equity do not prevent the granting of even equitable relief against bad or improvident husbands in a proper case.

[5] This digression brings me to the real point in this cause. The lady whose incompetency is averred in this proceeding has appeared by counsel, and by strong affidavits of reputable persons has completely controverted the allegation and supporting affidavits of the proponent. That I have in view of the traverse jurisdiction in this proceeding to vacate the order appointing the special guardian I do not doubt, nor do I doubt that under the circumstances disclosed I ought to vacate the orders designating and appointing the special guardian so as to enable her as sole heir at law and next of kin of testatrix to appear in person or by attorney and contest the probate of her mother's will, although, as I am informed, such will carries the entire estate to trustees for the benefit of this daughter.

[6] But the purport of the will, however wise in the abstract, is no reason for denying the right of the motioner here to contest the probate in the usual form.

[7] As to the part of the motion to strike out of the petition for probate an allegation made no doubt in good faith by the mother's executor, I deny it. The allegation conforms to the statute and was the basis of the authorized action of this court in the premises. I see no reason for striking it out and very good reason for retaining it. Present orders on the usual notice in conformity with this opinion.

(82 Misc. Rep. 266.)

MEYERS v. WESTERN UNION TELEGRAPH CO.

(Chautauqua County Court. October 1, 1913.)

1. TELEGRAPHS AND TELEPHONES (§ 78*)—TRANSMISSION OF TELEGRAM—"PENAL LAW."

Transportation Corporation Law (Consol. Laws 1909, c. 63) § 103, imposing a penalty upon a telegraph company for refusing or neglecting to transmit a telegram with impartiality and in the order in which it was received, is a penal law which must be strictly construed against one seeking to recover the penalty.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 79–81; Dec. Dig. § 78.*

For other definitions, see Words and Phrases, vol. 6, pp. 5269–5271.]

2. TELEGRAPHS AND TELEPHONES (§ 78*)—TELEGRAMS—DELAY—PENALTY.

Transportation Corporation Law, § 103, does not impose a penalty upon the mere negligence or mistakes of employés but only for acts or omissions characterized by bad faith or partiality.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 79–81; Dec. Dig. § 78.*]

Appeal from Municipal Court of Dunkirk.

Action by Jacob H. Meyers against the Western Union Telegraph Company. Judgment for the plaintiff in the Municipal Court, and defendant appeals. Reversed.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William S. Stearns, of Fredonia, for appellant.
Thomas H. Larkins, of Dunkirk, for respondent.

OTTAWAY, J. This is an appeal from a judgment rendered in the Municipal Court of the city of Dunkirk, Chautauqua county, N. Y., in favor of the plaintiff and against the defendant for the sum of $100, with costs.

The action is brought for the statutory penalty under section 103 of the Transportation Corporation Law of the state of New York. This section provides:

"Every such corporation shall receive dispatches from and for other telegraph or telephone lines or corporations, and from and for any individual, and on payment of the usual charges by individuals for transmitting dispatches as established by the rules and regulations of such corporation, transmit the same with impartiality and good faith and in the order in which they are received, and if it neglects or refuses so to do, it shall pay one hundred dollars for every such refusal or neglect to the person or persons sending or desiring to send any such dispatch and entitled to have the same transmitted. * * *"

During the month of January, 1913, the plaintiff resided in the city of Pittsburg, Pa.; upon the 14th day of January the plaintiff went to the defendant's place of business in Pittsburg and delivered to an employé a telegram for the purpose of transmission to his brother, who then lived at 709 Park avenue, in the city of Dunkirk, N. Y. The telegram read as follows:

"Pittsburg, Pa., Jan. 14, 1913.

"Mr. David C. Meyers, 709 Park Ave., Dunkirk, N. Y.—Dave: George is dead. Will be buried Thursday afternoon, two o'clock. Come at once.

"J. H. Meyers."

At the time of the delivery of the telegram the plaintiff paid for its transmission to its destination, the city of Dunkirk. In accordance with the service maintained by the defendant, this message was transmitted to its office at Buffalo, N. Y., in the first instance. It was delivered at the office of the defendant in the city of Pittsburg at 7:55 p. m. and arrived in Buffalo at 8:06 p. m. The office of the defendant in Dunkirk closes at 8 p. m., consequently the message was not transmitted from Buffalo to Dunkirk until the morning of January the 15th. It was received at defendant's Dunkirk office at 8:10 a. m., being the first message received that day.

Owing to a mistake in the transmission of this message, it was received at the Dunkirk office as addressed to 707 Park avenue instead of 709 Park avenue. Upon its receipt the operator in charge delivered the message to a messenger boy for delivery. The messenger at once went to 707 Park avenue, the address upon the message, and made inquiries for the addressee, David C. Meyers, and was informed that no such person lived at that address. Other inquiries were made in that locality and in another locality. The messenger was unable to find the addressee, David C. Meyers, and returned the message to the office of the defendant. David C. Meyers, the addressee, had lived in the city of Dunkirk since the October preceding January 14, 1913, and had boarded at 709 Park avenue.

The message remained in the office of the defendant until inquiry was made by the addressee as to this message. In answer to his inquiry the employé of the defendant in charge of the office stated that no such message had been received. Subsequently the message was delivered by the defendant by messenger to the addressee.

This action was brought by the plaintiff to recover the sum of $100 upon the foregoing facts, claiming that these facts came within the provisions of section 103 of the Transportation Corporation Law.

[1] The section of the statute under which this action is brought, being highly penal, must be strictly construed against the plaintiff, and in order to recover he must make out a plain case and bring his claim within the letter of the statute. Gifford v. Glen Telephone Co., 54 Misc. Rep. 468, 106 N. Y. Supp. 53; Thompson v. Western Union Co., 40 Misc. Rep. 443, 82 N. Y. Supp. 675; Wichelman v. Company, 30 Misc. Rep. 450, 62 N. Y. Supp. 491; Company v. Kaldenberg, 165 N. Y. 1, 58 N. E. 790.

[2] It was incumbent upon the defendant in its performance of this statutory duty to transmit the message, received by it, with impartiality, good faith, and in the order in which it was received without discrimination. The statutory penalty is incurred when the acts or omissions are characterized by or result from partiality or bad faith, or when it postpones messages out of the order of time in which they were received, or when it discriminates in the manner and condition of service between its patrons; each and all of the acts which involve the company in penal consequences proceed from some aggressive violation of statutory duty imposed and not from a mere negligent omission to act according to the obligation of its contract as a public carrier of messages. The act being highly penal in character, it is to receive such a construction as not to involve penal consequences, except when the act complained of is clearly within the prohibition of the statute. Wichelman v. Western Union Tel. Co., 30 Misc. Rep. 450, 62 N. Y. Supp. 491.

The evidence in this case is barren of any proof of impartiality, bad faith, or neglect to perform its statutory duty. This provision of the statute was not intended to punish for mistakes or negligence of employés in cases not coming within the clear import of this provision of the statute.

Judgment is reversed, with costs to the plaintiff.

(158 App. Div. 465)

In re GOODMAN.

(Supreme Court, Appellate Division, First Department. October 10, 1913.)

1. ATTORNEY AND CLIENT (§ 42*)—OFFICE OF ATTORNEY—NATURE OF OFFICE.
An attorney is an officer of the court, and as such it is his duty to aid, not obstruct, the administration of justice.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 54; Dec. Dig. § 42.*]

2. ATTORNEY AND CLIENT (§ 42*) — OFFICE OF ATTORNEY — DISBARMENT — GROUNDS—DECEPTION OF COURT.
Under Judiciary Law (Consol. Laws 1909, c. 30) § 88, making deceit ground for disbarment, where, immediately after the suspension of an attorney for professional misconduct had expired, he attempted to deceive the court by stating that there would be no doubt about the case on trial if a certain witness could be procured, knowing such witness could be produced and would be of no assistance, he should be disbarred, though the decision was not influenced thereby.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 54; Dec. Dig. § 42.*]

Proceedings for the disbarment of Elias B. Goodman, an attorney, on charges of professional misconduct presented by the Association of the Bar of the City of New York. Respondent disbarred.

See, also, 155 App. Div. 898, 140 N. Y. Supp. 1121.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

John Neville Boyle, of New York City, for petitioner.

Elias B. Goodman, of New York City, in pro per.

INGRAHAM, P. J. [1] The respondent was suspended from practice January 11, 1910, for two years for professional misconduct. 135 App. Div. 594, 120 N. Y. Supp. 801. His suspension terminated on January 11, 1912. On July 17, 1912, he appeared before the Court of Special Sessions as counsel for the defendant in a bastardy proceeding. The respondent called the defendant as a witness, who in answer to respondent's question testified as to his efforts to obtain the attendance of one Atwood Violet as a witness, and that he was informed that he was in Connecticut at school, and also of another witness. After the conclusion of defendant's examination the court asked the respondent, "Is that your case, Mr. Goodman?" to which respondent replied, "If we could produce the two boys here, there would be no doubt of the case." The court there found that the defendant was not the father of the child and dismissed the complaint. It now appears that the respondent had had an interview with this Atwood Violet on the day before, and on the morning of the trial, and had ascertained that Violet would give no evidence that could be of use to the defendant, and said he would not call him, that respondent could have produced the witness at the trial had he desired, and that his statement to the court was misleading. The judges of the court testified that the statement of the respondent did not influence the decision of the case; but it is clear that the respondent, by his examination of his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

client and his observation that the production of the witnesses would remove any doubt about the case, intended to deceive the court and influence its decision. The defendant could have produced Violet, and he knew that his testimony could have been of no assistance in clearing up any doubt as to the question at issue, yet he allowed his client, in answer to his question, to testify that he could not find the witness; that he had been informed that the witness was at school in Connecticut; and respondent made the statement to the court that if defendant could produce the witnesses there would be no doubt about the case.

[2] The respondent was an officer of the court, and it was his duty to aid, not obstruct, the administration of justice. That he did not succeed in deceiving the court, or that his statement had no effect on the decision of the case then under investigation, is not material. We strongly condemn such practice as unprofessional and "prejudicial to the administration of justice." Judiciary Law (Consol. Laws 1909, c. 30) § 88.

We also wish to condemn the conduct of the respondent before the referee as unprofessional and improper. The conduct of the respondent, both before the Court of Special Sessions and before the referee, with the facts presented in the former proceeding when he was suspended from practice and the fact that immediately after his suspension expired he made a deliberate attempt to deceive the court, satisfies us that the respondent is not a proper person to remain a member of the profession, and he is therefore disbarred. All concur.

(158 App. Div. 414)

LARKIN v. QUEENSBOROUGH GAS & ELECTRIC LIGHT CO. et al.

(Supreme Court, Appellate Division, Second Department. September 23, 1913.)

1. MASTER AND SERVANT (§§ 278, 281*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an action for the death of a telephone splicer, caused by an electric shock while repairing a blow-out, caused by lightning or by contact with electric light wires, evidence *held* insufficient to show any negligence on the part of the telephone company, but, on the contrary, to show that the accident resulted from deceased's disobedience of the company's rules and carelessness in neglecting well-known precautions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977, 987–996; Dec. Dig. §§ 278, 281.*]

2. MASTER AND SERVANT (§ 154*)—LIABILITY FOR INJURIES—FAILURE TO WARN.

The failure of a telephone company to warn a splicer, who was directed to repair a cable, that there was a burn-out in the cable, did not render the company liable for his death, due to an electric shock, where he learned this fact by his own observation before he began work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 308, 309; Dec. Dig. § 154.*]

3. MASTER AND SERVANT (§ 278*) — ACTIONS FOR INJURIES — SUFFICIENCY OF EVIDENCE.

In an action for the death of a telephone splicer, due to an electric shock, evidence *held* insufficient to show that the company's rules as to testing cables for electric currents before making repairs and as to wear-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing rubber gloves were habitually disregarded, or that splicing could not well be done with gloves.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. § 278.*]

Appeal from Trial Term, Nassau County.

Action by Delia Larkin as administratrix of Michael Larkin, deceased, against the Queensborough Gas & Electric Light Company and another. From a judgment for plaintiff, and orders denying a new trial, defendants appeal. Reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

John C. Robinson, of New York City, for appellant Queensborough Gas & Electric Light Co.

Alexander Cameron, of New York City, for appellant New York Telephone Co.

John M. Ward, of New York City, for respondent.

BURR, J. On August 17, 1911, about 1 o'clock in the afternoon, Michael Larkin, who for five years previous to that date had been in the employ of defendant New York Telephone Company, sustained injuries from an electric shock which resulted in his death. In a common-law action his administratrix has recovered judgment for the pecuniary loss resulting therefrom against the said Telephone Company and the Queensborough Gas & Electric Light Company, and from such judgment, and an order denying a motion for a new trial, each of the defendants appeals.

No evidence was introduced by either defendant. We are required, therefore, to determine whether, upon plaintiff's evidence, either or both of defendants have been shown to be lacking in the exercise of reasonable care, and whether decedent was free from negligence contributing to the injury.

[1] The accident occurred near the intersection of Tanglewood Crossing and Ocean avenue in the village of Lawrence. At this point the Telephone Company had erected a pole, upon the cross-arms of which wires were strung, and which was known as pole No. 66. Upon another cross-arm upon the same pole, and a short distance above these, the Gas & Electric Light Company had strung two of its lighting wires, which were intended to and did convey a powerful electric current, sufficient, if discharged through the body of a man, to cause death. There was evidence that at about 5 o'clock in the afternoon of August 15th, during a heavy rainstorm, sparks of fire were seen in the branches of a tree through which the wires of both defendants ran, and near the pole in question. This fact was at once communicated to the Electric Light Company. We may remark in this connection that other evidence, offered by plaintiff, tended somewhat to discredit this testimony; but for the purposes of this appeal we shall consider the evidence in its most favorable light for plaintiff, and assume its accuracy.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It does not appear that the Electric Light Company had done anything toward remedying the defect, if any defect existed, prior to the time of the accident. It does appear that in some manner the Telephone Company had learned of some difficulty at the point in question, for on the evening of August 16th Larkin, the decedent, was instructed to go the next day to the place "to clear a trouble." Larkin was known as a "splicer." There was another class of workmen employed by the Telephone Company, known as "trouble hunters." The distinction as to their duties is not entirely clear, but it seems to refer to the character of the repairs necessary. If the difficulty was in a single wire, the trouble hunter discovering it might repair it. If it affected a cable, or was of a more serious nature, other workmen were employed.

On the morning of August 17th, before Larkin was injured, a trouble hunter had visited the scene of the accident, found a burn in the cable carrying a large number of wires, and had reported this to the wire chief, who had instructed him to go on, and that he would report it to the cable department. Under such circumstances the splicers go and clear trouble by splicing and putting on some new pieces of wire. When Larkin arrived at the place in question, he climbed the pole and remarked to his helper, "It looks like a blow-out, Jack." This helper testified that:

"A blow-out is either caused by lightning, or by a high tension current coming in contact with one of our wires, blowing a hole in the sheathing. That is what we call a blow-out. This hole, we saw before we opened it up, was about the size of your finger nail; small finger nail. It was black."

The terms "blow-out" and "burn-out" seem to be interchangeable. Plaintiff's evidence is to the effect that:

"Going to a point and seeing a condition that is described by the term 'blow-out,' any telephone man or wire man of experience would know that a heavy voltage had got to that spot where the blow-out or burn-out appeared."

The rules of the Telephone Company, with which decedent was shown to be familiar, prescribed that each employé whose duties require it for his own safety to—

"supply himself, at his own expense, with spurs, body belts, safety straps, and rubber gloves. * * * Constant and extraordinary care shall be exercised in all situations where an element of danger is or may be present, as when working in the vicinity of high potential conductors. * * * Employé is warned that light or power wires, * * * carrying currents of dangerously high voltage, often exist in close proximity to the wires of this company; that contact with them or leaking of current from them is liable to occur by reasons of storm of all kinds, sagging or breaking of wires, defective insulation, dampness of poles and cross-arms, and other causes. Employé is also warned that apparently sound insulation on wires other than telephone wires is frequently insufficient to prevent serious and sometimes fatal results from contact therewith. * * * In all cases where the wires * * * referred to in this or the preceding paragraph are attached to telephone poles, or pass so near them, or telephone wires or cables, as to be within reach of the employé working on or about said pole, wires, or cables, such employé shall use safety straps, rubber gloves, and rubber boots. * * * where dangerous conditions exist, and particularly in cases where repairs are being made to telephone circuits that are in trouble, employé shall use said safety straps, rubber gloves, and rubber boots."

There was also evidence that, under circumstances such as are here disclosed, the first duty of a splicer, before making repairs, was to test the cable to ascertain whether there is any stray electric current in the wire. It is true that the witness who thus testified, and who was sent after Larkin's death to repair this cable, in response to a leading question by plaintiff's counsel, said that on this occasion he made the safety test, because he knew of the accident on the preceding day. But he afterwards testified that, without reference to the fact that a man had been injured, for his own safety he would make the test, when there had been a burn-out, and it appeared that Larkin was furnished with a "tester," which presumably was intended for use when occasion required. After discovering the blow-out, Larkin, without making any safety test, or putting on any rubber gloves, after opening the terminal box and taking the clamp off from the cable, proceeded with a tool called "splicing scissors" to cut the sheathing to expose the wires inside. While thus engaged, his helper heard a snapping sound, Larkin called out, "My God, John, I got it," and fell dead.

We fail to see wherein the negligence of the Telephone Company is established. The complaint alleges that it failed in its duty to provide decedent with a safe place to work and with safe tools and appliances, and neglected to promulgate and enforce reasonable and proper rules and instructions for the protection of its employés. There is no suggestion that any safer or more efficient tools and appliances could have been furnished than were furnished, or that more stringent rules could have been adopted. The danger surrounding the place where Larkin was at work was inherent to the nature of his employment. Mullin v. Genesee County Electric Light, Power & Gas Co., 202 N. Y. 275, 95 N. E. 689. He had been sent to make safe that which in the ordinary course of events had become dangerous, and his employment was for that very purpose.

[2] The learned counsel for respondent contends that the Telephone Company was at fault in not communicating to decedent the information which it had received earlier in the day, from the trouble hunter, that there was a burn-out in the cable. But Larkin knew this from his own observation before he began work, and no additional information could have been conveyed to him on that subject. The difficulty arose from his deliberate disobedience of the rules of his employer, and his own carelessness in neglecting well-known precautions. Sad as are the consequences, it would be unjust to visit these upon either of the defendants. Johnston v. Syracuse Lighting Co., 193 N. Y. 592, 86 N. E. 539, 127 Am. St. Rep. 988; McNamee v. Western Union Telegraph Co., 140 App. Div. 874, 125 N. Y. Supp. 622; Griffin v. New York Telephone Co., 141 App. Div. 1, 125 N. Y. Supp. 642; Geer v. New York & Pennsylvania Telephone & Telegraph Co., 144 App. Div. 874, 129 N. Y. Supp. 784. Another illustration is here afforded of the carelessness which often results from constant familiarity with danger.

[3] The learned counsel for plaintiff sought to show that the rule as to the use of the safety test and rubber gloves was habitually disregarded, and that splicing could not well be done with gloves. We

think that the evidence fails to establish this. One of the witnesses called by plaintiff, a splicer, after testifying on his direct examination that he had never seen any splicer using gloves, and that the work could not *very well* be done with them, admitted on cross-examination that:

"It could be done. The rule required us to do it. We used our own judgment as to whether or not we would obey the rule, or take the risk of not obeying it."

The other witness, who was a splicer's helper, and who testified on his direct examination that he had never seen splicers wear rubber gloves prior to the date of the accident, on cross-examination admitted that he did not know what the other men did. But in any event there is no evidence that this infraction of the rule, if it was of common occurrence, was ever brought to the attention of the superiors of those thus disobedient.

The judgment and orders should be reversed, and a new trial granted; costs to abide the event. As the record contains all of the exceptions taken by either party, and as no error is found in either of the rulings adverse to plaintiff, if plaintiff deems that it will facilitate a speedy determination of this controversy to direct judgment in favor of defendants, instead of ordering a new trial, application may be made to this court for an order to that effect. All concur.

(158 App. Div. 438)

GROSS v. LIDGERWOOD MFG. CO.

(Supreme Court, Appellate Division, Second Department. September 23, 1913.)

MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—EVIDENCE—GUARDING MACHINE.

In an action by an employé for injuries received from a machine which was not guarded as required by Laws 1909, c. 36 (Consol. Laws 1909, c. 31) § 81, it was error to sustain objections to questions whether it was customary to guard such a machine, and whether it could be guarded and still have performed its work properly, since the answers might have shown that it was not practicable to guard the machine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913–927, 932; Dec. Dig. § 270.*]

Appeal from Trial Term, Kings County.

Action by Sam Gross against the Lidgerwood Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

Jackson A. Dykman, of Brooklyn, for appellant.

James P. Kohler, of Brooklyn, for respondent.

BURR, J. On August 19, 1911, while plaintiff was in defendant's employ, his hand was caught between the shaft and a piece of metal, variously called a "cone" or a "face plate," on a machine upon which he was working. For resulting injuries he brings this action, and de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendant appeals from a judgment against it, and from an order denying a motion for a new trial.

The statute provides that:

"All vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws and machinery, of every description, shall be properly guarded." Consolidated Laws, c. 31 (Laws 1909, c. 36) § 81.

One of the allegations of the complaint was failure to guard the shaft at the point where the injury was caused, and the learned trial court submitted to the jury the question, among others, "whether or not this machine was properly guarded," and at the request of plaintiff's counsel further instructed the jury:

"That the risks occasioned by the failure of the employer to supply the statutory safeguards, above referred to, were not as matter of law assumed by the employé, though he had full knowledge of such failure." Fitzwater v. Warren, 206 N. Y. 355, 99 N. E. 1042, 42 L. R. A. (N. S.) 1229.

"A machine that is maintained wholly without guards is presumptively contrary to the statute. The burden of showing that it is impracticable to guard a machine, or that its location removes it from danger to employés, is upon the person or corporation maintaining it." Scott v. International Paper Co., 204 N. Y. 49, 97 N. E. 413.

While defendant was examining as a witness the manager of its works, who had had 23 years' experience in that position, he was asked:

"Is it customary to guard a machine, where the gears have to be shifted in that way?"

And again:

"Is there any way by which that machine, at that point, could have been guarded, and carry on the work properly?"

To each of these questions objection was made, although not specifically upon the form of the question, the objection was sustained, and defendant excepted. Construing these questions together, it is apparent that the answers which they would have elicited might have shown that it was not practicable to guard these cogs, and that the statute, which only required defendant to "properly" guard the same, had no application. Such evidence would be competent.

Without further discussion, I advise that the judgment and order appealed from be reversed, and a new trial granted; costs to abide the event. All concur.

(158 App. Div. 494)

BREDE v. ROSEDALE TERRACE CO.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

1. VENDOR AND PURCHASER (§ 75*)—CONTRACT OF SALE—IMPROVEMENT OF SUBURBAN PROPERTY.

Where plaintiff purchased certain lots from defendant, a developer of suburban property, the contract providing that defendant should grade streets, plant shade trees thereon, and put down cement sidewalks, defendant was required to grade streets, plant shade trees, and put down cement sidewalks on all the streets within a reasonable time.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 113–118, 126; Dec. Dig. § 75.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. VENDOR AND PURCHASER (§ 75*)—PERFORMANCE—REASONABLE TIME.
Where a contract required defendant to grade, plant shade trees, and put down cement sidewalks on all the streets in defendant's suburban addition within a reasonable time, the lapse of six years without the work being performed was unreasonable.
[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 113–118, 126; Dec. Dig. § 75.*]

3. VENDOR AND PURCHASER (§ 341*)—CONTRACT—PERFORMANCE—FINDINGS.
Where defendant, engaged in developing certain suburban property, to induce plaintiff to purchase certain lots therein, contracted to grade streets, plant shade trees, and put down cement sidewalks within a reasonable time, evidence that at the expiration of six years a little more than half of the sidewalks had been laid, and generally only on one side of projected streets, and that the only grading was by running a plow over the proposed streets, and there was no proof either way as to the setting out of shade trees, a finding that defendant had graded the streets, planted shade trees thereon, and put down cement sidewalks, as required by the contract, was erroneous.
[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008–1017; Dec. Dig. § 341.*]

4. VENDOR AND PURCHASER (§ 337*)—CONTRACT—DUTY TO PERFORM—VENDEE'S LIEN.
Where plaintiff's contract to purchase certain suburban property obligated defendant to grade, plant shade trees, and put down cement sidewalks on all streets, and after the expiration of a reasonable time defendant had wholly failed to do so, plaintiff was entitled to refuse to make further payments, and impress a lien on the property for the money paid.
[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 985–990; Dec. Dig. § 337.*]

Appeal from Special Term, Kings County.

Action by Herman Brede against the Rosedale Terrace Company. Judgment for defendant, and plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued before JENKS, P. J., and THOMAS, CARR, STAPLETON, and PUTNAM, JJ.

Robert H. Koehler, of Brooklyn, for appellant.

Hugo Hirsh, of Brooklyn, for respondent.

STAPLETON, J. The plaintiff and the defendant entered into a contract for the purchase and sale of real estate. The defendant was a developer of suburban property. The plaintiff agreed to pay $3,955 for eight lots, the dimensions of each being 20 feet by 100 feet. The payments were to be made as follows: Three hundred dollars on the signing and delivery of the contract, and $20 in each and every month thereafter until the entire amount of the purchase money, with interest at 6 per cent. on all unpaid balances, and taxes and assessments, should be paid. The contract contained this provision:

"Said party of the first part [the defendant herein] agrees to grade all streets and plant shade trees thereon, and put down cement sidewalks."

The date of the contract was the 31st day of October, 1906. The plaintiff paid $1,380, and made his last payment on the 1st day of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

May, 1911. On the 23d day of July, 1912, he commenced this action to impress a lien on the property for the amount of the money he had paid, alleging in his complaint that the defendant failed and neglected to comply with the contract provision hereinbefore quoted.

The undisputed evidence shows that a little more than half of the sidewalks had been laid in the tract under development at the time of the trial, six years after the date of the contract, and generally sidewalks had been laid on only one side of the projected streets. There were streets laid out on the map referred to in the contract. As to grading, the only conclusion fairly warranted by the evidence is that a plow was run over the proposed streets. There was no evidence, either way, as to shade trees.

The trial court made this finding:

"V. That the defendant has graded streets and planted shade trees thereon, and has put down cement sidewalks, as provided in said contract."

Judgment was directed, dismissing the complaint on the merits, and judgment was entered accordingly.

[1] A fair construction of the provision of the contract quoted required the defendant to grade all streets, plant shade trees on all streets, and put down cement sidewalks on all streets. The punctuation by comma in the body of the sentence may not operate to compel an absurd construction.

[2, 3] No time having been fixed, a reasonable time is implied (Simon v. Etgen, 152 App. Div. 399, 402, 137 N. Y. Supp. 369), and six years is beyond the bounds of reason. Purchasers who pay substantial prices for lots in process of development are entitled to require the developer fairly to live up to his express promises. They do not, in the light of these contract obligations on the part of the vendor, pay substantial sums of money for uncultivated farms and undisturbed sand lots. The finding quoted, upon which the judgment rests, is without evidence to sustain it.

[4] We are unable to distinguish this case from Feldblum v. Laurelton Land Co., 151 App. Div. 24, 135 N. Y. Supp. 349, in which the vendee was adjudged to have a vendee's lien under a state of facts essentially similar.

The fifth finding of fact should be reversed, and a finding in accordance with this opinion should be made. The judgment should be reversed, and judgment on the merits directed for plaintiff, with costs in this court and at the Special Term. All concur.

(158 App. Div. 475.)

DENISON v. JACKSON BROS. REALTY CO.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

EXECUTION (§ 370*)—SUPPLEMENTARY PROCEEDINGS—EXAMINATION OF THIRD PERSON—APPOINTMENT OF RECEIVER.

The appointment of a receiver for a judgment debtor does not deprive the court of jurisdiction to order the examination of a third person concerning property in its hands belonging to the debtor at the instance of the judgment creditor.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1096; Dec. Dig. § 370.*]

Appeal from Special Term, Kings County.

In the matter of supplementary proceedings against Jackson Bros. Realty Company in favor of Ernest B. Denison. From an order vacating an order requiring the treasurer of the Home Trust Company of New York to appear and be examined concerning property in its hands belonging to the debtor, plaintiff appeals. Reversed.

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

John T. Delaney, of New York City, for appellant.

John H. Corwin, of New York City, for respondent.

RICH, J. The plaintiff appeals from an order vacating an order in supplementary proceedings which required the respondent's treasurer to appear and be examined concerning property in its hands belonging to the judgment debtor. The order from which the appeal is taken was made for the sole reason that a receiver of the judgment debtor had been appointed and had duly qualified. Sorrentino v. Langlois, 144 App. Div. 271, 128 N. Y. Supp. 1003, was cited by the learned justice at Special Term as authority.

The only question presented by this appeal relates to the power of the court to order the examination of a third party after the appointment of a receiver for the judgment debtor. This precise question was presented to this court in Smith v. Cutter, 64 App. Div. 412, 72 N. Y. Supp. 99, in which it was held that the appointment of a receiver of a judgment debtor in proceedings supplementary to execution does not prevent the judgment creditor from obtaining an order for the examination of a third party. Mr. Justice Sewell said:

"If an order appointing a receiver terminated the proceeding in which he was appointed, it would not prevent the judgment creditor from pursuing another proceeding to examine a third party having property of the judgment debtor."

The receiver here was appointed without an examination of any one, and, as said by Judge Smith in People ex rel. Fitch v. Mead, 29 How. Prac. 360:

"It cannot be that he [the judgment creditor] loses all right to discover * * * after the appointment of such receiver."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is stated in the case referred to, and it is the law of this state:

"That when an affidavit stating the jurisdictional facts is presented the judgment creditor is entitled to institute a proceeding for the examination against a person who has property of the judgment debtor, independent of the fact that a proceeding for the examination of the judgment debtor is pending or has resulted in the appointment of the receiver."

It is the purpose and object of the proceeding to discover property of the judgment debtor, and this purpose would be entirely nullified if a receiver, by refusing to institute a proceeding against a third party having property of the debtor in his possession, could successfully contend that his appointment prevented the judgment creditor from availing himself of the examination and discovery secured to him by statute.

It is contended by the learned counsel for respondent that this court, in the case of Sorrentino v. Langlois, 144 App. Div. 271, 128 N. Y. Supp. 1003, has overruled Smith v. Cutter, supra, and, while it would seem that there is a conflict in the two decisions, there was no such intention. In the Sorrentino Case the defendant unsuccessfully moved to vacate an order for the examination of a third party, and the reversal was necessary because the moving affidavit did not show that the person to be examined had personal property of the defendant exceeding $10 in value, or that she was indebted to him in a sum exceeding $10, without reference to the fact that a receiver had been appointed, and this was the real ground for the reversal. True, it was said that an examination of a third patry could not be had after the appointment of a receiver; but this must be regarded as obiter. It follows that the order must be reversed.

Order reversed, without costs, and the proceeding remitted to the Special Term. All concur.

(158 App. Div. 461)

COLEMAN v. SIMPSON, HENDEE & CO.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

1. SALES (§ 266*)—WARRANTIES—IMPLIED WARRANTY AGAINST LATENT DEFECTS.

There is no implied warranty against latent defects in a sale of goods, unless the seller is the producer or manufacturer thereof, notwithstanding the seller knows the purpose for which the goods are bought.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 743, 746, 747, 754–759; Dec. Dig. § 266.*]

2. SALES (§ 264*)—WARRANTIES—IMPLIED WARRANTY OF IDENTITY.

There is an implied warranty on the part of every seller, whether manufacturer or not, that the article sold is identical with the article bought.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 752, 753; Dec. Dig. § 264.*]

3. SALES (§ 266*)—WARRANTIES—IMPLIED WARRANTY AGAINST LATENT DEFECTS.

Where, in pursuance of a contract to furnish a car of "fancy clip't seed oats," the seller, who was merely a middleman, furnished a car of oats of that general description, the fact that there was a latent defect

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the oats which prevented their germinating, of which the seller had no knowledge, did not render him liable to the buyer, as there was no implied warranty as to quality.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 743, 746, 747, 754–759; Dec. Dig. § 266.*]

Appeal from Trial Term, Dutchess County.

Action by John D. Coleman against Simpson, Hendee & Co. for breach of warranty in a sale of seed oats. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and THOMAS, CARR, STAPLETON, and PUTNAM, JJ.

Schuyler C. Carlton, of New York City, for appellant.

Morschauser & Mack, of Poughkeepsie, for respondent.

CARR, J. In 1911 the plaintiff was a dealer in grain at Pawling, N. Y., and as a part of his business he sold oats to farmers for planting purposes. The defendant, a corporation, was engaged in the general business of selling grain at wholesale, generally in car load lots. It had an agent, one Merriam, who went about soliciting orders. In January of that year Merriam called upon the plaintiff and obtained an oral order for a car load of oats, which order was given by the plaintiff in manner as follows (using his own words):

"I asked Mr. Merriam to furnish me a car of extreme Northern grain seed oats; that our people were cranks on seed oats, and I wanted him to give us something nice, and I was willing to give him one or two cents over the feed oats price. Mr. Merriam said he would see I had an extra fine car. That was all that was said that day. Mr. Merriam had been in the habit of going there to my place of business, and knew what I was doing, selling seed oats and other things."

Merriam transmitted this order to the defendant, who thereupon sent to the plaintiff a "confirmatory" letter, partly printed and partly written, in which the defendant confirmed a sale to the plaintiff of "one car * * * heavy fancy clip't seed oats * * * at 42½" cents (a bushel), to be shipped "Feb'y 15th, or later; terms, usual." The defendant, as plaintiff well knew, did not raise the grain it sold, but simply purchased the same in the West, generally in the Chicago market, and had the car loads shipped directly from Chicago to its customers. The practice was to send along a bill of lading with the grain, and afford the customer an opportunity to examine the cargo before delivery and acceptance. The defendant bought on the Chicago market a car load of oats for delivery to the plaintiff on an order for "fancy clip't seed oats." On said order, a car load of oats was shipped to the plaintiff at Pawling, where he received the same and stored the oats in his bins. He paid for the oats according to a bill rendered for "fcy. clip't seed oats." He sold to his various customers, farmers, for planting purposes, some 1,300 bushels of the cargo. It happened that the oats so sold to the farmers did not germinate when planted under ordinary conditions, and he was obliged to make good to his customers the moneys they had paid for the oats, and, as he claimed,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he incurred obligations to said customers for their expenses in plowing and reseeding their lands.

He brought this action to recover his losses, on the ground that the defendant had warranted that the oats in question were suitable for planting purposes and could and would germinate under ordinary conditions of soil and culture. On the trial, the court held that there was no express warranty, and the case was submitted to the jury on the theory of an implied warranty that the oats were suitable for planting purposes. The defendant gave proofs that in the trade there were well known and simple processes for testing the germinating powers of the oats; but the plaintiff testified that he was ignorant of these processes, and had been informed by Merriam, after the oats had been received by him, that they had already been tested, and that therefore he made no tests himself before selling the oats to his customers. The defendant had never seen the oats in question, nor had them in its actual possession, except as they were in transitu. They had been selected and shipped at Chicago as "fancy clip't seed oats," according to the usual methods of the general grain business. The proofs were that the words "seed oats" were descriptive of large or heavy berries which had been cleaned of chaff and foreign seeds, to fit them for planting. The plaintiff produced evidence to show that these oats had been "purified"—that is, treated by fumes of sulphur to such an extent as to impair or destroy their power of germination; but whatever such treatment had been used was not done by or known to the defendant, and must have been done, if at all, before the defendant bought the oats at Chicago for delivery to the plaintiff. The primary question involved in this appeal is whether, under these circumstances, the law will charge the defendant with an implied warranty that these oats were suitable for ordinary planting purposes. The defect in the oats was latent. It was due to causes unknown to the defendant. The oats delivered were selected as "seed oats," and answered generally to the description of such; but their quality for planting purposes was inferior, according to the plaintiff's claim.

[1] The general rule as to an implied warranty in the sale of goods is that, unless the vendor is the producer or manufacturer of the articles, there is no implied warranty against latent defects, even if the vendor knows the purposes for which the goods are bought. Bartlett v. Hoppock, 34 N. Y. 118, 88 Am. Dec. 428; Dounce v. Dow, 64 N. Y. 411; American Forcite Powder Mfg. Co. v. Brady, 4 App. Div. 95, 38 N. Y. Supp. 545; Cafre v. Lockwood, 22 App. Div. 11, 47 N. Y. Supp. 916; Reynolds v. Mayor, Lane & Co., 39 App. Div. 218, 57 N. Y. Supp. 106; Carleton v. Lombard, Ayres & Co., 149 N. Y. 137, 43 N. E. 422. There are several authorities in this state relative to the question of an implied warranty in the sale of seeds; but all of these, so far as an implied warranty as to the quality of the seeds was declared, relate to cases where the sale of the seeds was made by the growers thereof, and not by middlemen in the ordinary course of business. White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Landreth v. Wyckoff, 67 App. Div. 145, 73 N. Y. Supp. 388; Prentice v. Fargo, 53 App. Div. 608, 65 N. Y. Supp. 1114.

[2] There is, of course, an implied warranty on the part of every seller, whether manufacturer or not, to the extent that the article sold is identical with the article bought, as was held in Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595, where one who sold an article as "blue vitriol," which was in fact not "blue vitriol," but a substance known as "saltzburger," or mixed vitriol, and which contained but a small portion of blue vitriol, was held liable on a breach of implied warranty as to identity, but not as to quality. In Allan v. Lake, 18 A. & E. (N. S.) 560, one who had sold turnip seed as "Skirving's Swedes" was held for a breach of an implied warranty, on proof that the seed sold was not "Skirving's Swedes." A similar case is that of Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136, where one who had sold cabbage seed as "Van Wycklin's Flat Dutch, raised at New Lots, Long Island," was held liable for a breach of implied warranty, on proof that the seed delivered was not "Van Wycklin's Flat Dutch," which was a well known and specially valuable brand of cabbage seed; but here again the breach was as to an implied warranty of identity between the thing sold and delivered and the thing bought.

The most recent authority on this point is Depew v. Peck Hardware Co., 121 App. Div. 28, 105 N. Y. Supp. 390. There a farmer bought seed as pure alfalfa seed. After it was planted, it turned out that the seed was mostly trefoil and dodder, both useless weeds, with but a very small mixture of alfalfa. The seller was held liable for breach of an implied contract because the seed was not alfalfa—even impure alfalfa, although there was a small proportion of the latter present. The court, however, was careful to point out that:

"If the alfalfa seed had been defective, not up to the standard in quality, there would have been no implied warranty."

[3] There the seller was not the producer of the seeds, but a mere middleman. Now, in the case at bar, the defendant was a middleman. It did not raise the oats, nor was it in the business of selling seeds for planting purposes. It had no knowledge, actual or constructive, of any latent defects in the oats in question. It did deliver oats of the general description of "seed oats," and if there was any defect in them it was in their quality of germinating power, and not as to their identity as "fancy clip't seed oats."

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur.

(158 App. Div. 471)

In re NEWMAN.

(Supreme Court, Appellate Division, First Department. October 10, 1913.)

ATTORNEY AND CLIENT (§ 42*)—MISCONDUCT OF ATTORNEY—FALSE TESTIMONY.

Where respondent, as attorney for one charged with bigamy, testified unqualifiedly in his behalf that witness had made diligent search to ascertain the whereabouts of the client's former wife and had been unable to do so,' in support of the client's defense that he believed her dead at the time he contracted the second marriage, when in fact the attorney, some time previously, had received letters from a Canadian firm in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dicating that the wife was alive and her whereabouts easy to ascertain, such testimony constituted misconduct deserving of severe censure, even though it could not be said that the testimony was willfully false, so as to make respondent guilty of perjury.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 54; Dec. Dig. § 42.*]

Proceedings by the Bar Association of the City of New York against Eugene Newman, an attorney, for professional misconduct. Recommendation of referee, that respondent be censured, but not otherwise punished, confirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, SCOTT, and DOWLING, JJ.

George Gordon Battle, of New York City, for petitioner.

Edward Mandel, of New York City, for respondent.

INGRAHAM, P. J. The respondent was charged with testifying falsely before a magistrate on an examination of William A. Dixon, who was charged with bigamy. Dixon had been the respondent's client, and the testimony was given on behalf of Dixon to show that he believed his former wife was dead when he contracted the second marriage. The official referee has reported that respondent should be severely censured for giving the testimony "as an almost unqualified fact, whereas it was at best his mere recollection"; that "it is most reprehensible for an attorney to show so little regard to the accuracy of his statements under oath"; and "I am led to the conclusion that while the respondent's testimony was biased, and negligently and even recklessly given, the evidence does not show that it was so knowingly and willfully false as to constitute fraud, deceit, and misconduct in his office as an attorney and counselor at law."

After a careful consideration of the letters received by the respondent from his Canadian correspondents, it is difficult to see how he could have believed that they had answered him in substance that they could find no trace of Dr. Dixon's wife. These letters contained references to the woman as still living, with no suggestion of her death. That of January 28, 1905, from Clute & Morden, spoke of Mrs. Dixon as married to a man of large means; that her father lived in Belleville, Ontario, Canada, and suggested that cautious inquiries be made of the father, which respondent requested be made. As to this letter, respondent testified before the magistrate that he had communicated with Clute & Morden, and that up to about March, 1905, they were unable to obtain any trace whatever of Mary A. Dixon, and, further, that he never ascertained any facts which led him to believe that Mary Alice Dixon was alive, or whereabouts she was living.

It is evident from these letters that Clute & Morden had obtained a trace of Mary A. Dixon, that they knew her to be alive, and that the respondent could have ascertained where she was at the time. We therefore agree with the referee in his conclusion that the respondent's testimony before the magistrate "was biased, and negligently and even recklessly given," and deserves the most severe censure. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

referee, however, concludes that the evidence does not show that the respondent's testimony was knowingly and willfully false. The respondent testified before the magistrate about three years after the receipt of the letters. He said that he had delivered the letters to his client when they were received, and that he testified from recollection only; and it would seem that the referee believed him. This was certainly giving the respondent the benefit of every reasonable doubt; but, as the referee had the benefit of hearing the respondent's explanation, we are not disposed to reject this conclusion.

We wish, however, to express in the strongest way our condemnation of the conduct of the respondent in giving this testimony. Dixon was charged by the people of the state with a serious crime. The respondent was an officer of the court, whose duty it was to assist in the enforcement of the law. It seems, from the ground assigned by the magistrate in discharging Dixon, that it was the testimony of the respondent that procured his discharge, and that testimony was essentially false, and thus defeated the enforcement of the law. The respondent either had a clear recollection of the contents of these letters, or he had not. If he had, he was guilty of perjury. If he had not, he was not justified in testifying in the positive way that he did. Members of the bar, when called to account for false testimony given in judicial proceedings, will not be allowed to shield themselves by saying that they testified from recollection, which they thought was correct; and we wish to say that we consider the respondent's conduct, even accepting the referee's lenient conclusion, as a violation of his duty as an attorney at law which cannot be condoned.

With this censure, which we wish to make as emphatic as possible, we refrain from imposing further penalty. All concur.

(158 App. Div. 485)

SMITH v. LUCKENBACH et al.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

1. PLEADING (§ 239*)—AMENDMENT—TERMS—JURISDICTION OF TRIAL COURT.

Where defendants applied to withdraw a juror, for the purpose of applying for leave to amend their answer by alleging a new defense, the trial court, on granting the motion and imposing the payment of certain fixed costs, had no jurisdiction to order that the costs fixed included those that should be awarded by the Special Term as a condition to granting leave to amend.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 626–635; Dec. Dig. § 239.*]

2. PLEADING (§ 239*)—ANSWER—AMENDMENT—TERMS—COSTS.

Where defendants apply for leave to withdraw a juror, so as to apply for leave to amend the answer, such leave should only be granted on payment of full costs, though the order granting leave to withdraw a juror provided that the testimony taken on the trial, or all previous trials, might be read in evidence on any subsequent trial by either party without recalling the witnesses.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 626–635; Dec. Dig. § 239.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Kings County.

Action by Mary Smith, as administratrix, etc., against Edgar F. Luckenbach and others. From part of an order granting defendants' application to withdraw a juror and apply to the Special Term for leave to amend their answer on terms, plaintiff appeals. Modified and affirmed.

See, also, 155 App. Div. 451, 140 N. Y. Supp. 292.

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

Alfred C. Cowan, of Brooklyn, for appellant.

William L. O'Brion, of New York City, for respondents.

RICH, J. Upon the trial of this action at a Trial Term, and after all of the evidence of the plaintiff had been received, the defendants' motion for leave to withdraw a juror for the purpose of permitting them to apply to the Special Term for leave to amend their answer by alleging a new defense was granted—

"upon condition that they [defendants] pay to the plaintiff $30, trial fee, and the witness fees of the plaintiff on this trial, and upon the further condition that the evidence taken upon this and all the previous trials herein may be read in evidence upon any subsequent trial by either party, without calling the witnesses, and with the same force and effect as if the witnesses were actually called and testified; and it is further ordered that these terms be inclusive for leave to amend the answer."

[1] This appeal is from the latter clause of the order, and also from an order denying plaintiff's motion to resettle this order. I think the learned trial court exceeded his power when he undertook to fix the amount of costs that should be awarded by the Special Term. But even if the learned trial court possessed the power, the order should have to be modified. The rule frequently enforced in this court is that, upon the facts presented, leave to amend should only be granted upon payment of full costs. Palazzo v. Degnon-McLean Contracting Co., 115 App. Div. 172, 100 N. Y. Supp. 682; Woolsey v. Brooklyn Heights R. R. Co., 129 App. Div. 410, 113 N. Y. Supp. 245; Audley v. Townsend, 131 App. Div. 79, 115 N. Y. Supp. 145; Carpenter v. Atlas Improvement Co., 132 App. Div. 112, 116 N. Y. Supp. 454.

[2] The appellant argues that this case is not within the rule cited, for the reason that the order permitted the plaintiff to read on any subsequent trial any testimony taken on former trials. The answer to this is that that right is not limited to the plaintiff, but is also secured to the defendants.

That part of the order of April 7th from which the appeal is taken must be reversed, with $10 costs and disbursements, and the order modified, by striking therefrom the words:

"Ordered that these terms be inclusive for leave to amend the answer."

The original order having been modified, the appeal from the order of May 20, 1913, should be dismissed, without costs. All concur.

(158 App. Div. 467)

In re SLAWSON.

(Supreme Court, Appellate Division, First Department. October 10, 1913.)

1. ATTORNEY AND CLIENT (§ 44*)—OFFICE OF ATTORNEY—SUSPENSION—TAKING ADVANTAGE OF CLIENT.

Where an attorney, acting in collusion with his partner, took advantage of a client by obtaining a default judgment against a company, in which the client was the only person interested, through service of summons on his partner, who was secretary of the company, and settled with the client without disclosing or satisfying the judgment, he should be suspended.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

2. ATTORNEY AND CLIENT (§ 44*)—OFFICE OF ATTORNEY—SUSPENSION—TAKING ADVANTAGE OF CLIENT.

An attorney, who obtains an advantage over a client, or one who has been a client, by means that are not fair and honorable, is subject to suspension.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

Charges presented by the Association of the Bar of the City of New York against Edward V. Slawson, an attorney, for professional misconduct. Respondent suspended for one year.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Middleton S. Borland, of New York City, for petitioner.

R. M. Moore, of New York City, for respondent.

INGRAHAM, P. J. [1] The Association of the Bar of the City of New York presented charges of professional misconduct against the respondent as an attorney of this court, to which the respondent interposed an answer. The matter was referred to the official referee, who has reported that the respondent took an unfair advantage of one Keller, who had been his client and the client of his firm for several years, in the particulars specified in his report, and that the advantage taken constituted conduct professionally reprehensible. The referee has submitted a full and careful report of the facts upon which he bases his conclusion, and it is unnecessary to restate them, as we agree with his conclusions. It is quite impossible to avoid the conviction that the respondent and his partner, Beare, were acting together to obtain an advantage over Keller. The fact that a few months before the transactions in question they claimed to have dissolved their partnership is of no importance. They still occupied the same offices, seemed to have continued the transaction of their business as before, and in an action that Beare commenced against the Bay Shore & Brentwood Company, in which the respondent, Beare, and Keller were interested, the same firm, consisting of the respondent and Beare, and Mr. Moore appeared as the plaintiff's attorneys. In the action which the respondent commenced against this company, he appeared as attorney in person, caused the summons to be served on his partner, Beare, who was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

secretary of the company, and, when no appearance had been received, filed a complaint, and entered judgment. Beare, having received this summons, took care that Keller, who was the only one interested in the company, should have no knowledge of the action, so that he or the company could not appear and interpose a defense. The evidence that the respondent and Beare acted in collusion to obtain this judgment without Keller's knowing anything about the action, and then made a settlement with Keller, obtaining an allowance on that settlement of the amounts that had been paid by the respondent and Beare for the benefit of the company, which was included in the judgment thus obtained by the respondent, and in the action which Beare had commenced, without disclosing the fact that he had obtained a judgment, and without satisfying the judgment, with the other evidence referred to by the referee, convinced us that the respondent and Beare were acting in collusion to obtain a personal advantage as against Keller and the company.

[2] The respondent submits that there was nothing in his conduct which calls for censure; that he was mixed up in an unfortunate business deal, and happened to be a lawyer. When he went into this "unfortunate business deal," it was with his client. That relation continued until it was seen that the "deal" would be unfortunate. He then severed his connection with his client, and proceeded to obtain an advantage over his client by means that were not fair and honorable. Attorneys must understand that in their dealings with their clients, or those with whom they have had such relation, they must be honest, if they wish to remain members of the profession.

Having approved of the conclusion of the referee, the question remains as to the proper discipline. We have concluded that we cannot overlook the offense, and therefore the respondent is suspended from practice for one year, and until the further order of this court, with leave to apply for reinstatement at the expiration of said period, upon proof that he has actually abstained from practice during that period and has otherwise properly conducted himself. All concur.

(158 App. Div. 469)

In re BEARE.

(Supreme Court, Appellate Division, First Department. October 10, 1913.)

1. ATTORNEY AND CLIENT (§ 44*)—OFFICE OF ATTORNEY—SUSPENSION—MISCONDUCT AS TO CLIENT.

Where an attorney collusively allowed his former partner, with whom he was still connected, to secure a default judgment against his client, a company of which he was secretary, through service of summons on himself, he is subject to suspension for professional misconduct, under Judiciary Law (Consol. Laws 1909, c. 30) § 88, making malpractice ground for suspension.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

2. ATTORNEY AND CLIENT (§ 46*)—OFFICE OF ATTORNEY—SUSPENSION—MISCONDUCT AS TO CLIENT.

The Appellate Division is charged with the supervision of its attorneys, and if any attorney is guilty of dishonest or improper conduct, es-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pecially toward his clients, or those who have been clients, it is its duty to discipline him, and an attorney cannot escape discipline for breach of duty to his client by severing his relation with the client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 71; Dec. Dig. § 46.*]

Charges presented by the Association of the Bar of the City of New York against Clifford L. Beare, an attorney, for professional misconduct. Respondent suspended for one year.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Middleton S. Borland, of New York City, for petitioner.

John Neville Boyle and Philip W. Carney, both of New York City, for respondent.

INGRAHAM, P. J. [1] The charges grow out of the same fact that was present in the Matter of Slawson, 143 N. Y. Supp. 594, decided herewith. The referee has reviewed the facts in his report, upon which he bases his conclusion that the respondent has been guilty of professional misconduct, and it is sufficient to say that we concur in his report. Keller was the respondent's client, and it is clear that it was in consequence of that relation which existed that the partners united in forming this corporation. Respondent acted as attorney for Keller and the corporation, and was also its secretary, and was bound to exercise the good faith and honesty required of an attorney to his clients to protect its interest, and when the summons in the action of Slawson, his former partner, and with whom he was still connected, was served on him, he was bound to give the corporation notice that the summons had been served, and not determine for himself that, whatever the claim was (and as no complaint was served, he could only know upon what the action was based from what Slawson told him), the company had no defense. At any rate, the corporation was to determine that question, not its secretary.

[2] The undisputed facts show that the respondent acted in bad faith, and intended to allow Slawson to get a judgment against the corporation by default, which he well knew he could not get if the corporation were informed that the summons had been served. It is claimed by the respondent that, to sustain the referee's report, this court "must transcend the powers conferred upon it and exceed its jurisdiction." We understand that this court is charged with a supervision of its attorneys, and that if any attorney is convicted of dishonest and improper conduct, which establishes that he is not a proper person to hold the office of an attorney of the court, it is its duty to discipline him. If an attorney desires to continue to hold his office, he must be honest in his dealings, especially with his clients, and those who have been his clients, and he cannot escape discipline for acts which involve a breach of his duty to a client by severing the relation with his client.

We think that the acts of the respondent were violations of his professional obligation, that he was guilty of professional misconduct prej-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

udicial to the administration of justice (sec. 88, Judiciary Law [Consol. Laws 1909, c. 30]), and the respondent is therefore suspended from practice for one year and until the further order of this court, with leave to apply for reinstatement at the expiration of said period, upon proof that he has actually abstained from practice during that period and has otherwise properly conducted himself. All concur.

(158 App. Div. 453)

In re KINGS COUNTY TRUST CO.

Appeal of FOWLER et al.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

1. WILLS (§ 634*)—CONSTRUCTION—VESTED OR CONTINGENT BEQUEST.
A will directed the testator's widow, as his executrix, to pay to herself yearly a specified amount for her support and the maintenance and education of their son C., and to divide the excess income, if any, among his children, three of whom were issue of a former marriage, the surviving issue of any deceased child to take his share per stirpes. It further directed that when C. became of age the estate should be divided equally among the wife and the four children, the surviving issue of any deceased child to take his share, that if C. died before attaining his majority the estate should then be divided between the wife, surviving children, and the issue of any deceased child, and that, "believing that equality is justice," if any child should die without issue before the time for division, the share of the child so dying should be divided among the wife and surviving children. The wife died before C. attained his majority. *Held*, that the share given to the wife was contingent upon her surviving until the time for distribution, as any other construction would give her a vested interest, while that of the children was conditional, which would be inconsistent with the testator's plan of equality.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

2. WILLS (§ 634*)—CONSTRUCTION—VESTED OR CONTINGENT BEQUEST.
A testator, after postponing the distribution of his estate until the death or majority of a minor child, provided in a codicil that, the sum of $2,500 having been paid to each of two children, in order to carry out the principle of equality stated in the will, a like sum should be paid before division to the wife and each of the other children. *Held*, that the legacy of $2,500 to the wife was not contingent upon her surviving until the time for distribution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

Burr, J., dissenting.

Appeal from Surrogate's Court, Kings County.

Proceedings for the judicial settlement of the account of the Kings County Trust Company, as administrator of Charles S. Fowler, deceased. From the decree (78 Misc. Rep. 245, 139 N. Y. Supp. 454), Richard E. Fowler and others appeal. Modified on reargument.

For order granting reargument, see 157 App. Div. 893, 142 N. Y. Supp. 1126.

Argued before JENKS, P. J., and BURR, THOMAS, STAPLETON, and PUTNAM, JJ.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

G. H. Brevillier, of New York City, for appellants.

Ernest C. Brower, of Brooklyn, for respondent Kings County Trust Co., as executor, etc.

John T. McGovern, of New York City, for respondent Charles S. Fowler, Jr.

THOMAS, J. [1] The remainder to the widow did not vest at her husband's death. The scheme of the will is this: A gift of the furniture to the wife; power to his executrix, the widow, to sell, and from the net income to pay to herself $1,500 yearly for her support and the maintenance and education of his youngest son, Charles, issue of testator's marriage with her, during his minority, and to divide equally the excess income, if any, among his children, three of whom were issue of a former marriage, the surviving issue of any deceased child to take his share per stirpes; when Charles S. should become of age to divide equally the corpus of the estate among his wife and the four children named, the surviving issue of any deceased child to take his share per stirpes. The widow died before the period of division.

Why should the application of the usual rule be doubted? The testator, aided by legal advice or knowledge, used apt words to give the furniture, the income, and to limit the remainder to those surviving to the time of division. But then the natural question arose in testator's mind: What if Charles did not live to majority? The testator answered by saying that his executrix—that is, his widow—should divide the corpus among his wife and children and the issue of a deceased child. Here he is providing for a single contingency, viz., the death of Charles and the survival of the others, and he follows the exact plan of division first stated. Now he has provided for wife and each child, or the issue of any child deceased. But there is one possible event for which he wished to make provision in express terms, viz., the death of a child without issue before division. As to that he said that the share of the child so dying should be divided among the wife and surviving children. Of course, this presupposes that the wife is then living.

It will be observed that by the literal reading such share goes to survivors, and not to surviving children, and the issue of any who may have died. In other words, upon the contingency of survivorship the children took, although such interpretation is not necessary. But it would not be thought that the wife, dead, would share in the division of a child dead without issue. Therefore the plan for the remainder was equal division at Charles' majority among the wife and four children, with substituted gift to the issue of a deceased child, similar disposition to wife and children surviving at Charles' death before majority, and division among surviving beneficiaries of the share of a child dying with issue. Survivorship is made the test of sharing in the division. The testator put his property in his wife's hands to hold and divide. He thought of her as administering and making the division and living to the time of it and through any vicissitudes that might arise.

It is urged, on the other hand, that at the testator's death his widow took absolutely a one-fifth part of the corpus, and that, whatever the

date of her death after the testator, her title, already vested, awaited the division in which no other member of the family could participate unless he lived to the time; that, after having given her a share in the whole income of the corpus pending division, he selected her as the only one among his beneficiaries who were to share equally, and absolutely vested a share in her. The language of the will in its legal sense and ordinary import excludes such conclusion and it is inconsistent with the testator's own statement:

"Believing that equality is justice, it is my will that my wife shall share equally with my children in the division of my estate whenever the same shall be made."

Therefore she is permitted to share the portion of a child dying without issue. But shall she share it absolutely, and each child conditionally? Shall she share equally in the division, although dead at the time? The issue of a dead child takes, because he stands for his parent. Her only child was given his share if he lived to take it. It was not necessary to give her a vested estate, so that her issue would be provided for. I think it was not at all in the testator's thought, as expressed, to prefer his wife, even though she had died before she could enjoy the remainder.

[2] The second question relates to the gift in the codicil. In my judgment the codicil gave the wife another and quite different absolute legacy of $2,500. A similar sum had been given to William and Richard each, and "now, in order to carry out the principle of equality annunciated in my said will," he desired that a like sum should be paid before division to his wife, Abbie, and Charles, each with certain interest. A testator, who directs that $2,500, with interest, shall be paid before the corpus shall be distributed, means that the legatee shall take it freed of the power to distribute, and as the taker is to be put on an equality with others, who took and kept a like sum, it follows that the gift is not burdened by the contingency of living to the time of the distribution, from which it is in express words excluded.

The decree should be modified in accordance with this opinion, and, as so modified, affirmed, without costs.

JENKS, P. J., and STAPLETON and PUTNAM, JJ., concur. BURR, J., dissents.

(158 App. Div. 456)

MOLLOY v. VILLAGE OF BRIARCLIFF MANOR.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

1. PLEADING (§ 258*)—LEAVE TO AMEND—DURING TRIAL.

In an action against a village, begun in 1908 and reversed in 1911, after which defendant served an amended answer, alleging that the contract sued on was void because workmen were employed more than eight hours a day, leave asked during the trial to further amend the answer, so as to allege that they were so employed where there was no extraordinary emergency, was properly refused.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 765–782; Dec. Dig. § 258.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MUNICIPAL CORPORATIONS (§ 374*)—ACTIONS—PLEADING—VIOLATION OF LABOR LAW.

Under Laws 1906, c. 506, § 3, making void all contracts under which workmen on municipal work are worked more than eight hours a day, except in cases of extraordinary emergency, when a municipality claims that a contract is avoided, it must allege, not only that workmen were worked more than eight hours, but that they were so worked when there was no extraordinary emergency.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.*]

3. MUNICIPAL CORPORATIONS (§ 339*)—PUBLIC IMPROVEMENTS—CONTRACTS—VIOLATION OF LABOR LAW.

Under Laws 1906, c. 506, § 3, making void all contracts for municipal work which do not contain a provision that workmen shall not be employed more than eight hours a day, a contract containing such a provision in proper form, though referring to a prior statute, is not invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 868, 870–873; Dec. Dig. § 339.*]

4. MUNICIPAL CORPORATIONS (§ 374*)—PUBLIC IMPROVEMENTS—CONTRACTS—VIOLATION OF LABOR LAW.

Laws 1906, c. 506, § 3, making void all contracts for municipal work under which workmen are employed more than eight hours a day, except in cases of emergency, being penal in nature and tending to cause forfeitures, the burden should not be cast on the contractor, suing for compensation, to show that an emergency existed when a violation of the act was alleged to have occurred.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.*]

Appeal from Trial Term, Westchester County.

Action by Frank W. Molloy against the Village of Briarcliff Manor. From a judgment for plaintiff, and also from orders granting plaintiff's motion to amend the complaint, and denying defendant's motion to amend its answer, the defendant appeals. Affirmed.

See, also, 145 App. Div. 483, 129 N. Y. Supp. 929.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

William Woodward Baldwin, of New York City, for appellant.

Franklin Nevius, of New York City (L. Laflin Kellogg and Alfred C. Pette, both of New York City, on the brief), for respondent.

THOMAS, J. The disputed items have been considered, and it is concluded that the verdict is sustained by sufficient evidence, and also that the several exceptions should be overruled. There is a question that requires some discussion.

[1] The action was begun in 1908. The first judgment was reversed in June, 1911, and thereafter defendant served an amended answer alleging a breach of the contract:

"In that he permitted or required laborers, workmen, or mechanics in his employ, in doing the said work contemplated by the said contract, to work more than eight hours in one calendar day."

But the plaintiff was enabled to work men more than eight hours in one day "in cases of extraordinary emergency caused by fire, flood, or danger to life or property." But the defendant failed to allege

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the overwork was not in any of such cases. Upon the trial it asked to amend its answer so to state; but the court denied it, and I think properly. Then defendant asked a witness, who had furnished teams for the work, what was said to him by the plaintiff prior to furnishing them. The question as to what was said about teams is not strictly probative of a charge that laborers, workmen, or mechanics overworked, although it may have been introductory to that subject. But it is apparent that the court intended to sustain the objection to any evidence on the proffered issue, and so the essential question should be met.

[2] Should the defendant have alleged that the case was not within the exception? The statute in force when the contract was made was chapter 506, Laws of 1906, enacted May 19th. The contract was dated October 1, 1906, and contained the stipulation required by section 3, chapter 415, Laws of 1897, as amended by chapter 567, Laws of 1899, which has been declared unconstitutional. People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39. The statute existing at the time was, so far as material, as follows:

"Hours to Constitute a Day's Work.—Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law. * * * Each contract to which the state or a municipal corporation or a commission appointed pursuant to law is a party which may involve the employment of laborers, workmen or mechanics shall contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, sub-contractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract shall be permitted or required to work more than eight hours in any one calendar day except in cases of extraordinary emergency caused by fire, flood or danger to life or property. * * * No such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state or of a municipal corporation pay the same or authorize its payment from the funds under his charge or control to any such person or corporation for work done upon any contract, which in its form or manner of performance violates the provisions of this section, but nothing in this section shall be construed to apply to persons regularly employed in state institutions, or to engineers, electricians and elevator men in the department of public buildings during the annual session of the legislature, nor to the construction, maintenance and repair of highways outside the limits of cities and villages."

[3] Hence the plaintiff was not entitled to recover anything, nor was the defendant competent to pay anything, for work done under the contract, if, in form or manner of performance, there was a violation of the provisions of the section. But the contract was in form obedient to the statute, although reference to the old rather than the new statute was made, but the stipulation is pursuant to the old statute. But unless the stipulation be referable to the then existing law, there could be no recovery, as the contract would be void, and the plaintiff upon its introduction would show that he had no cause of action. But did the manner of its performance violate the statute? Must plaintiff assert and prove the validity of his contract, and is it sufficient for the defendant to deny it, or may the plaintiff assume the continuance of the contract and must the defendant plead that it has

ceased? I think that the burden was not on the plaintiff. The contract was made by the parties in proper form. Hence it had a valid inception. It presumptively continued a valid contract, and as such the plaintiff sued under it to recover payment according to its promises. Hence all that he was obliged to prove was that he did the work and that payment was due. The defendant then denies the existence of the contract on which suit is brought, and asserts the disability of the plaintiff to receive and of the defendant to pay. The condition on which the contract may become void is subsequent, for the contract becomes a fact, and loses its existence only on the happening of an event in the course of its performance. It would be a strange construction that would require a person, enabled to make and so making a contract sanctioned by public policy, to plead that he had not violated a general law of the state, and had not by any violation become unable to sue, and that his contract, once lawful, had not become vitiated.

The stipulation is not material to the performance of the work to be done, but inheres in the capacity of the parties to continue their contractual relations in case of a transgression of public policy. Hence the defendant, if it would have the plaintiff deprived of his ability to sue under the contract, should assert the disability and the reason for it. Did he not pay the prevailing rate of wages? Did he require men to work more than eight hours per day in cases other than of the extraordinary emergency enumerated in the statute? Whatever of such things were done in violation of the statute the defendant should point out. But the defendant is content to allege that plaintiff violated the contract by permitting or requiring men to work more than eight hours. But that is not necessarily a violation of the statute. For the statute declares that in cases he may work the men over eight hours. Is the defendant referring to overwork in such cases, or in cases when such conditions did not exist. The statute makes two classes of cases, in one of which men must not work over eight hours, and in the other of which they may. It does not put the plaintiff in the wrong if by his connivance or will the men worked over the allotted time, but it is the occasion of their excess that qualifies the labor as a violation of, or obedient to, law. Things excepted from a statute are as if it were not enacted. A proviso avoids them by way of defeasance or excuse, it is said, and so it is urged that in the present statute the exception is a mere proviso that excuses the violation of the statute, and that it need not be negatived. But when a statute declares that men shall not be permitted to labor more than eight hours on work, but excepts occasions when they may, there is no presumption that by so working the contractor disobeyed the law or incurred penalty, and that he must go to court and primarily make excuses for doing the lawful act.

[4] The statute is penal in its nature; it tends to the forfeiture of important property interests; it is capable of arresting or preventing the progress of great public works, and the alleged offender at the bar of the court should not be compelled to show that the act was not a guilty one, and to excuse it by manifesting the conditions under which it was done. Section 2143 of the Penal Code provides:

"All labor on Sunday is prohibited, excepting the works of necessity and charity."

An indictment that charged that a person labored on Sunday, without stating that the work was not of necessity or charity, would not state a crime. Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398; People v. Stedeker, 175 N. Y. 57, 67 N. E. 132. And yet the things within the exception furnish an excuse quite as much as does the emergency work in the present statute. I see no occasion for discussing People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605, in the Appellate Division, or Village of Medina v. Dingledine, 152 App. Div. 307, 136 N. Y. Supp. 786.

The judgment and orders appealed from should be affirmed, with costs. All concur.

(158 App. Div. 443)

HUGHES v. NEW YORK, O. & W. RY. CO.

(Supreme Court, Appellate Division, Second Department. September 23, 1913.)

LIMITATION OF ACTIONS (§ 127*)—INJURIES TO SERVANT—ACTIONS—LIMITATIONS.

Where a railroad conductor died pending an action brought by him for personal injuries under the provisions of the state law, his administratrix could not, after the expiration of two years from the time of the accident, file, as substituted plaintiff, an amended complaint based upon a right of action given by Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1322), section 6 of which, as amended, limited actions under that law to those brought within two years from the time the cause of action accrued.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543–547; Dec. Dig. § 127.*]

Appeal from Special Term, Orange County.

Action by John F. Hughes against the New York, Ontario & Western Railway Company. From an order of the Special Term, denying an application of Avasta Hughes, as administratrix of the estate of John F. Hughes, to be substituted as plaintiff and to file an amended complaint, the plaintiff appeals. Order affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

Benjamin Patterson, of New York City, for appellant.

Elbert N. Oakes, of Middletown, for respondent.

THOMAS, J. The summons served January 13, 1911, was followed on March 29th by the complaint, which showed that the plaintiff, a conductor, was injured on his train on April 21, 1910. It is alleged that defendant was organized under the laws of this state and "operating a railroad in various parts of" this state "and the state of Pennsylvania, and at the places hereinafter specified," and that at the date of the accident the plaintiff "was in the employ of defendant as a conductor upon a train which was being run by defendant along the line of its railroad near Starlight, in the state of Pennsylvania." Then

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the cause of the accident and the statute of the state of Pennsylvania are pleaded. Issue was joined, but the action had not been tried at the time of the plaintiff's death on February 13, 1912. On October 29, 1913, letters of administration were issued to decedent's widow, and a motion was made in February, 1913, to substitute the administratrix as plaintiff and to permit her to serve an amended complaint, basing the action upon the federal Employers' Liability Act, entitled "An act relating to the liability of common carriers by railroad to their employés in certain cases," passed April 22, 1908, and the amendatory act of April 5, 1910.

The action was not brought under that act, but is specifically based on the common law as modified by the statute of the state. An action under the federal law must be begun within two years from the time the cause of action accrued (section 6), but after nearly three years it is sought to convert the action under the state law into an action under the federal law, thus extending the statute by a substituted cause of action. On April 5, 1910, the federal act was amended so as to provide "that any right of action given by this act to a person suffering injury shall survive," etc. But the right cannot survive the time limited for its exercise, and when the person to whom the right is initially given elects to proceed under the law of the state, the right to proceed under the federal statute is at least dormant, and ceases after the expiration of the two years. The federal statute is tendered to him who, entitled, chooses to employ it. He may prefer the law of the state, as the injured person did in the present instance. But such law cannot be exploited, and, upon emergency, the action be changed into one under the federal law. There is not a suggestion of fact in the original complaint indicating intention to avail of the federal statute.

The order should be affirmed, with $10 costs and disbursements. All concur.

(82 Misc. Rep. 46.)

SZYMANSKI v. CONTACT PROCESS CO.

(Supreme Court, Special Term, Erie County. August, 1913.)

1. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—BURDEN OF PROOF—AFFIRMATIVE DEFENSE.

In an action under Labor Law (Consol. Laws 1909, c. 31) § 202a, as added by Laws 1910, c. 352, contributory negligence is an affirmative defense, which defendant has the burden of proving.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. § 265.*]

2. PLEADING (§ 318*)—BILL OF PARTICULARS—MASTER AND SERVANT.

Under Code Civ. Proc. § 531, authorizing the court to order a bill of particulars of an affirmative defense, the defendant in an action under Labor Law (Consol. Laws 1909, c. 31) § 202a, as added by Laws 1910, c. 352, to recover for personal injuries to plaintiff's intestate resulting in his death, may be required to furnish a bill of particulars of the alleged contributory negligence of the deceased.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 963–969, 971; Dec. Dig. § 318.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Antoinette Szymanski, as administratrix, etc., against the Contact Process Company. On motion for a bill of particulars. Motion granted.

Michael M. Cohn, of Buffalo, for plaintiff.
Almon W. Lytle, of Buffalo, for defendant.

BISSELL, J. The plaintiff moves for an order requiring the defendant to furnish a bill of particulars of the alleged contributory negligence of the plaintiff's intestate. The answer alleges:

"That the said alleged injuries to the said Woichech Szymanski, deceased, occurred, and the said alleged injuries, if any there were, were sustained, by reason of his own want of care and his own negligence, and not by any negligence or want of care on the part of this defendant, and that, if any negligence other than that of the said deceased caused or contributed to cause the said alleged accident and injuries, it was the negligence of a competent fellow servant or fellow servants of the plaintiff."

[1] The action has been brought under the Labor Law (Consol. Laws 1909, c. 31, § 202a, as added by Laws 1910, c. 352), which provides that:

"On the trial of any action brought by an employé or his personal representative to recover damages for negligence arising out of and in the course of his employment, contributory negligence of the injured person shall be a defense, to be so pleaded and proved by the defendant"

—thus constituting contributory negligence an affirmative defense, and placing the burden of proving it upon the defendant.

[2] The court has power, under section 531 of the Code of Civil Procedure, to make an order for a bill of particulars of an affirmative defense. Dwight v. Germania Life Ins. Co., 84 N. Y. 493; Spitz v. Heinze, 77 App. Div. 317, 79 N. Y. Supp. 187.

The allegations of contributory negligence in the answer are general, and the plaintiff's intestate is dead, and the defendant should be required to state the particulars of the plaintiff's intestate's several acts of omission or commission which the defendant claims constitute contributory negligence. This should be done to avoid surprise on the trial and—

"to reach exact justice between the parties by learning just what is the truth, and to learn what is the truth by giving to each party all reasonable opportunity to produce his own proofs and to meet and sift those of his adversary." Dwight v. Germania Life Ins. Co., supra.

The motion for a bill of particulars is granted, with $10 costs.

Motion granted, with $10 costs.

(158 App. Div. 445)

SALOWICH v. NATIONAL LEAD CO.

(Supreme Court, Appellate Division, Second Department. September 23, 1913.)

1. MASTER AND SERVANT (§ 129*)—INJURIES TO SERVANT—PROXIMATE CAUSE OF INJURY—UNGUARDED MACHINE.

Where a servant was instructed not to oil certain cogwheels unless they were at rest, the master is not liable, on account of failure to guard the wheels, for injuries received by the servant while oiling the wheels when in motion, even though the guards were necessary to protect workmen at a mixer just below the cogwheels.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257–263; Dec. Dig. § 129.*]

2. MASTER AND SERVANT (§ 129*)—INJURIES TO SERVANT—PROXIMATE CAUSE OF INJURY—UNGUARDED MACHINE.

Where a servant was injured by unguarded cogwheels, which were put in motion unintentionally while he was oiling them, the failure to guard the wheels was the proximate cause of the accident, if there was reason to believe that there was danger of their starting, either without or through the negligence of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257–263; Dec. Dig. § 129.*]

3. MASTER AND SERVANT (§ 139*)—INJURIES TO SERVANT—PROXIMATE CAUSE —NEGLIGENCE OF MASTER.

In such a case, the negligence of the master, if any, which caused the starting of the wheels, might be a concurring proximate cause, and the master would be liable on both grounds.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 275, 282, 289, 296; Dec. Dig. § 139.*]

4. MASTER AND SERVANT (§ 125*)—INJURIES TO SERVANT—KNOWLEDGE OF DEFECT.

In an action for injuries to an employé, caused by the unintentional starting of cogwheels which he was oiling, the fact that the belt had shifted on another occasion about a week before and started the wheels, and that the foreman knew of that fact, is sufficient evidence of negligence on the part of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243–251; Dec. Dig. § 125.*]

5. TRIAL (§ 253*) — INJURIES TO SERVANT — INSTRUCTIONS — THEORY OF DEFENSE.

Where a servant was injured by an unguarded cogwheel, which he was oiling, and there was a conflict in the evidence whether he was oiling them, contrary to orders, while they were in motion, or whether they started while he was oiling them, it was reversible error to refuse to charge that the plaintiff could not recover if he started to oil the wheels while they were in motion, even though the charge of the court involved that proposition, since defendant was entitled to have it brought sharply to the attention of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

6. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—BURDEN OF PROOF —CONTRIBUTORY NEGLIGENCE.

Under the express provisions of Employers' Liability Act (Consol. Laws 1909, c. 31) § 202a, as added by Laws 1910, c. 352, the burden of proving contributory negligence of a servant is upon the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. § 265.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Kings County.

Action by Hohn Salowich against the National Lead Company. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

James J. Mahoney, of New York City (George J. Stacy, of New York City, on the brief), for appellant.

Martin T. Manton, of New York City (William H. Griffin, of New York City, on the brief), for respondent.

THOMAS, J. The primary question is whether there was error in the charge to the jury. The plaintiff's arm was carried into unguarded cogwheels, which he was oiling and which were 1 foot and 7 inches above a tank 8 feet and 2 inches high. It was the conceded duty of the plaintiff to oil the wheels when the shaft was at rest. He states that he ascended the ladder placed against the tank, stood on the second rung, and "was about putting that oil can into one of those holes," when the machine started. The machine could start only from the belt passing from the loose to the tight pulley, and, as plaintiff testified, it made the change in this instance without interference by anybody. In his experience of ten years in that service, it had happened only about a week before the accident, which he reported to the foreman, as well as the absence of guards, and the latter replied that he would report it to the chief engineer, who would fix it. The plaintiff added that he also reported a loose screw related to the belt shifter. The foreman denied that there was any conversation on the subject. The screw had no effect upon the starting of the machinery, and may be disregarded here, as it should have been upon the trial. The tank was used for mixing water, acid, and lead, and the machinery was started in usual practice after the introduction of the lead began. The plaintiff states that there was no lead in the tank at the time the machinery started, and so in usual course should not have been in motion. But the foreman said, with doubtful credence, that there was lead in it and that it was in motion. The statement of the plaintiff, that it was not, was supported by a fellow workman called by the defendant.

[1] Several times each day the plaintiff, or some other of several persons, was required to go up the ladder and use a stick in the tank to test the composition, and for that purpose raise the stick up and down, whereby his hand came near to the cogwheel, an inch or two therefrom, as plaintiff states. So the jury would have been justified in finding that the cogwheels were not properly guarded to protect workmen testing the mixture in the tank. But no guard was necessary to protect one oiling the wheels, as no one was permitted to do so when they were in motion, and if plaintiff attempted to oil the moving parts he was guilty of disobedience of the practice and brought about his own injury.

[2] But it is necessary to go a step further. What if the machine self-started while plaintiff was oiling it? Then was defendant liable for leaving it unguarded? Yes; if it could be properly found that

there was reason for believing that it might start either without or through the master's negligence as to the shifting of the belt. But in ten years it had started but once, and defendant's foreman was found to have had notice of it a week before. If this be true, what should the defendant have done? Corrected the self-shifting, or guarded the cogs, or both; and if he neglected either was he liable to plaintiff? If the jury was justified under the evidence in finding that with or without the defendant's fault there was practical, and in the use of due care recognizable, danger of the wheels beginning to move while the plaintiff was oiling them, and so injuring him, it was justified in holding that defendant had disobeyed the statute. As regards this case, the question is whether the machine did start a week earlier or on this occasion. The jury credited plaintiff's statement that it did. Hence the case is one that may fall under the statute, and the failure to guard becomes a proximate cause of the accident. The court properly refused a request that it could not be so found. If the belt was liable to shift, the cogwheels were liable to go, and to hurt the workmen, and in such case the guards were demanded.

[3] But could the master's negligence as to the shifting belt be a concurring proximate cause? If the master's neglect permitted the self-starting, whereby the cogwheels were actuated, such neglect was a proximate cause. So the cause of action could rest on the unguarded cogwheels, or the master's neglect, or both. But the learned court in its main charge submitted the case upon the defendant's negligence; that is, whether the—

"cogs were not properly guarded and brought about the accident by reason of some defect, of which notice was given to the man who was standing for the master, and which started this machinery while it was at rest, and while the plaintiff was performing the work which he was required to do in the ordinary course of his employment."

It is true that reference had been made to the omission to guard the wheels; but the final question was the master's negligence, and would have so remained, had not the defendant's counsel requested a charge that the uncovered cogs were not the proximate cause of the accident. This was refused. It might have been in harmony with the cause of action submitted to have so charged, but it would have been error as to the plaintiff, for, as already indicated, the plaintiff was entitled to have the question of the failure to guard, as well as that of the neglect in regard to the belt, submitted to the jury if the evidence justified it.

[4] But did the evidence tend to show any neglect as to the belt, beyond the fact that it changed on this and the earlier occasion? The court refused to charge that the self-starting did not indicate any defect, but did later charge that plaintiff must show what caused the belt to shift and that the cause was a negligent one. No specific cause was shown, as the loose screw was not the cause. But could the jury credit the story that the belt shifted, and that it had done so before, and that the master through the foreman had notice of it? If so, the fact was sufficient evidence of negligence, within Fox v. Le Comte, 2 App. Div. 61, 37 N. Y. Supp. 316, affirmed on opinion below 153 N. Y. 680, 48

N. E. 1104, McCarragher v. Rogers, 120 N. Y. 526, 24 N. E. 812, and Staskowski v. Standard Oil Co., 127 App. Div. 17, 111 N. Y. Supp. 58. In Dingley v. Star Knitting Co., 134 N. Y. 552, 32 N. E. 35, the court indicated that the starting of the machine on the occasion of the accident and in an earlier instance was attributable to a cause other than a defect.

[5] The defendant made a series of requests to the general purpose that the plaintiff could not recover if he went up to oil it when the machinery was in motion. The plaintiff criticises the requests, in that they do not relate to the time when the plaintiff began to oil the machinery. The plaintiff states that the machinery was at rest when he went up the ladder, and started when he began to oil the cogs. The requests covered the undertaking, and could not be misunderstood. The charge should have been made. It is true that the charge of the court involved the thought in the request, but the defendant was entitled to have it brought sharply to the attention of the jury. It is also charged as error that the court submitted the question of the negligence of the superintendent, but I infer that the intention was to submit the question of Gossl's position for the purpose of determining whether he was the proper person to receive notice of the self-starting of the machinery. To that extent, at least, the question was involved.

[6] There are various other exceptions urged, but the only one that needs attention relates to the burden of proof as regards contributory negligence. But the defendant does not indicate why it does not bear it under section 202a of the Employers' Liability Act (Consol. Laws 1909, c. 31), as added by Laws 1910, c. 352.

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur.

PITTSBURGH PLATE GLASS CO. v. VANDERBILT et al.

(Supreme Court, Special Term, New York County. June 26, 1911.)

1. MECHANICS' LIENS (§ 157*)—NOTICE OF LIEN—IMPROPER ITEMS.
Inclusion of improper items by inadvertence in a mechanic's lien notice, the claimant having withdrawn the same on discovering the error, will not vitiate the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268–274; Dec. Dig. § 157.*]

2. MECHANICS' LIENS (§ 196*)—SUBCONTRACTOR OR MATERIALMAN—LIEN NOTICE—MANUFACTURE OF SPECIAL TRIM.
Where a lien claimant supplied doors and other special trim, manufactured for the particular building in controversy, in accordance with special designs, not staple articles carried by any class of tradesmen, but manufactured in the claimant's factory apart from the premises on which the building was being constructed, claimant was entitled to a lien for both labor and material, as a subcontractor as distinguished from a mere materialman, and this though the notice claimed a lien for material only.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 337–341; Dec. Dig. § 196.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MECHANICS' LIENS (§ 196*)—MONEY DUE—ASSIGNMENT—FILING—FAILURE TO FILE—EFFECT.

An order given by a subcontractor on the contractor to a materialman for $9,600, not amounting to an assignment of the entire balance due the subcontractor, but being a mere authority to the contractor to pay the sum specified out of the balance due, prior to any claims the subcontractor might have on the money, was unenforceable against subsequent liens for failure to file the same under Consol. Laws 1909, c. 33, § 15, requiring an assignment of money due or to become due for labor performed or materials furnished for the improvement of real property, or an order drawn by a contractor or subcontractor on the owner for payment of such money, to be filed, etc.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 337-341; Dec. Dig. § 196.*]

4. MECHANICS' LIENS (§ 139*)—NOTICE—MATERIALS—DESCRIPTION.

A notice of mechanic's lien filed by the "Hasbrouck Flooring Company," containing no description except "the labor performed and the materials furnished, and the agreed price and value thereof, are as follows, respectively, $3,645.03," the amount unpaid being $977.03, was insufficient for failure to describe the materials furnished and the work performed, nor was such defect cured or aided by the name of the claimant.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 234-236; Dec. Dig. § 139.*]

5. MECHANICS' LIENS (§ 195*)—NOTICE—LABOR AND MATERIALS—DESCRIPTION—DEFECTS.

Lien Law, § 9, subd. 4 (Consol. Laws 1909, c. 33), requiring that the labor performed or the materials furnished or to be furnished shall be specifically described in the notice of lien, is not for the sole benefit of the owner but is available to a subsequent lienor as well, who is entitled to object to a prior lien on the ground that the labor and materials claimed for are not sufficiently described.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 336; Dec. Dig. § 195.*]

6. MECHANICS' LIENS (§ 157*)—LIEN FOR LABOR AND MATERIALS—LIEN NOTICE—DEFECTIVE DESCRIPTION—EXTRINSIC EVIDENCE.

Defects of description of labor and materials, claimed for in a mechanic's lien notice, cannot be supplied by extrinsic evidence, but the notice, in all matters of substance, must conform to the statutory requirements.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268-274; Dec. Dig. § 157.*]

7. MECHANICS' LIENS (§ 195*)—LIEN FOR LABOR AND MATERIALS—OBJECTIONS—WAIVER AS BETWEEN LIENORS—BOND.

In a contest between colienors litigating for priority, the fact that the liens on the improvement had been bonded did not constitute a waiver of objections as to the form and sufficiency of a prior lien notice.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 336; Dec. Dig. § 195.*]

8. MECHANICS' LIENS (§ 195*)—LIEN FOR LABOR AND MATERIALS—OBJECTIONS—WAIVER—INTRODUCTION OF NOTICE IN EVIDENCE.

In an equity suit to determine the priority of liens on a building as between colienors, the fact that a notice of lien was admitted in evidence without objection did not constitute a waiver of objections as to its form and sufficiency.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 336; Dec. Dig. § 195.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

9. MECHANICS' LIENS (§ 157*)—FILING—EXCESSIVE AMOUNT.
The filing of a mechanic's lien for an excessive amount is not fatal, where it appears that the claimant's books were carelessly kept and there was no intention to obtain any unfair advantage.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268–274; Dec. Dig. § 157.*]

10. MECHANICS' LIENS (§ 157*)—NOTICE—FORM.
Where a lien was filed for materials only, the omission in one instance to erase the words "labor and" before "material" in the notice did not characterize it as one for labor and material.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268–274; Dec. Dig. § 157.*]

Action by the Pittsburgh Plate Glass Company against one Vanderbilt and others for the foreclosure of a mechanic's lien. Rights of parties determined, and decree of foreclosure rendered.

S. G. De Kay, of New York City, for plaintiff.
Eidlitz & Hulse, of New York City, for defendants.

HENDRICK, J. In this action to foreclose a mechanic's lien, defendants Vanderbilt, the owner, and Jacob & Youngs, Incorporated, the contractor, have no pecuniary interest. The liens have been transferred from the property to the bond given by defendant National Surety Company. Defendants A. P. Bigelow & Co. and the Russell & Erwin Company did not appear at the trial. Defendant Relyea, trustee in bankruptcy of subcontractor Maher, may also be ignored. We have left the plaintiff and four other lienors and a fund of about $9,000 still in the hands of the contractors. That fund must be distributed among these five lienors, and the question presented is how it shall be divided. The principal lienor is A. W. Burritt & Co.

[1] This company has a claim larger than the fund on hand and claims the whole of it. The lien filed amounted to $10,419.26. The company has withdrawn an item of $10.75 and another for $250. I am satisfied that these were included through inadvertence and that they do not vitiate the lien. Ringle v. Wallis Iron Works, 149 N. Y. 439, 44 N. E. 175; Aeschlimann v. Presbyterian Hospital, 165 N. Y. 296, 59 N. E. 148, 80 Am. St. Rep. 723.

[2] One objection to this claim is made in common by several of the other lienors. It is not stated, however, more clearly than by counsel for this company, who sums it up in this single question:

"Suppose in the case of Herrmann & Grace v. City of N. Y., 130 App. Div. 531 [114 N. Y. Supp. 1107], affirmed 199 N. Y. 600 [93 N. E. 376], the American Radiator Company had made the radiators for the particular structure so as to fit in the different window recesses, and of special and suitable sizes for the different rooms, or of special designs, would the court in that case have held that company any less a materialman because it made special radiators for a special building?"

The Burritt & Co. lien is not for labor and materials but for materials only. If the question quoted should be answered in the negative, this company is entitled to preference over prior liens for both labor and material, for that has been so adjudicated. Herrmann & Grace Co. v. City of N. Y., 130 App. Div. 531, 114 N. Y. Supp. 1107,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

affirmed 199 N. Y. 600, 93 N. E. 376; Hedden Const. Co. v. Proctor & Gamble Co., 62 Misc. Rep. 129, 114 N. Y. Supp. 1103. The question quoted is substantially the question presented here, except that the material is different. Burritt & Co. supplied doors and other trim manufactured for this particular improvement in accordance with special designs. They were not carried in stock by the company; they could not be purchased from drummers in the trade; they are not staple articles carried by any class of tradesmen. If they had been, the company would be entitled to judgment. 130 App. Div. 531, 114 N. Y. Supp. 1107, supra. On the other hand, our doubts would be resolved if the company had come into the house with its workmen and fabricated the doors and other trim in a room adjacent to that where they were to be hung or attached. The company would then be a subcontractor, as distinguished from a simple materialman. Now, where lies the difference in principle? In one case the company contracts to manufacture interior trim on the premises and in the other at their manufactory. In both cases the articles are specially adapted to that one particular purpose; in neither are they of any substantial value as trim in any other building. The Municipal Building now under construction on Chambers street will consist mainly of steel and stone fitted elsewhere; each beam and block being placed where the designers planned while the steel was pig iron and the stone was in the quarry. If a lien were filed, should it be for material or for both labor and material? I feel constrained to hold that Burritt & Co. were subcontractors and furnished for this building both labor and materials. What, then, is the status of the company? It cannot have a lien for material only, and it has filed no lien for labor and material. If a lien for labor and material is filed, the lienor, it seems to me, could not recover for material only, as that would give him an advantage over prior lienors claiming for both labor and material. But the converse does not seem to follow. I shall hold that Burritt & Co. are entitled to stand in their order of priority as a lienor for labor and material. Burritt & Co. make another point which requires notice.

[3] About a week before any of the liens were filed, it obtained from Mr. Maher, the subcontractor, an order on the contractor for $9,600. This was not an assignment of the entire balance but authority to the contractors to pay that sum out of the balance to become due "prior to any claims I may have on said moneys." That lacks something even of an equitable assignment. It seems to be an order on a fund which should take precedence of any other order Maher might give, but it does not purport to effect any inchoate rights in the fund possessed by other lienors. Without pausing to inquire what rights are obtained by an assignee of part of a fund, we pass on to the reply made by the contractor. This states that there is apparently enough money to cover the order and the same would be credited, but—

"it is distinctly understood and agreed between us that if there should be any charges against his account of which we do not know at the present time, they shall be deducted before paying you the amount of the order. The reason for making this special arrangement is that the amount appearing to Mr. Maher's credit is less than $125 more than the amount of the order, and we wish to protect ourselves in the matter."

If Burritt & Co. had sued the contractor on that order, it seems doubtful whether they could recover. Just what is meant by "charges" is not clear. The company, however, did not obtain payment but proceeded to file a lien and are asking foreclosure in this action. Nor did the company surrender any of its rights. It has not, therefore, brought itself within the facts of the case which is invoked. Harvey v. Brewer, 178 N. Y. 5, 70 N. E. 73. The company suggests that section 15 of the Lien Law (Consol. Laws 1909, c. 33), declaring such orders void if not filed with the county clerk, has no application to the order in question, because this was not drawn upon an owner but upon a contractor. That does not seem to be strictly correct. Van Kannel Revolving Door Co. v. Astor, 119 App. Div. 214, 104 N. Y. Supp. 653. In the absence of authority, I am inclined to follow the meaning which seems to lie on the face of section 15 of the Lien Law and to rule against this company's contention. No special objection is made to this company's lien for $250 and that will be allowed.

[4] The notice of lien filed by the Hasbrouck Flooring Company contains no description except as follows:

"The labor performed and the materials furnished, and the agreed price and value thereof, are as follows, respectively, $3,645.03."

The amount unpaid is $977.03. The colienors challenge the sufficiency of this notice on the ground that it does not describe the materials furnished and the work performed, either separately or both together. This company contends that a description is unnecessary, as that is impliedly stated in the title of the corporation. Unless a more persuasive answer can be found, I fear that the objection must be sustained. Any one passing the windows of a dairy company or a tea company will see many articles exposed for sale that have not the remotest connection with either tea or dairy products. This company cites a case in which a statement appears in the opinion arguendo that the notice is required for the benefit of the owner. Vogel v. Luitwieler, 52 Hun, 184, 5 N. Y. Supp. 154. But this particular statute appears to place no limitation upon the purpose to be served by its different provisions. A lienor may rely upon it as well as an owner.

[5] Subdivision 4 of section 9 provides that "the labor performed or to be performed, or materials furnished or to be furnished, and the agreed price or value thereof," shall be stated in the notice of lien. It is sometimes held that such notices must conform to the statute in order to confer jurisdiction on the court. Davidsburgh v. Knickerbocker Life Ins. Co., 90 N. Y. 526.

[6] It is also held that the requirement as to the kind of labor performed and the amount thereof cannot be omitted (Toop v. Smith, 181 N. Y. 283, 73 N. E. 1113), and that defects in the notice cannot be supplied by extrinsic evidence. Armstrong v. Chisholm, 100 App. Div. 440, 91 N. Y. Supp. 693. In short, the rule seems to be general that in all matters of substance the notice must conform to the statutory requirements. Norton & Gorman Cont. Co. v. Unique Const. Co., 121 App. Div. 586, 106 N. Y. Supp. 372; Bossert v. Fox, 89 App. Div. 7, 85 N. Y. Supp. 308; In re Emslie (D. C.) 98 Fed. 716.

[7] This company pleads further that this lien was bonded without

objection, and thereby all objections as to form were waived. The case of Kerrigan v. Fielding, 47 App. Div. 246, 62 N. Y. Supp. 115, is cited. This is a contest between colienors litigating for priority, and I think that the bond as among them serves no purpose except to transfer to itself the liens that rested upon the building.

[8] This company also urges that all objection to the notice of lien disappeared when it was received in evidence without protest. I do not so understand the rule. This is an equity action, and the mere fact that a paper is put in evidence is not conclusive upon its effect. With some reluctance I reach the conclusion that the lien of the Hasbrouck Flooring Company must be disallowed. The lien of D. B. Pershall & Son was filed for an excessive amount.

[9] But I am satisfied from the evidence that, although the accounts were kept very carelessly, there was no intention to obtain any unfair advantage.

[10] The lien was filed for material only. The omission in one instance to erase the words "labor and" before "material" does not characterize the notice as one for labor and material. The main objection made is that nearly all the material was delivered more than 90 days before the notice was filed. The statute provides that:

"The notice of lien may be filed * * * within ninety days after * * * the final furnishing of the materials, dating from the last item of * * * materials furnished."

These lienors appear to be entitled to a decree for $236.09; that being the sum to which the lien was reduced. The lien of John J. Wallace for labor and material must be allowed. Plaintiff, Pittsburgh Plate Glass Company filed a lien for both labor and material. While the notice makes no claim for material alone, it repeatedly claims for labor and material. In one place this occurs:

"That the nature and amount of the labor and services performed and the material furnished, and the agreed price and value thereof, are as follows: Materials, consisting of plate glass and sheet glass, and the labor in cutting and preparing same for shipment, delivered and set, of the price and value of $1,824."

If plaintiff had filed a notice, as permitted by the statute, for materials and for labor, separating the amount of each, the court might feel authorized to reject the item of labor on plaintiff's motion and allow the lien to stand for material only. But I must accept the notice as it appears on file, and plaintiff's lien for labor and material will stand for the amount claimed.

A decision and decree in accordance with this memorandum should be settled on notice not later than June 27, 1911.

(81 Misc. Rep. 562.)

CHAMBERS v. GEORGE VASSAR'S SONS & CO., Inc., et al.

(Supreme Court, Special Term, New York County. July, 1913.)

1. MECHANICS' LIENS (§ 132*)—NOTICE OF LIEN—TIME FOR FILING.

Under Lien Law (Consol. Laws 1909, c. 33) § 10, providing that notice of lien may be filed at any time during the progress of the work or within 90 days after the completion of the contract or the final furnishing of the materials, a materialman may secure a lien for the balance due for all materials furnished by filing a notice within 90 days of the time the last item was furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190, 192–207; Dec. Dig. § 132.*]

2. MECHANICS' LIENS (§ 83*)—MATERIALS FURNISHED—"MATERIALMAN."

Under Lien Law (Consol. Laws 1909, c. 33) § 2, defining a materialman as any person other than a contractor who furnishes materials for such improvement, one who furnishes material for the construction of a building but does not perform any work in putting it in place is a materialman, even though the materials were specially made by him for that building after he received the order therefor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 115; Dec. Dig. § 83.*

For other definitions, see Words and Phrases, vol. 5, p. 4409; vol. 8, p. 7718.]

3. CORPORATIONS (§ 589*)—CONSOLIDATION—RIGHT OF CONSOLIDATED COMPANY—MECHANICS' LIEN.

A corporation formed by the consolidation of two others pursuant to the Business Corporations Law (Consol. Laws 1909, c. 4) §§ 7 to 10, inclusive, which provide that the consolidated corporation shall succeed to all the rights of the constituent corporations, may claim a mechanics' lien for materials furnished by a constituent corporation prior to consolidation as well as for those furnished by the consolidated corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2354–2360; Dec. Dig. § 589.*]

4. MECHANICS' LIENS (§ 154*)—NOTICE OF LIEN—VERIFICATION—INFORMATION AND BELIEF.

Where all the statements in the notice of a lien are made on information and belief, a verification of the notice which states that the verifier had read the notice and knew the contents thereof and the statements stated to be alleged upon information and belief, and as to those matters he believed it to be true, is a sufficient verification.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 261–267; Dec. Dig. § 154.*]

5. MECHANICS' LIENS (§ 108*)—PERSONS ENTITLED—MATERIALMEN—DEFAULT BY SUBCONTRACTOR.

Where a subcontractor to install plumbing materials failed, a corporation which originally agreed to furnish the plumbing materials to the subcontractor but which, after his failure, furnished them directly to the principal contractor charging the principal contractor upon its books therefor was a materialman furnishing materials to the contractor; the latter being primarily liable and not merely the guarantor of the subcontractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 140, 141; Dec. Dig. § 108.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. MECHANICS' LIENS (§ 31*)—NATURE OF IMPROVEMENT—FIRE EXTINGUISHING SYSTEM.

Fire hose and racks attached by screws to the wall as accompaniments to a fire extinguishing system and easily detached are not materials within the Lien Law (Consol. Laws 1909, c. 33).

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 36; Dec. Dig. § 31.*]

7. INTEREST (§ 19*)—UNASCERTAINED DEBT—BUILDING CONTRACT—EFFECT OF MECHANIC'S LIEN.

An owner of a building is not liable for interest on the balance due the contractor who has not fully performed his contract and who by reason of liens filed against the building is not in a position to receive payment of the balance.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35–40; Dec. Dig. § 19.*]

Action by Albert N. Chambers against George Vassar's Sons & Co., Incorporated, and others to foreclose a mechanics' lien. Judgment entered distributing the balance due from the owner to the principal contractor among the lienholders.

Phillips & Avery, of New York City, for plaintiff.

Sullivan & Cromwell, of New York City, for defendant Dreicer Realty Co.

William F. Kimber, of New York City, for defendant Goetchins.

Sidney G. De Kay, of New York City, for defendant Pittsburg Plate Glass Co.

Isaac Hyman, of New York City, for defendant Brown.

Gregg & McGovern, of New York City, for defendant Monarch Metal Mfg. Co.

Morgan, Morgan & Carr, of New York City, for defendant Post & Powers.

Robert Godson, of New York City, for defendants J. L. & Michael Keating.

Albert L. Phillips, of New York City, for defendant Architectural Cornice & Skylight Works, Inc.

Williams, Folsom & Strouse, of New York City, for defendant Kemlein & Leahy, Inc.

Henry L. Brant, of New York City, for defendant Otis Elevator Co.

Frederick Klein, of New York City, for defendant Sykes Co.

Weschler & Rothschild, of New York City, for defendant Seus.

Joab H. Banton, of New York City, for defendant John Jordis Iron Works.

Wilbur F. Earp, of New York City, for defendant Hull, Grippen & Co.

William F. Kimber, of New York City, for defendant J. I. Haas, Inc.

Shepard & Houghton, of New York City, for defendant John O. Kane Co.

Morgan, Morgan & Carr, of New York City, for defendant American Hardware Corp.

Thompson, Warren & Pelgram, of New York City, for defendant New York Vault Light Co.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Raymond Hull Noble, of New York City, for defendant Nason Mfg. Co.

Deyo & Bauerdorf, of New York City, for defendant McCarthy.

Kurzman & Frankenheimer, of New York City, for defendant Impervious Products Co.

Cornelius J. Earley, of New York City, for defendant Howden.

Sampson H. Schwarz, of New York City, for defendant Corcoran, Inc.

Bernard H. Arnold, of New York City, for defendant Jiffy Fire Hose & Rack Co.

PAGE, J. This action is brought to foreclose a mechanic's lien. In all there were 25 such liens involved in this action, and several legal questions were raised upon the trial and by the briefs of various counsel which will first be considered.

[1] It is contended that as to materialmen their recovery must be limited to such materials as were delivered within the period of 90 days of the filing of the notice of lien. The cases relied upon to sustain this contention (Spencer v. Barnett, 35 N. Y. 94, 97; Goodale v. Walsh, 2 Thomp. & C. 311; Tiley v. Thousand Island Hotel Co., 9 Hun, 424; Duffy v. Baker, 17 Abb. N. C. 357) cannot now be considered as authorities. The first two arise under the Lien Law of 1853, which provided that the "notice must be filed before the expiration of thirty days after the completion of the work or within sixty days after the materials are furnished or supplied." Laws of 1853, c. 335, § 4.

In the case of Duffy v. Baker, supra, the court held that the last work done was not within the original contract and not performed at the instance and request of the person against whose interest a lien was sought to be imposed. The case of Tiley v. Thousand Island Hotel Co., supra, was decided on the authority of Spencer v. Barnett; the attention of the court evidently not having been directed to the difference in the wording of the Laws of 1873, c. 489, and the act of 1853. In Chase v. James, 10 Hun, 506, however, the court distinguished Spencer v. Barnett and Goodale v. Walsh and pointed out their inapplicability under the law of 1873. Since that time this question does not seem to have been raised. The language of section 10 of the present Lien Law is so plain that it is not strange that no one has heretofore sought to apply the decision of Spencer v. Barnett to our present statute. It provides:

"The notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or within ninety days after the completion of the contract or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished. * * *"

That this means that the lien may be filed within 90 days of the furnishing of the last item of the materials, for the balance due on the entire account, was recognized and applied, although the point does not seem to have been contested, in Landsberg & Co. v. Hein Construction Co., 135 App. Div. 819, 120 N. Y. Supp. 190. I shall hold, there-

fore, that, where the materialmen filed their notice of lien within 90 days of the furnishing of the last item of material, their lien secures the balance due for all materials furnished to this particular property.

[2] The priority of the lien of the American Hardware Company is resisted on the ground that the materials furnished were specially manufactured for this building, and hence the said company has only the standing of a lienor who has furnished labor and materials. I cannot accept this construction of the Mechanics' Lien Law, although it has been adopted by one of my Associates. Pittsburg Glass Co. v. Vanderbilt, 143 N. Y. Supp. 609. The definition of materialman in section 2 of the Lien Law, "any person other than a contractor who furnishes materials for such improvement," is not full and clear. As has been pointed out by the Court of Appeals, this language excludes a person who furnishes materials directly to the owner, but includes a person who furnishes materials to a contractor. Jackson v. Egan, 200 N. Y. 496, 94 N. E. 211. The distinction has also been drawn between the man who merely furnishes material and the man who furnishes material and performs labor to install it in the building. Herrmann & Grace v. City of New York, 130 App. Div. 531, 114 N. Y. Supp. 1107, affirmed 199 N. Y. 600, 93 N. E. 376; Jackson v. Egan, supra. These distinctions are recognized by the courts as creating anomalous conditions and are admitted to be doubtful as expressions of the true intent of the Legislature. The Lien Law should be amended in this regard and a definition given in apt words to express the meaning intended by the Legislature.

We are now asked to exclude from those entitled to a preference under the common acceptation of the term "materialmen" a third class, those who perform any work in preparation of the materials for that particular building, although they do no work in installing the materials in the building, thus limiting the term to those who sell and deliver to the contractor materials from stock on hand. The goods must be in existence in their final and complete form so that no work shall be done upon them prior to delivery. Thus, if a number dealer carries in stock timber 16 feet in length and the contractor desires timber 12 feet in length, the lumber dealer by sawing off 4 feet destroys his right of preference. Logically, if this distinction is sound, the unfortunate dealer whose stock of a particular kind of materials has been depleted, so that it is necessary for him to manufacture a new supply from which to fill the order, ceases to be a materialman within the statute. Also one who sells from samples loses the benefit of the statute. If, therefore, the time when the work is done upon the materials becomes the test, it becomes a question of the sufficiency of the stock on hand of each materialman to meet the demands of his trade. That the materials are especially manufactured for the particular building does not seem to me to constitute a valid distinction. From his experience the materialman has found that certain sizes, styles, or designs are generally acceptable. By manufacturing in quantities the cost of production is decreased and a prompt delivery is made possible. In anticipation of the demand he performs or hires labor in the production of the article. There comes a purchaser who takes some articles from the stock, but as to others the needs or taste of the purchaser has not

been foreseen, and the materialman performs or hires labor to produce the same article in a different size, style, or shape. Both articles are delivered and he performs or employs no labor subsequent to the delivery. The materials are attached to or incorporated in the edifice by others. Can it be that the law provides that as to the articles he sells from his stock he is entitled to a preference over others, but as to those that are subsequently manufactured he has no such right? If the time when the labor is performed in the production of the article is to be the test, will not the laborer, if unpaid, have a right to file a lien against the property for such work as he does upon the materials subsequently to the receipt of the order? A negative answer to these questions seems obvious. An architect prepares plans for the erection of a specific building. If he does not perform work upon the building in supervising the erection, he is not entitled to a lien; but if, in addition to preparing the plans, he supervises the erection, he is entitled to a lien because of his "active participation in the manual function of construction." Rinn v. Electric Power Co., 3 App. Div. 305, 307, 38 N. Y. Supp. 345; Thompson Starrett Co. v. Brooklyn Heights Realty Co., 111 App. Div. 358, 360, 98 N. Y. Supp. 128; Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262. I am of opinion, therefore, that the test as to preference is not the time when labor was expended in producing the material but whether the person furnishing the materials thereafter performed labor in attaching to or incorporating the materials into the building or improvement to real estate. The term "materialman," as defined by the statute and limited by the decisions above cited, refers to those who are not engaged in the construction of building or improvements upon real estate but in producing or selling to contractors with the owner materials that are incorporated in or attached to real estate by the labor of others.

[3] The American Hardware Corporation claims a lien for $1,126.30 for materials furnished from October 12, 1912, to January 27, 1913. The evidence shows that this corporation was formed December 23, 1912, and that it only furnished materials to the amount of $148.56, and it is urged that the lien must be limited to the latter amount. Prior to the organization of the American Hardware Company, the Russell & Irwin Manufacturing Company of New York was furnishing materials consisting of builders' hardware to George Vassar's Sons & Co., Incorporated, and such materials were delivered at the building and were installed therein by others. On December 23, 1912, the Russell & Irwin Manufacturing Company consolidated with three other corporations and formed the American Hardware Corporation of New York, and the branch of the new corporation which was formerly the Russell & Irwin Manufacturing Company continued its business of the Russell & Irwin Manufacturing Company without interruption or change under the name American Hardware Corporation of New York, Russell & Irwin Manufactuirng Company Division, and as such completed the contract with George Vassar's Sons & Co., Incorporated. It is well settled that there is no inchoate mechanic's lien upon real estate. The right of lien is conferred by statute, and, until a notice pursuant to statute is filed, the person with a claim stands in

no different position than any creditor. Hence an assignment of the claim carries with it no right to file a lien to secure its payment. After the notice is filed, the lien comes into existence and may then be assigned. If, therefore, the consolidation of these corporations, so far as this claim is concerned, effected an assignment of the claim by act of the parties, no right passed to the American Hardware Corporation to file a lien upon the claim transferred to it by the Russell & Irwin Manufacturing Company. The legal effect of the act of consolidation must be determined from a reading of the statutes by virtue of which the consolidation was effected. In this case the consolidation was pursuant to and by virtue of sections 7 to 10 of the Business Corporations Law (Consol. Laws, c. 4). Section 10 provides:

"Upon the consummation of such act of consolidation, all the rights, privileges, franchises and interests of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this state, vested in either of such corporations, parties to such agreement and act, shall not be deemed to revert or be in any way impaired by reason of this chapter, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation; and all the rights, privileges, franchises and property of the corporations, parties to any consolidation heretofore made under this chapter, shall vest as fully in the new corporation thereby created as they were vested in the corporations, parties to such consolidations."

More comprehensive language could not be employed to indicate the intention that any right, privilege, or property of any and every nature and kind that was vested in the old corporations should be by operation of law transferred to and vested in the new corporation unimpaired by the act of consolidation. It would be contrary to the expressed intention of the Legislature by a narrow construction to cut down or limit the broad and comprehensive language of this statute by holding that the right to file a lien for a claim that existed prior to the consolidation in one of the old corporations did not pass to the new, and contrary, also, to the provisions of the Lien Law that "this article is to be construed liberally to secure the beneficial interest and purposes thereof" (section 23), under which it has been held that the right to file a lien passed with the claim to a trustee in bankruptcy. Held v. City of New York, 83 App. Div. 509, 82 N. Y. Supp. 426. I shall therefore hold that the American Hardware Corporation had the right to file a notice of lien for the materials furnished by the Russell & Irwin Manufacturing Company prior to the consolidation and for such materials as it furnished subsequently thereto.

[4] Objection is raised to the notice of lien filed by the Nason Manufacturing Company because the verification which is made by the assistant treasurer is not in the exact form prescribed by the statute. It is as follows:

"Thomas F. Larkins, being duly sworn, deposes and says: I am assistant treasurer of the lienor mentioned in the foregoing notice of lien. I have read the said notice and know the contents thereof, and the statements therein stated to be alleged upon information and belief, and as to those matters I believe it to be true."

As all the statements in the notice of lien are made upon information and belief, I am of opinion that this is a substantial compliance with the statute and is a sufficient verification.

[5] The Nason Manufacturing Company furnished and delivered to the premises plumbing supplies and fixtures. The contract was originally made with the Killian Crean Company, a subcontractor, which was to install the plumbing materials in the building. This latter company became financially involved, and an agreement was thereupon made whereby the Nason Manufacturing Company agreed and did furnish the materials directly to George Vassar's Sons & Co., Incorporated, charging the same to the Vassar corporation upon its books and billing the materials to it. The Vassar corporation employed the man who had been theretofore working for the Killian Crean Company to install the materials for it. Under these circumstances I find that Nason Manufacturing Company was a materialman furnishing materials directly to George Vassar's Sons & Co., and was neither furnishing them to the subcontractor, Killian Crean Company, nor was George Vassar's Sons & Co. a guarantor of Killian Crean Company but was primarily liable for the materials furnished to it.

[6] The Jiffy Fire Hose & Rack Company has filed a notice of lien for the materials furnished by it that consisted of fire hose attached to the standpipe by couplings or by means of a loose collar in which a thread is cut which fitted to a corresponding thread on the plug of the standpipe. There is also a rack upon which the hose rests that is attached to the wall by screws. These make convenient but not necessary accompaniments to the fire extinguishing system. They are evidently easily detached. If gas and electric light fixtures, unless made especially for the particular building, do not come within the Mechanics' Lien Law (Caldwell v. Glazier, 138 App. Div. 826, 123 N. Y. Supp. 622; Wahle Phillips Co. v. Fifty-Ninth St.-Madison Ave. Co., 153 App. Div. 17, 138 N. Y. Supp. 13), it is difficult to hold that the furnishing of fire hose and racks gives a right of lien. This lien will therefore be held invalid.

The lien of John L. Keating and Michael J. Keating was held invalid upon the trial for defects in the notice and insufficiency of the answer.

[7] Although it was urged at the trial that the owner should be charged interest upon the balance found to be due upon the contract with George Vassar's Sons & Co., it is not pressed in the briefs submitted; and as the contract was not fully performed by George Vassar's Sons & Co., and because of this fact and the filing of liens they were not in position to demand payment, I do not think the owner should be charged with interest.

The foregoing covers all the questions of law. I find that there was a balance due from the owner to the George Vassar's Sons & Co., Incorporated, in the sum of $14,275.06. That the plaintiff is entitled to

judgment of foreclosure and sale, with costs, and an additional allowance of 5 per cent. on the amount hereinafter adjudged to be due upon his lien. That the following liens are established at the amounts severally set opposite the names of the lienors who are entitled to priority in payment in the order named, in so far as the sum of $14,275.06 will pay the same, with costs, and as to those liens which cannot be wholly paid out of said sum the lienors will be entitled to enter a personal judgment against George Vassar's Sons & Co., Incorporated, for the amounts respectively their due, with costs:

Hull, Grippen & Co., $106.93, with interest thereon from the 1st day of February, 1913.

John O. Kane Company, $566.44, with interest from February 1, 1913.

American Hardware Corporation, $1,126.30, with interest from February 1, 1913.

Nason Manufacturing Company, $1,358.36, with interest from February 1, 1913.

John H. Goetchins, $8,436, with interest from January 30, 1913.

Albert N. Chambers (the plaintiff), $3,235, with interest from January 31, 1913.

Davis Brown, $2,908.71.

Monarch Metal Manufacturing Company, $1,800, with interest from January 31, 1913.

Architectural Cornice & Skylight Works, $3,329, with interest from January 31, 1913.

Otis Elevator Company, $4,300, with interest from January 31, 1913.

The Sykes Company, $932, with interest from February 1, 1913.

Rudolph Seus, $1,685, with interest from February 1, 1913.

John Jordis Iron Works, $2,384.04, with interest from February 1, 1913.

J. I. Haas, Incorporated, $440, with interest from February 1, 1913.

New York Vault Light Company, $176, with interest from February 1, 1913.

James McCarthy, $1,419.90, with interest from February 3, 1913.

Impervious Products Company, $110, with interest from February 3, 1913.

Thomas F. Howden, doing business as the Howden Tile Company, $148, with interest from ———.

J. I. Haas, Incorporated, $110, with interest from February 4, 1913.

A. J. Corcoran, Incorporated, $200, with interest from February 5, 1913.

Requests to find so far as presented have been passed upon. Settle findings in accordance therewith and as indicated in this opinion and decree upon notice.

Judgment accordingly.

(158 App. Div. 473.)

In re RICH.

(Supreme Court, Appellate Division, First Department. October 10, 1913.)

ATTORNEY AND CLIENT (§ 44*)—MISCONDUCT—DISBARMENT.

Where an attorney misappropriated $250 collected for a firm which was his client, and also a mortgage for $2,000, assigned to him for collection, he was guilty of professional misconduct rendering him subject to suspension, though such misappropriation was consented to by one of the members of the firm, while it was in financial difficulties, such member sharing in the proceeds of the misappropriation.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

Proceedings by the New York County Lawyers' Association for the disbarment of Maurice B. Rich, an attorney. Suspended from practice for one year.

See, also, 150 App. Div. 925, 135 N. Y. Supp. 1138.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Hiram Thomas, of New York City, for petitioner.

Isador Goetz, of New York City, for respondent.

INGRAHAM, P. J. The respondent is charged with having misappropriated $250 collected for his clients, and also a mortgage for $2,000 assigned to him for collection. The proceeding was referred to one of the official referees, who after a most thorough investigation has reported that the charges are sustained by the evidence.

The report is so full and satisfactory that it is not necessary to restate the facts. The referee had the witness before him and heard the explanation of the respondent. It is established that, when the firm of Van Bergen & Co. were found to be in financial difficulties in the fall of 1907, the respondent, who had been their attorney, and one Bronk, who was a member of that firm, undertook to secure what they could for their joint benefit, and the transactions detailed by the referee were put through for that purpose. Bronk was willing to let respondent get all he could, and the payments by respondent to Bronk were to carry out this agreement. It is clear that, as to the other partners, the assignment of the Rappaport mortgage mentioned was not intended to vest the ownership in the respondent for his own benefit. That Bronk was willing that respondent should get the mortgage is explained by the fact that respondent was to pay him a proportion of the amount realized. This is shown by the letter of respondent to Bronk, inclosing the check for $18, and the letter of respondent to Van Bergen. These letters, and the statements made by the respondent to the receiver appointed in the bankruptcy proceeding, are inconsistent with his present position. We therefore adopt the report of the official referee.

The respondent acted with the consent of Bronk, one of his clients, and that, in view of his youth and inexperience, justifies us in not inflicting the full penalty of disbarment; but the respondent was guilty

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of professional misconduct which cannot be overlooked, and he is therefore suspended from practice for one year, and until the further order of this court, with leave to apply for reinstatement at the expiration of said period, upon proof that he has actually abstained from practice during that period and has otherwise properly conducted himself.

There was also submitted with the motion on the report of the official referee an application to order a rehearing. The respondent obtained from Van Bergen an affidavit which to some extent qualifies his evidence before the referee; but the main facts relied on by the referee are not involved, and Van Bergen's explanation as to the method adopted by the respondent in procuring this affidavit rids it of any force.

That application is therefore denied. All concur.

(82 Misc. Rep. 57.)

BOOTH v. H. S. KERBAUGH, Inc.

(Supreme Court, Special Term, Cattaraugus County. August, 1913.)

1. COSTS (§ 157*)—TRIAL FEE—PRIOR ALLOWANCE.
That a certain allowance had been made by the court to plaintiff as a condition of granting a postponement did not deprive him of his right to tax a trial fee, where it appeared by affidavit that such allowance was made to pay witness fees and other expenses already incurred by plaintiff, and that the respective attorneys had agreed that plaintiff's expenses would aggregate about that sum, and that his expenses did in fact amount thereto.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 613–617; Dec. Dig. § 157.*]

2. COSTS (§ 186*)—ITEMS TAXABLE—MILEAGE OF WITNESSES.
Under Code Civ. Proc. § 3318, providing for witnesses' fees, plaintiff was not entitled to tax mileage for material witnesses under subpœna, for their trips to and from their homes during an adjournment from Friday afternoon until the following Monday.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 737; Dec. Dig. § 186.*]

Action by Elijah Booth against H. S. Kerbaugh, Incorporated. On motion for retaxation of costs. Motion granted.

George E. Spring, of Franklinville, for plaintiff.
Allen J. Hastings, of Olean, for defendant.

LAUGHLIN, J. The court is required by this motion to review the rulings of the county clerk in disallowing objections duly interposed by the defendant to the taxation by plaintiff, on entering judgment herein, of a trial fee for the March term, 1913, and five items of disbursements, aggregating $18.24, shown in the usual form to have been paid or incurred to certain witnesses for mileage for returning to their respective residences pending the trial of the action on the usual adjournment of court over Sunday, and for returning to attend court on Monday.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] The right of the plaintiff to tax the trial fee depends upon a question of fact. Taxation of that item is contested only on the ground that it was embraced in an allowance of $100 made by the trial court to the plaintiff as a condition of granting the postponement of the trial on the application of the defendant. It appears by affidavit that such allowance was made for the purpose of paying the witness fees and other expenses of the trial incurred by the plaintiff at that time, and that it was agreed by the attorneys for the respective parties, without taxation of the items, that the plaintiff's disbursements and expenses would aggregate about that sum. It further appears by affidavit that such disbursements and expenses did in fact amount to that sum. That allowance, therefore, affords no basis for precluding the plaintiff from taxing the trial fee.

[2] It appears that after the trial of the action was begun, and on a Friday afternoon, the court adjourned until the following Monday at 1 o'clock in the afternoon, and that the justice presiding at the term, the attorneys, jurors, and the witnesses all left the county seat during the interim; and five material witnesses for the plaintiff, who had been subpœnaed and were in attendance, and resided from 43 to 48 miles from the courthouse, went home and returned to attend court at the adjourned hour. It is conceded on the part of the defendant that the plaintiff was entitled to tax $5 for the per diem fees of these witnesses for Saturday and Sunday, and its counsel argues that there is no authority for taxing more; but counsel for the plaintiff contends that his client was entitled to tax mileage for these witnesses, in effect, as if they had been duly subpœnaed anew, and he cites in support of his contention Muscott v. Runge, 27 How. Prac. 85, Moulton v. Townsend, 16 How. Prac. 306, Miller v. Huntington, 1 How. Prac. 218, and an unreported decision in which no opinion was written at Trial Term, Supreme Court, Cattaraugus County, in the case of Kales v. Hogg. The point presented is both interesting and important. It would seem that the ruling made in Kales v. Hogg, sustaining the right to tax mileage in such case, was a mere expression from the bench of the opinion of the justice presiding without specially examining the question; and it appears by affidavit that the court remarked, on so ruling, that as jurors were entitled to such mileage the same rule should apply to witnesses. In the case of jurors, however, it is expressly provided by section 3314 of the Code of Civil Procedure that unless a per diem allowance is made to them by the board of supervisors, in counties other than the county of New York, they shall receive mileage at the rate of 5 cents per mile for each mile necessarily traveled in going to and returning from the term, and that each juror is entitled to such mileage "for actual travel once in each calendar week during the term," with certain exceptions relating to three other counties. There is, however, no such provision with respect to witnesses, and therefore, with all due deference to the view of the learned justice who presided in Kales v. Hogg, the ruling in that case cannot be regarded as a controlling precedent, or one which should be followed, even if deemed erroneous, by a court of co-ordinate jurisdiction.

The fees to which the witnesses were entitled are prescribed in section 3318 of the Code of Civil Procedure as follows:

"A witness in an action or a special proceeding, attending before a court of record, or a judge thereof, is entitled, except where another fee is specially prescribed by law, to fifty cents for each day's attendance; and, if he resides more than three miles from the place of attendance, to eight cents for each mile, going to the place of attendance."

Those statutory provisions have remained substantially the same since the enactment of chapter 386 of the Laws of 1840, from section 8 of which they were taken. In codifying the statute, its phraseology, which prescribed half the mileage for going and the other half for returning, was changed; but the revisers' notes do not indicate that they intended to change the effect of the statute. See Throop's Annotated Code Civ. Pro. 1886, § 3318. We may take judicial notice that in those early days, and until quite recently in nearly every rural county in the state, court was ordinarily held continuously from the commencement until the end of the term, including Saturdays, and jurors, witnesses, and others attending court usually remained at the county seat over Sunday adjournments, and were often obliged to do so. The phraseology of the statute contemplated the payment of mileage for one trip only to each witness, and it is now expressly given as traveling fees *for going to the court* and not, as in the case of jurors by the present statute, for going to and returning from the court.

It is manifest, therefore, that the question hinges on whether it became necessary to subpœna the witnesses de novo for Monday; for if it did not, and if their attendance on that day could have been lawfully required by paying them, before they were excused on Friday, their per diem fees for Saturday, Sunday, and Monday, then the defeated party cannot be charged with additional mileage unnecessarily paid. It seems, on the bare statement of the proposition, reasonable that witnesses should be reimbursed for the expenses of returning to their homes during the ordinary recess of the court over Sunday; but on reflection it will be seen that, if more than one mileage may be taxed for a witness, it must be allowed in the case of a witness residing at the most remote point in the state, as well as in the case of a witness residing in the county where the trial is to be had. It is evident, therefore, that the taxation of more than one mileage for the same witness might become very oppressive to litigants, and it should only be allowed, I think, when his attendance could not lawfully be compelled unless subpœnaed again. It is one of the highest duties of citizenship to aid in the administration of justice by giving material testimony, and it is not contemplated by the statutes with respect to the payment of witness fees that full compensation or indemnity shall be afforded. The argument to sustain the taxation is based on the fact that the witnesses are not required to be in attendance at the courthouse during such adjournment, and that now they ordinarily go home. That is also true with respect to adjournments overnight, and yet in such case it has recently been authoritatively held that they are not entitled to mileage. O'Rourke v. Degnon R. & T. I. Co., 139 App. Div. 695, 124 N. Y. Supp. 364. The case of Muscott v. Runge, supra, was an action by a party against a witness to recover the statutory penalty and damag-

es for his failure to attend, and the court, on deciding that the plaintiff failed to prove many essential facts, and among others that the witness was duly subpœnaed, expressed the view that on an adjournment of the trial from Saturday until Monday the witness was either entitled to per diem fees for both Sunday and Monday, or to be excused or discharged from attendance under the first subpœna, and to be duly subpœnaed anew and paid mileage and the per diem fees for Monday.

I am of opinion, therefore, that when a witness is duly subpœnaed to attend court it is his duty, unless relieved by special application to the court on the ground that there has been an abuse of process in holding him in attendance at the court, to attend from day to day on due payment of the per diem allowance prescribed by the statute, and that it is not necessary, in the case of the usual recess of the court over Sunday or a legal holiday, to subpœna him over and pay another mileage. Of course, if after a witness is duly in attendance the case in which he is subpœnaed should be postponed for some time, or the court should be adjourned for a longer period than the ordinary recess, the court would not require the witness to remain in attendance on payment of a per diem fee, when it was known that the case could not be moved for trial, or that the court was not to be in session; and in such case, doubtless, the attorneys for the respective parties would be warranted, without special application to the court, in serving new subpœnas without applying to the court for a ruling on the question, and that is the effect of the decisions in Moulton v. Townsend, supra, and Miller v. Huntington, supra.

It follows that the motion for a retaxation of the costs should be granted, and that the second item for mileage for said five witnesses should be disallowed, and there should be substituted therefor an item of $5 for the per diem fees of the witnesses, and the cost should be retaxed at $240.63; but since the question is novel, and not free from doubt, no costs of the motion are allowed.

Ordered accordingly.

(158 App. Div. 936)

In re ANDERSON (two cases).

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

1. JUDGMENT (§ 717*)—CONCLUSIVENESS.

Where a trustee purchased a lease of real property with accumulations, and it having been thereafter decreed that the provision for the accumulations was void, and that three children of the testator took the accumulations in equal shares by the intestacy of their ancestor in respect thereto, pursuant to such decree the trustee turned over the accumulations, including the lease, one-third to each child, the judgment and compliance therewith was conclusive of all questions as to the propriety of the purchase of the lease with the accumulations, and as to the title to it vesting in the persons specified.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1248; Dec. Dig. § 717.*]

2. INSANE PERSONS (§ 42*)—COMMITTEE—ACCOUNTING—SURCHARGE.

A trustee under a will, who was also one of the beneficiaries and committee of the estate of an incompetent brother, as trustee purchased an

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

outstanding lease of real property belonging to the estate with accumulations under the will. It was thereafter determined that the accumulations were void, and that three children, the trustee individually, his sister, and the incompetent took the same in equal shares as intestate property; whereupon the trustee turned over the accumulations, including the lease, one-third to each. When the lease expired, one-third of the fee of the property vested in certain minors and one-third in the trustee, while the other third was limited to the incompetent's heirs at law, subject to a use for the incompetent's life in the trustee, the minors, and the incompetent. The lease provided for renewal, with a stipulation that the lessor should pay the appraised value of any building on the property at the end of the renewed term. It was adverse to the interest of the trustee individually to renew the lease, and also to that of the minors; nor could the trustee compel them to effectively consent to the renewal, and a failure to renew left the property free from the incumbrance of the lease and more convenient for sale, and such minors, in case the lease was not renewed, could not be obliged to contribute to the payment of the building at the end of the term. *Held*, that the trustee was not guilty of misconduct in failing to renew the lease as against his ward, and was not subject to have his account surcharged for the ward's interest in the renewed lease by reason of the failure to renew it.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 64–67; Dec. Dig. § 42.*]

Appeal from Special Term, Westchester County.

Judicial settlement of the account of James M. Anderson, as committee of the estate of Eugene Anderson, an incompetent. From parts of a final order charging the accountant with the ward's interest in a lease, which the accountant failed as trustee to renew, he appeals. Reversed.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

Benjamin N. Cardozo, of New York City, for appellant.

Willard N. Baylis, of New York City, for respondent Josephine Mali Hicks Anderson.

THOMAS, J. In 1884 Anderson leased 1180 Broadway for the term of 20 years upon an annual rental of $2,000 and certain taxes, with an option to the lessee to renew for a similar term upon a rental of 5 per centum of the value of the lot and all taxes and assessments, with stipulation that the lessor should pay the appraised value of any building on the property at the end of the renewed term. The trustee under Anderson's will bought the lease in 1894 for $32,691.31, together with a mortgage thereon on which $20,000 was unpaid, and paid for it from certain income accumulated pursuant to testamentary directions. But when the lease expired, in July, 1904, James, then the trustee in place of his mother, who died in 1896, did not renew it, and in this proceeding for an accounting by James as committee since 1896 of his incompetent brother Eugene, who, married, but without issue, died in 1912, and who owned one-third of the lease, the committee has been surcharged with one-third the cost of it and interest thereon from July 31, 1903, to which time the incompetent was credited with his share of the returns of the property.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] By the terms of the will Eugene had no interest in the accumulations, or in the corpus, or practically in the income, and the purchase could not have been considered at the time as having been made for him or in his interest, but rather for the benefit of those who were entitled to the income of the properties and the remainders. But in 1903 the infant children of testator's daughter Lizzie, Benedict by name, who had died in 1899, brought suit against the trustee and others, wherein it was decreed that the provision for the accumulations was void, and that the three children, James, Lizzie, and Eugene, took them in equal shares by the intestacy of their father in respect thereto, and so pursuant to the decree the trustee James turned over the accumulations including the lease, one-third to each child. That judgment and obedience to it forecloses all question as to the propriety of the purchase with the accumulations, and as to the title to it vesting in the parties named.

[2] But why is the committee surcharged as stated? Here it must be noticed that when the lease expired in 1904 one-third of the fee of 1180 Broadway vested in the Benedict children, one-third in James, while the other third was limited to Eugene's heirs at law, presumably James and such children, subject to a use during Eugene's life by him, the Benedict children, and James. Had the lease been renewed, James would for the term have owned one-third of the income, less his proper contribution to the rent and taxes, and at the end of the term he would have been entitled to receive one-third of the appraised value of any building on the lot. So that it is apparent that, if there were no renewal, not only would James lose his principal, but would share less in the income. But the Benedict children and James were the better for the lapse of the lease, in that (1) it left the property free from the incumbrance of a long lease, and so more convenient for sale; (2) they received all the income, less one-ninth; (3) they received all the purchase money on the sale; (4) they were not obliged to contribute to the payment of a building at the end of a new term. Indeed, it is conceded that it was a pecuniary advantage for them to be rid of the lease. But, even so, can James be charged for it? What default of duty as committee has he made?

It is urged that he should have deducted the cost of the lease to Eugene from the proceeds of sale of the property in 1905, when there was taken for the purchase price a mortgage on the property of $40,000 by the Benedict children for their one-third, and one of $80,000 by James individually for his one-third, and, as trustee, for the other third that would go to Eugene's heirs. The respondent's theory is that, as the lease lapsed had enhanced the value of the property, Eugene should have made the owners pay for it when the property was sold. Assuming that the property rid of the lease was better sold, James could not legally compel the Benedict children to deduct something from money received by them; nor was James, as trustee or as an individual, owing himself as committee something merely for the enhanced value of the property. The lease was not in existence, and so no estate for years in which Eugene had a part was sold.

But it is urged that the lease should have been in existence, and was not by James' failure to renew it. If so, there may be reason to

make James respond, but not by compelling other interests to contribute. But the lease could not be renewed without the consent of the Benedict children and James individually and James as committee. It was against the interest of all owners of the fee to do it. James could not compel the Benedicts, infants, to do it. They could not by themselves make a lease that would survive their disaffirmance upon coming of age, and the court would not direct that their interest in the fee should be made subject to a term of years to their disadvantage. It was equally disadvantageous to James to renew the lease, and in my judgment he was not obliged to sacrifice his own pecuniary interests as a co-owner of the fee and of the lease to renew the same. Moreover, it is a serious question whether as committee he should have obligated Eugene and his estate to pay the new rental for a term of twenty years. But the court could have directed him as to that.

What, then, should have been done? The respondent should particularize. Should James have gone to the court and explained what I will assume was a conflict of interests, and asked that another committee be appointed? That would have been a prudent disposition of the matter. But, although the court could have appointed another committee, nothing could come of it, as the lease could not be renewed without the Benedict children and James joining in it as lessees, or consenting that it run only to Eugene as lessee—an impossible concession on their part, and one not demanded by law. What, then, has been the damage from James omitting to resign on application to the court, or sale of Eugene's interest in the lease upon its expiration? Who would buy? But, passing all such considerations, how is the sum surcharged the legal damage? I find no evidence that the cost of the lease to Eugene is the amount of his damage for failure to renew it on entirely different terms.

The respondent's counsel have corrected their impression that under the present lease the lessees were entitled to the appraised value of the building on the property at its expiration. But even that value was not shown. There was fault in this matter, and I consider that it was in adjudging that the lease was bought for Eugene, as that could not have been contemplated. I find no occasion to consider whether the matter has been adjudicated in previous accountings by the committee. But of what value is an accounting, if it effectuates nothing and sets nothing at rest?

The order, in so far as appealed from, should be reversed, and the report of the referee confirmed, with $10 costs and disbursements. All concur.

(158 App. Div. 477.)

RINTELEN v. SCHAEFER et al.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

1. WILLS (§§ 55, 166*)—CONTEST—SUFFICIENCY OF EVIDENCE—TESTAMENTARY CAPACITY—UNDUE INFLUENCE.

In proceedings to contest a will, evidence *held* insufficient to sustain a verdict that the testatrix was mentally incompetent when she made the will, and that it was obtained by undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–158, 161, 374; Dec. Dig. §§ 55, 166.*]

2. WILLS (§ 52*)—TESTAMENTARY CAPACITY—PRESUMPTIONS—JUDICIAL DECLARATION OF COMPETENCY.

Where one, who had previously been declared incompetent to transact her business affairs, was thereafter judicially declared competent three years before she executed a will, the presumption of her competency, resulting from such judicial declaration, could only be rebutted by showing a change in her mental condition between that time and the date of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101–110; Dec. Dig. § 52.*]

3. WILLS (§ 158*)—VALIDITY—UNDUE INFLUENCE—WEIGHT OF EVIDENCE.

The mere fact that testatrix resided, for some time prior to the making of a will, with the relatives to whom she gave the most of her property is no evidence of their undue influence, without some proof of its exercise by them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 385, 386; Dec. Dig. § 158.*]

4. WILLS (§§ 52, 163*)—CONTEST—INCOMPETENCY—UNDUE INFLUENCE—BURDEN OF PROOF.

In proceedings to contest a will, the burden of proving the mental incompetency of the testatrix or undue influence upon her is upon the contestant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101–110, 388–402; Dec. Dig. §§ 52, 163.*]

5. WILLS (§ 53*)—TESTAMENTARY CAPACITY—ADMISSIBILITY OF EVIDENCE—ADJUDICATION OF INSANITY.

The depositions and papers in a proceeding in which a woman was adjudged incompetent to manage her affairs are not admissible in proceedings to contest her will, where she had subsequently been judicially declared to be restored to sanity prior to the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111, 112, 120–130; Dec. Dig. § 53.*]

6. WILLS (§ 53*)—TESTAMENTARY CAPACITY—ADMISSIBILITY OF EVIDENCE—INSANITY OF RELATIVES.

Evidence of the insanity of the ancestors or other relatives of testatrix is admissible only in support of proof of acts of an insane character on the part of the testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111, 112, 120–130; Dec. Dig. § 53.*]

7. WILLS (§ 400*)—PROBATE—REVIEW—ADMISSION OF EVIDENCE—CURE BY STRIKING OUT.

Error in the admission of evidence as to the insanity of a brother of testatrix, where there was no evidence of insane acts on her part, is not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cured by merely striking out the testimony without instructing the jury to disregard it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869–873; Dec. Dig. § 400.*]

3. WITNESSES (§ 199*)—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT—COMMUNICATIONS PRIOR TO EMPLOYMENT.

On the contest of a will on the ground of incapacity and undue influence, testimony by the attorney for the testatrix as to conversations with her prior to his employment as such attorney is not inadmissible, under Code Civ. Proc. § 835, relating to communications between attorney and client.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 749–751, 766, 767; Dec. Dig. § 199.*]

Appeal from Trial Term, Queens County.

Action by Joseph C. Rintelen against Rose D. Schaefer and others. Judgment for the plaintiff, and all the defendants except one appeal. Reversed and remanded.

See, also, 153 App. Div. 916, 138 N. Y. Supp. 1139.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

M. Linn Bruce, of New York City, for appellants.

Cormly J. Sproull, of New York City (John McG. Goodale, of New York City, on the brief), for respondent.

RICH, J. Elizabeth Rintelen died testate at Woodhaven, Long Island, August 29, 1910, leaving her surviving the plaintiff in this action, a nephew, and the defendants, her cousins (with whom she had lived and been cared for during the six years preceding her death), her sole surviving relatives. By her last will and testament she gave to the plaintiff the sum of $1,000; to the Woodlawn Cemetery Association for the care and maintenance of her father's burial plot, in which she directed her body interred, $400. The balance of her personal property she bequeathed to the appellant Rose D. Schaefer, and the rest, residue, and remainder of her estate to the appellants, share and share alike, stating that the devises and bequests to them were "in recognition and appreciation of their kindness to, and in recompense of their care and trouble of me in the past and particularly since I have been at their home." After a contest instituted by plaintiff, the will was admitted to probate on December 23, 1910. This action was commenced on January 14th following, and has been here before (152 App. Div. 727, 137 N. Y. Supp. 527). Upon the first trial the learned trial court submitted to the jury two questions:

"First. Was Elizabeth Rintelen at the time of the execution of the paper writing in question, on December 11, 1908, of sound mind and memory, and mentally capable of making a will? Second. At the time of the execution of such paper writing was she under any restraint or influence exerted upon her by any other person or persons, to such an extent that the paper was not an expression of her will, but was in reality the will of such other person or persons?"

The jury answered the first question in the affirmative, and the second in the negative. Judgment was accordingly directed and entered,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

adjudicating that said written instrument was the last will and testament of Elizabeth Rintelen. Upon appeal the judgment and the order denying plaintiff's motion for a new trial were reversed, upon the ground that the trial court committed reversible error in the admission of evidence over the plaintiff's objections. Upon the second trial the same two questions were submitted to the jury, who answered the first in the negative and the second in the affirmative. Judgment was entered, adjudging that the instrument admitted to probate on December 23, 1910, as the last will and testament of Elizabeth Rintelen, deceased, as a will of real and personal property, "is not in truth and in fact the last will and testament of the said Elizabeth Rintelen, deceased," and annulling and setting aside said probate. From such judgment, and from an order denying their motion for a new trial made on the minutes, all of the defendants, with the exception of the Woodlawn Cemetery Association, appeal.

[1] Up to the year 1904 the deceased was an active and energetic business woman, conducting a grocery business for herself, and personally managing several pieces of improved real property of which she was the owner. During the year 1904 she became ill, as the result of passing through the climacteric period, and became physically and mentally incompetent to manage her affairs. On August 3, 1904, she was judicially declared incompetent, and Frank Schaefer, the father of the appellants, was appointed committee of her person and estate. Her mental condition proved to be temporary only, and on December 28, 1905, upon her own petition concurred in by her committee, she was declared competent, and thereafter managed her affairs until her death in August, 1910. Her health continued to improve, and while she never recovered her full strength, she seems to have lived happily with the appellants and attended to her business affairs without assistance. At the time she was declared incompetent she was examined by Dr. McGuire, her father's family physician for years, Dr. Gilday, and Dr. Spitzka, an alienist. When she was restored she was examined by the first two of the above-named physicians, Dr. MacFarland, and Dr. Allan McLane Hamilton, who was appointed by the court to examine and report as an expert. Each of these four physicians, after a careful and thorough examination, testified on this trial to her competency and soundness of mind and memory in December of 1905, and her physician during the last six years of her life, Dr. MacFarland, who saw her last the day before she died, testified to her mental condition and soundness of mind to the time of her death.

The trial court charged the jury that from the time of her restoration in 1905 it was to be presumed that she was competent to manage herself and her affairs the same as if she had never been adjudged incompetent, but that such presumption might be overcome by proof to the contrary.

[2] There is a further presumption, namely, that the condition of sound mind and memory of the testatrix, established in 1905, continued until the contrary was clearly proven. To overcome this presumption, it was incumbent upon the plaintiff to produce convincing

proof of a change in the mental condition of the testatrix between December, 1905, when she was judicially declared competent and restored, and December 11, 1908, when her will was executed, and that she was not of sound mind at that time. I am unable to find any evidence even tending to prove any such change, or of any deterioration in her mental condition during the three years elapsing between her restoration and the execution of her will. She died two years after executing her will, from a disease which the evidence shows did not affect her mental condition.

In addition to the medical evidence and the legal presumptions flowing therefrom, and from the admission of the will to probate after a spirited contest, the defendants fortified their case by the evidence of 11 witnesses, who had known the testatrix for from 5 to 28 years and visited her repeatedly, that her mind was clear and normal after she recovered from her sickness in 1905, down to the time of her death. Their testimony covers her life for many years prior to her death, and particularly during the year she executed her will and the six years she resided with the appellants. In addition, the defendants introduced in evidence 170 checks, beginning May 11, 1906, and ending May 24, 1910, three months before her death, all of which were signed by testatrix, and all but 25 drawn and filled out by her in the conduct of her business.

[3] Against this mass of testimony the defendants called one medical expert, Dr. Spitzka, who had seen the deceased on one occasion only, in 1904, who testified in answer to a hypothetical question that, assuming the facts contained in such question to be true, the testatrix was, on December 11, 1908, the date she executed her will, "in a condition of chronic insanity"; and several other witnesses, some who had not seen testatrix for 7 to 20 years before her death, some whose testimony related to her acts during her sickness in 1904, some who had never spoken to her but once or twice, and whose opportunities of observing her were very limited, only two of whom testified that any acts of the testatrix impressed them as being irrational. The testamentary disposition of her property by testatrix does not tend to establish either incompetency or undue influence. She states the reasons for such disposition to be in recognition and recompense of the appellants for their kindness, care, and trouble in the past, and particularly during the six years she was in their home. It was in accord with her expressed intention, declared repeatedly before her sickness and long before she made her will. She had no other relatives save the plaintiff, against whom and his mother the evidence shows she had a strong antipathy, growing out of her belief that the latter had not properly treated her husband, brother of testatrix, and that her nephew, the plaintiff, born after his father's death, was like his mother, and that neither of them ever paid her any attention except when they wished to obtain money from her. It was shown that she had stated that the plaintiff was a spendthrift, and she would not leave him anything. The fact that for some four years before the making of her will she resided with appellants does not furnish any proof of the exercise by them of undue influence, and such influence cannot be assumed

to exist by reason of their opportunity to exact the same. It must be established affirmatively (Cudney v. Cudney, 68 N. Y. 148; Matter of McCarty, 141 App. Div. 816, 126 N. Y. Supp. 699; Matter of Van Ness, 78 Misc. Rep. 603, 139 N. Y. Supp. 485; Matter of Smith, 95 N. Y. 516, 522), and must be of a substantial nature (Thompson v. Peterson, 152 App. Div. 667, 137 N. Y. Supp. 635; Smith v. Keller, 205 N. Y. 39, 44, 98 N. E. 214). There is no proof of any act of a substantial nature or influence exerted, or attempted to be exerted, by any or either of the appellants tending to prove or warranting the inference of the exercise of undue influence over the testatrix.

[4] The burden was upon the plaintiff of establishing, by a fair preponderance of the evidence, the incompetency of the testatrix at the time she executed her will, or the exercise of undue influence amounting—as the Court of Appeals said in the Smith-Keller Case (supra)—to coercion and duress. This burden he failed to sustain, and the finding of the jury to the contrary is so greatly against the weight of the evidence that the judgment must be reversed for that reason.

In addition, the exceptions of the defendants to the admission and rejection of evidence during the trial present prejudicial and reversible error.

[5] The depositions of the physicians who examined the testatrix in the incompetency proceeding in 1904, and the papers connected with that proceeding, consisting of 23 exhibits, were clearly incompetent and inadmissible. Bookman v. Stegman, 105 N. Y. 621, 11 N. E. 376. The depositions were not offered as admissions of deponents, who were present in court and sworn as witnesses, or to contradict them, but as part of plaintiff's case, and upon the theory that they formed part of the res gestæ. The incompetency of the testatrix in 1904 was not controverted, and the effect of that adjudication as raising a presumption of continuing incompetency was wholly destroyed by the subsequent adjudication of December 28, 1905, of her competency. The matter presented by the exhibits had no relevancy to the questions involved.

[6, 7] Permitting Dr. McGuire to testify that a brother of the testatrix died a maniac was error, and, although later stricken out, I do not think the error was cured. The rule regulating the admission of such testimony is stated, in Pringle v. Burroughs, 185 N. Y. 375, 78 N. E. 150, 7 Ann. Cas. 264, to be that evidence of the insanity of ancestors or other relatives of a person whose sanity is called in question is not admissible, except in support of proof of acts or language of an insane character on the part of the individual whose mental capacity is in question. No such condition was presented when this evidence was received. In his charge the court did not direct the attention of the jury to the evidence stricken out, or instruct them that they were to disregard it. The admission of this evidence may well have given the jury the impression that insanity was hereditary and prevalent in the Rintelen family, and the learned court ought to have instructed them to disregard this evidence.

[8] The learned trial court was in error in sustaining the plain-

tiff's objection to the question asked Livett as to his conversations with the testatrix during the year preceding his becoming her attorney, upon the ground that the witness was precluded from testifying by the provisions of section 835 of the Code of Civil Procedure. That section relates only to communications made by a client to his attorney in the course of his professional employment, and prohibits the attorney from disclosing such communications, or his advice given thereon. The relation of attorney and client did not exist between the witness and the testatrix at the time to which the question was limited, and the question did not call for the disclosure of any communication by the witness. It was a question to be answered "Yes" or "No," and its object undoubtedly was to show the opportunity the witness had, by observation and conversation with testatrix, to qualify him to say whether such conversations and acts impressed him as being rational or irrational.

Judgment and order reversed, and a new trial granted, costs to abide the final award of costs. All concur.

(158 App. Div. 449)

SWEENEY v. EDISON ELECTRIC ILLUMINATING CO. OF BROOKLYN.

(Supreme Court, Appellate Division, Second Department. September 23, 1913.)

1. ELECTRICITY (§ 19*)—INJURIES—ACTIONS—PRESUMPTIONS—CAUSE OF ACCIDENT.

In an action for personal injuries received from a falling electric light globe, which could have fallen only because of the negligence of the trimmer in improperly fastening it in place, or because of the malicious act of some other person, the presumption is that it was due to negligence rather than to malice.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. NEGLIGENCE (§ 121*)—ACTIONS—BURDEN OF PROOF—CAUSE OF ACCIDENT.

Where a person is injured by the falling of an electric light globe under such circumstances as to raise a presumption of negligence under the doctrine of res ipsa loquitur, the burden is upon the defendant to show that it exercised reasonable care to keep the lamp from falling, but it need not show the cause of the accident; it being sufficient if it exercised care as to all probable causes.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217–220, 224–228, 271; Dec. Dig. § 121.*]

Appeal from Trial Term, Kings County.

Action by James H. Sweeney against the Edison Electric Illuminating Company of Brooklyn. Judgment for the plaintiff, and defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, STAPLETON, and PUTNAM, JJ.

Samuel F. Moran, of New York City, for appellant.

Henry M. Dater, of Brooklyn (George F. Elliott and Jay S. Jones, both of Brooklyn, on the brief), for respondent.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

THOMAS, J. The plaintiff, while making fast a boat at the Thirty-Ninth Street ferry, borough of Brooklyn, at about 5:25 p. m. on Tuesday, November 14, 1911, was struck by a fragment of a glass globe that fell from defendant's lamp that hung outside of and some 7 feet aside the pathway on the ferry bridge. The top of the globe is fastened by three screws into a ring thrust into a collar, where three bolts engage three slots in it, and then turned so that its rim rests on the bolts. A chain connects the globe to the lamp for the sole purpose of holding the globe when detached from its fitting in the lamp. After the accident, defendant's inspector found the ring detached from the globe, on a beam which was beneath the lamp. The lamp was of the most approved type and was inspected. The lamp was trimmed on the Saturday before the accident, and was examined every night by the inspector. The trimming process involves the lowering of the lamp by the rope, the removal of the outer and inner globes, cleaning and refurnishing with carbon, the restoration of the parts, the return of the globe to its place, and rehoisting. The trimmer stated that he found the lamp and globe in November in good condition. That is the total of his evidence of care. The inspector on the night of the accident found the lamp burning with the inner globe intact, but the outer globe was gone, the ring on the beam beneath, and the hook on the chain bent. In short, the globe by some force had been turned so that the slots in the ring dropped off the bolts, and nothing was broken save as stated. The ring is not held in place in the lamp by set screws, and it does not appear specifically whether collision with the ferry bridge could disturb the ring, if thoroughly locked in place, nor whether, if the trimmer failed to twist the lamp, so as to make a complete interlocking, the globe could be dismantled by continued vibration.

[1] It is useless, in a rational investigation of such a happening, to conjecture mysterious causes. Considering the matter practically, it is a just conclusion that some hand turned the globe so that it fell, or that it was jarred out of place by the external force. There is an entire absence of statement of any experience relating to similar accidents. But if a meddler did not climb up and detach the ring, it fell because it was not secured against the effect of shock or vibration. I assume that it was capable of secure adjustment. Hence, if it became detached in the absence of a meddler, it was because of failure to twist it thoroughly in place, unless it was moved by some violent disturbance. But the presumption is against a person ascending and mischievously letting the globe come crashing down in front of a ferryboat already in the slip with two men on the bridge. As between the man who had the handling of the lamp and some unknown person inclined to malicious mischief, the presumption would be that the fault was with the manipulator. Of course, this presupposes ordinary conditions. If it fell during a hurricane, or some natural convulsion, or when the ferryboat crashed into the bridge, the inference of some failure on the part of the defendant could not be drawn for the contemporaneous fall of the lamp. The lamp had hung in safety from Saturday night to Tuesday night, with the use of the slip for three intervening days. Had there been evidence that there was no such im-

minent cause for the fall of the globe as I have suggested, then the fall with the attendant facts was sufficient evidence of culpable omission of duty on the part of defendant's servant to require it to show that no neglect on its part existed in relation to any matter that could in reasonable expectation cause the fall.

It is a used expression that in such case the burden of explanation rests on the defendant, or that it must show a cause of the accident consistent with the exercise of requisite care on its part. The law does not require impossibilities. The cause of such an event may not be ascertainable. But the burden cast on the defendant by the prima facie case is to show that it exercised the legally requisite care to do those things which, if omitted, would probably be the cause of the lamp falling. The nature of the case may be such that the defendant could make the proof so firm and incontrovertible that the jury could not justly disregard it, or that even the court should regard it as proven. But it might be the defendant's misfortune that he could not give evidence of such strength. For instance, in the present case the trimmer does not say that he remembered locking the globe in place, and his act was so often repeated that he could not say that from specific recollection. He could only say that he did make a secure union, because that was his intended act on every night. But if a failure to do it fully be a competent cause of the part to shift and fall, and the facts justify the finding of no other competent cause, or if the testimony of the giving of it show the defendant's witnesses unworthy of belief, then the jury may prefer the presumption of negligence to the attempted rebuttal of it. The court stated the matter in a sentence:

"Hence the main question for you to decide is whether the defendant had discharged the duty incumbent upon it in keeping that lamp in a reasonably safe condition."

[2] But the defendant's counsel made several requests to charge. As to some of them the court and counsel were at cross purposes, and one was:

"That, even if the defendant has not shown just the cause of the accident, the jury cannot assess damages against the defendant here, because it is not able to tell why this accident happened."

The cause of the fall of the lamp was an important, but not indispensable, ascertainment. So far as it enters into the matter, the burden of showing it is on the person having the thing in its control. Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630. If it were known, the defendant's care in respect to the cause could be considered. But if the cause were not discovered, yet if the defendant exercised reasonable care in regard to the things that in reasonable expectation would keep the lamp intact, it was faultless. Hubener v. Heide, 73 App. Div. 200, 206, 76 N. Y. Supp. 758. The burden of explanation is thrown on the defendant (Robinson v. Consolidated Gas Co., 194 N. Y. 37, 86 N. E. 805, 28 L. R. A. [N. S.] 586), but to explain that it was not negligent, rather than the cause of the accident (Piehl v. Albany Railway Co., 30 App. Div. 166, 169, 51 N. Y. Supp. 755). When the rule res ipsa loquitur is applicable, the facts are deemed to "afford sufficient evidence that the acci-

dent arose from want of care on its part" (Breen v. N. Y. C. & H. R. R. R. Co., 109 N. Y. 297, 300, 16 N. E. 60, 61, 4 Am. St. Rep. 450), and the defendant must rebut this inference. But it is not necessary to show the cause of the accident in order to do this. It would be helpful if the defendant could make the specific cause known, and then show its care respecting it. But if it negatives the presumption of negligence, by showing its care as to all probable cause, that is sufficient. The jury may well have inferred that the defendant must show the specific cause of the fall, and that respecting it the defendant was not negligent.

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur, except BURR, J., not voting.

(158 App. Div. 422)

HUSCHER v. NEW YORK & QUEENS ELECTRIC LIGHT & POWER CO.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

1. NEGLIGENCE (§ 134*)—ACTIONS—BURDEN OF PROOF—WRONGFUL ACT.
To establish a cause of action for an injury, there must be evidence, either direct or circumstantial, of a wrongful act on the part of the defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267–270, 272, 273; Dec. Dig. § 134.*]

2. NEGLIGENCE (§ 134*)—ACTIONS—BURDEN OF PROOF—WRONGFUL ACT—CIRCUMSTANTIAL EVIDENCE.
To establish a wrongful act by circumstantial evidence, it is not necessary to exclude the possibility of the injury happening in any other way, but only to raise the inference by a fair preponderance of the evidence that it was due to a wrongful act.

[Ed. Note.—For other cases, see Negligence, Cent. Dig §§ 267–270, 272, 273; Dec. Dig. § 134.*]

3. NEGLIGENCE (§ 121*)—ACTIONS—BURDEN OF PROOF—"RES IPSA LOQUITUR."
The doctrine of "res ipsa loquitur," which is a concise way of saying that the circumstances are such as to justify the jury in inferring negligence as the cause of an injury, does not relieve the plaintiff of the burden of the issue, nor raise a conclusive presumption in his favor, but only requires the defendant to go forward with the proof to rebut the inference of a wrongful act, either by showing the precise cause of the accident to be one for which he was not responsible, or by showing that he fully discharged his duty in the matter, and if, at the close of the entire case, the presumption, arising from the happening of the accident, does not fairly preponderate over the evidence introduced by defendant as to his freedom from wrong, the plaintiff has failed to make a case.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217–220, 224–228, 271; Dec. Dig. § 121.*

For other definitions, see Words and Phrases, vol. 7, pp. 6136–6139; vol. 8, p. 7787.]

4. ELECTRICITY (§ 19*)—ACTIONS FOR INJURY—PRESUMPTIONS—CAUSE OF INJURY.
Where a man was electrocuted by coming in contact with the wires of a dark electric lamp, which was hanging only four or five feet above the street, the circumstances were sufficient to cast upon defendant the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

burden of showing that it had exercised reasonable care in the construction and maintenance of the lamp.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

5. ELECTRICITY (§ 19*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE OF DEFENDANT.

In an action for such death, evidence *held* sufficient to rebut the inference arising from the accident, and to show by the great weight of evidence that the defendant had discharged the duty of reasonable care, so that a verdict for the plaintiff should be set aside.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

6. NEGLIGENCE (§ 142*)—VERDICT OF JURY—SPECIAL INTERROGATORIES—FINDINGS INCONSISTENT WITH GENERAL VERDICT.

Where the jury returned a general verdict for the plaintiff in an action for death caused by the defendant's negligence, but answered special questions as to whether the defendant exercised reasonable care by saying that they did not know, such verdict indicates that the plaintiff had not sustained the burden of proof imposed by law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 400–403; Dec. Dig. § 142.*]

Appeal from Special Term, Queens County.

Action by Florence E. Huscher, as administratrix of William H. Huscher, deceased, against the New York & Queens Electric Light & Power Company. From an order setting aside a verdict in favor of plaintiff and granting a new trial (139 N. Y. Supp. 537), plaintiff appeals. Order affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and STAPLETON, JJ.

A. Feldblum, of Brooklyn (Philip Levison, of Brooklyn, on the brief), for appellant.

William Rasquin, Jr., of New York City, for respondent.

BURR, J. In an action to recover damages for the pecuniary injury resulting from the death of her husband through defendant's negligence, plaintiff recovered a verdict. She appeals from an order setting aside said verdict and granting defendant's motion for a new trial.

Defendant was engaged in the business of furnishing electric power for lighting purposes in the borough of Queens. In connection therewith it maintained a pole on the southwest corner of Rockaway Road and South street in what was formerly the village of Jamaica. From the upper part of this an arm projected over the street, and from the end of this arm a lamp was suspended. When the lamp was in place it was about 25 feet from the ground. It became necessary, however, from time to time that it should be lowered to a point 4 or 5 feet from the ground in order to trim and clean it. Appliances were attached to the lamp and the mast arm for that purpose.

At about 10 o'clock on the evening of May 7, 1912, William Huscher, plaintiff's intestate, was proceeding in a diagonal direction from the northeast to the southwest corner of said intersecting streets. It was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

raining, and the night was dark. At that time the lamp had been lowered from its normal position, and hung over the roadway about 4 or 5 feet from the ground. The lamp was unlighted, but a powerful current of electricity was passing over the wires with which the lamp was connected, sufficient, if communicated to a human being, to cause death. Huscher had an umbrella in his hand, which he was holding over him to protect him from the storm. Although there was some conflict of testimony upon this point, the evidence justified the finding of the jury that some portion of his umbrella came in contact with some portion of the lamp or its appurtenances, and that as a result he received an electric shock, from which his death followed within a few moments.

[1] Plaintiff, invoking the application to these facts of the doctrine of res ipsa loquitur, contends that therefrom arose a presumption of defendant's negligence which justified the jury's verdict. A cause of action is not complete by proof of the occurrence of an injury. In addition thereto, there must be evidence of a wrongful act or an omission of duty upon the part of the person on whom it is sought to charge liability.

[2, 3] In some instances this is accomplished by direct evidence, showing precisely the character of the act or the omission, and its culpable nature. In some cases the evidence is circumstantial, and not direct; and in civil actions it is not necessary that plaintiff should exclude the possibility that the occurrence might have happened in any other way than that alleged. Given defendant's responsibility for such causal act or omission, and it is sufficient if the inference that it occurred as alleged fairly preponderates over any other inference or conclusion that may be drawn from the evidence. 29 Cyc. 625; 33 Cyc. 1068. In any case, however, there must be evidence of one sort or the other. "Res ipsa loquitur" is a concise way of saying that the circumstances shown to have been attendant upon an occurrence producing injury are themselves of such a character as to justify a jury in inferring negligence as the cause thereof. 34 Cyc. 1665; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; Robinson v. Consolidated Gas Co., 194 N. Y. 37, 86 N. E. 805, 28 L. R. A. (N. S.) 586; Hardie v. Boland Co., 205 N. Y. 336, 98 N. E. 661; Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S. E. 443. When the injury results from a defective appliance, "the apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user. Both inspection and user must have been at the time of the injury in the control of the party charged." 4 Wigmore on Evidence, § 2509.

But the doctrine of res ipsa loquitur does not relieve plaintiff of the burden of the issue, nor raise a conclusive presumption in his favor. The fact of the occurrence and the attending circumstances merely furnish some evidence, which requires the defendant "to go forward with his proof" (Ross v. Cotton Mills, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. [N. S.] 298), and rebut the presumption of negligence arising therefrom (Kaples v. Orth, 61 Wis. 531, 21 N. W. 633;

Robinson v. Consolidated Gas Co., supra; Hubener v. Heide, 73 App. Div. 200, 76 N. Y. Supp. 758. This presumption may be overcome by evidence showing precisely the cause of the occurrence, and that the cause is attributable to some person other than defendant, for whose acts he is not responsible, or by evidence showing precisely the cause of the occurrence and that such cause, although not attributable to a third person, is of such a character that defendant is not culpable in connection therewith, but that such occurrence is in the nature of an accident unavoidable by the use of that degree of care with which defendant is chargeable, or, finally, by evidence which, while it may not be sufficient to disclose the precise cause of the occurrence, is sufficient to show that defendant's entire duty in connection therewith was discharged. 29 Cyc. 624; Baran v. Reading Iron Co., 202 Pa. 274, on page 286, 51 Atl. 979; Barber v. Manchester, 72 Conn. 675, 45 Atl. 1014; Sweeney v. Edison Elec. Ill. Co., 143 N. Y. Supp. 636. If at the close of the entire case the presumption arising from the happening of the accident and the attendant circumstances does not fairly preponderate over that introduced by defendant respecting his freedom from culpability, plaintiff has failed to make out a case, and defendant should be absolved.

[4] Applying these rules to the facts of this case, what result follows? To permit an unlighted lamp, charged with electric current of a high intensity, to remain suspended over a traveled highway, upon a dark and stormy night, at such a distance from the ground that persons lawfully making use of said highway are likely to come in contact therewith, is highly dangerous. If defendant was responsible for maintaining it in that position, it might well be held chargeable with the consequences resulting therefrom. The position of the lamp, however, is the only ground, as it seems to us, upon which defendant can be chargeable in this case. The fact that it was unlighted, that it was defective, so that it could not be lighted (if such were the fact), was not a source of danger to persons using the highway. So long as the lamp remained suspended in its normal position, 25 feet above the ground, the ordinary pedestrian would not be injured by contact with it, whether it was lighted or unlighted. For the same reason, the fact that the wires which conducted the current to the lamp were not insulated was not a ground for imputing negligence to defendant, under the circumstances here disclosed. But the lamp was under the control of defendant, and, except in the case of a trespasser unlawfully disturbing it, under its exclusive control. Lamps which are properly constructed to be used at a point of safety 25 feet above a traveled street do not ordinarily descend to a point 4 or 5 feet from the ground, unless there is some defect of construction, maintenance, or want of repair, or unless some outside agency draws them down.

[5] Under the circumstances above detailed, we think that it was incumbent upon defendant to show that it had exercised reasonable care in the construction of the lamp and in the maintenance thereof, including under the word "maintenance" necessary repair, inspection, and operation. Byrne v. Boston Woven Hose Co., 191 Mass. 40, 77 N. E. 696. We think that defendant so successfully met this burden

that, if the court would not have been justified at the close of the entire case in directing a verdict in its favor, a contrary verdict was properly set aside as against the weight of the evidence. So far as the construction of the lamp is concerned, there is nothing to contradict the evidence offered by defendant that the devices employed were standard throughout the country, and no better method of construction was established. Plaintiff did seek to show by cross-examination of some of defendant's expert witnesses that there was in existence a device intended to be placed at the end of the mast arm, by which, if the lamp came down, it was disconnected from the circuit, provided the device operated, and in such event the lamp would cease to be a source of danger through transmitting electric current. But the same witnesses testified that this device, when tested, did not operate successfully, and that no one used it, and there was no evidence to the contrary. Neither was there any satisfactory evidence that the appliances were defective through lack of repair.

One of plaintiff's witnesses did testify that after the accident he examined the snap at the end of the rope, and that the spring in it was broken. This rope is used to raise and lower the lamp for trimming purposes, and the snap fastened the end of the rope to an eyelet on the pole. The force of this testimony was wholly destroyed by the physical facts as established by all of the witnesses called by either party who testified on the subject. The rope was not intended to hold the lamp in place, but simply to raise and lower it. If the snap had broken, thus releasing it, this would not have permitted the lamp to come down. To accomplish this, the collar of the lamp must be raised 6 or 8 inches out of the socket in which it rests. Again, after the lamp had come down to the point at which it hung when the accident happened, the end of the rope to which the snap was attached would have been close up to the pulley at the end of the mast arm, and some 25 feet above the ground, where the witness could not have seen or touched it, as he claimed that he did. To reach it, it would have been necessary to climb the pole, and one of plaintiff's witnesses, the only one testifying on the subject, said that on this occasion he did this, and after the lamp was retrimmed, and a new inner globe supplied, it was lighted, raised to its proper place, and thereafter continued to burn without further change or alteration.

But if it could be asserted that there was some evidence of defect through want of repair, there was no evidence of actual notice to defendant, nor was there credible evidence that the lamp had descended from its normal position more than an hour or an hour and a half before the accident happened. With a single exception, no witness called by plaintiff saw the lamp down earlier than about 9 o'clock on the evening of May 7th, when decedent was killed, and some of these witnesses testified affirmatively that at that hour it was up and in its normal position, although unlighted. One witness called by plaintiff did testify that while in the employ of the Shults Bread Company, and delivering bread to its customers, he noticed on the morning of the 6th of May, at about half-past 3, that the lamp was down, and that about the same time on the morning of the 7th it was in the same

condition. Not only is he contradicted as to this by the other witnesses called by plaintiff, as well as those called by defendant, but it appeared by the testimony of the foreman and bookkeeper of the baking company, verified by its records, that this witness left the employ of said company on the 29th of April, and that no bread was delivered to him for distribution to its customers after that date. As the learned trial justice said:

"The most liberal view of the evidence would only show that the lamp was down from an hour to an hour and a half."

So far as the operation of the lamp is concerned, the evidence of defendant's employé charged with the duty of trimming the lamp is to the effect that he trimmed the same on the 1st of May, and restored it to its place at the top of the pole, and there is no evidence that any one connected with the defendant touched it from that time until after the accident had occurred.

In view of the mechanical construction of the lamp, and in view of the fact that it continued in proper position for more than seven days afterwards, it is far more probable that the lamp was caused to descend, on the evening of May 7th, by some other agency, for which defendant is not responsible, than that on the occasion when the trimmer trimmed the lamp he improperly adjusted it. This presumption is strengthened by the fact that from the necessities of the case the lamp could be lowered by any person who might from malicious or mischievous motives desire to do so, without there being any defect either in the construction or maintenance of the appliances thereof. But, even if the hypotheses were equally reasonable, plaintiff has failed to establish her cause of action. Yaggle v. Allen, 24 App. Div. 594, 48 N. Y. Supp. 827; McGrath v. St. Louis Transit Co., 197 Mo. 97, on page 104, 94 S. W. 872.

So far as the duty of inspection to discover defects or appliances out of order is concerned, defendant was bound to exercise reasonable care with respect thereto. But it would be quite unreasonable to charge it with negligence through lack of proper inspection, when the defect had existed for so short a time before the fatal occurrence. To meet the presumption of negligence, therefore, arising from plaintiff's evidence of the occurrence and the surrounding circumstances, defendant has established by uncontradicted evidence that the method of construction was reasonably safe, and by the great weight of evidence that in the maintenance of the appliances, so far as repair, inspection, and operation are concerned, it discharged the duty of reasonable care.

[6] It is a significant fact that the jury, while finding a general verdict for the plaintiff, answered two questions specifically submitted to it as follows:

"Did the defendant exercise reasonable care in the erection of its lamps and poles and the apparatus thereon? A. We do not know.

"Did the defendant exercise reasonable care in maintaining said lamps, poles, and other apparatus thereon? A. We do not know."

If they were unable to determine these questions, plaintiff had not sustained the burden of proof which the law imposes upon her. Plain-

tiff did not establish the precise cause of the occurrence resulting in the injury; neither did the defendant, but it did overcome the presumption that it resulted from its negligence.

The order setting aside the verdict and granting a new trial should be affirmed, with costs. All concur.

(82 Misc. Rep. 38.)

WINDSOR et al. v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Equity Term, Erie County. August, 1913.)

1. CARRIERS (§ 199*)—MAINTENANCE OF STOCKYARDS—DISCRIMINATION.
It is the duty of a domestic railroad corporation, which, for the convenience of its patrons, maintains stock yards on premises acquired and held for railroad purposes, to serve the public without unjust discrimination.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 901–905; Dec. Dig. § 199.*]

2. WAREHOUSEMEN (§ 1*)—LEGISLATIVE POWER TO REGULATE.
It is competent for the Legislature to regulate the business of warehousemen as well as that of common carriers.
[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. CARRIERS (§ 201*)—DISCRIMINATION BETWEEN SHIPPERS—INJUNCTION.
Where, by a long course of business dealing, the defendant carrier had given the plaintiff shippers the same unrestricted right of access to stockyards as was given to their competitors, and where such right of access was taken away by defendant from plaintiffs but not from their competitors, occasioning great inconvenience to plaintiffs and their customers, to their irreparable loss through losing opportunities for sales of stock, plaintiffs having no adequate remedy at law, they were entitled to an injunction restraining defendant from discriminating between them and their competitors.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906–915; Dec. Dig. § 201.*]

Suit in equity for injunction by Millard F. Windsor and another against the New York Central & Hudson River Railroad Company. Judgment for plaintiffs.

William J. Donovan, of Buffalo, for plaintiffs.
Irving W. Cole, of Buffalo, for defendant.

LAUGHLIN, J. This is a suit in equity, by the members of a copartnership engaged in business as commission brokers in buying and selling live stock, to enjoin the defendant, a domestic railroad corporation, which maintains and conducts, in connection with its business as a common carrier and for the convenience of the plaintiffs as consignees or owners of live stock and its other customers and others, certain stockyards on premises acquired, held, and owned by it for railroad purposes, from discriminating against the plaintiffs by locking the pens which it had assigned to and set apart for their use in their said business, thus preventing them from exhibiting their live stock to intending purchasers, while at the same time affording its other custom-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ers the free and unrestricted use of the pens assigned for their use without locking the same. The defendant has maintained the stockyards in Buffalo for a very long period of time, and by a uniform custom and course of business it has held out and still holds out, not only to its own customers, but to the customers of other carriers, that it will receive into its stockyards and feed and care for stock for fixed charges and afford facilities for the sale thereof, and it has done and still is doing so. There is some evidence tending to show that the yards are also designed for the reception from drovers of stock which has not been and may not be transported by common carrier; but it clearly appears that nearly if not all the stock received and cared for in the defendant's stockyards is received over the defendant's line or over the line of another common carrier or is to be carried by the defendant or another common carrier.

[1] The learned counsel for the defendant contends that the defendant in conducting the stockyards is acting as warehouseman, and that it may at pleasure discriminate between its customers. We are not now concerned with the question as to whether a private warehouseman may discriminate between his patrons; nor are we concerned with the question as to the rule of law applicable to the liability of the defendant for loss or injury to stock while in its stockyards. The only statutory authority the defendant appears to possess is to conduct business as a railroad corporation. Incidental to that business it undoubtedly has the right to establish warehouses into which it may unload and store freight, if not removed within a reasonable time after notice, and thus terminate its liability as a common carrier and become liable only under the law applicable to a warehouseman (Goodwin v. Baltimore & O. R. Co., 58 Barb. 195; Fenner v. Buffalo & St. Line R. R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96; Pelton v. R. & S. R. R. Co., 54 N. Y. 214, 13 Am. Rep. 568; O'Neill v. N. Y. C. R. R. Co., 60 N. Y. 138; Bank of Oswego v. Doyle, 91 N. Y. 32, 43 Am. Rep. 634; Conkey v. Milwaukee & St. Paul R. Co., 31 Wis. 619, 11 Am. Rep. 630); and it may establish stockyards for receiving stock for transportation and for unloading and holding stock for delivery, and doubtless its liability for stock in such yard would not be measured by the strict rule of the common law applicable to common carriers (Missouri, K. & T. R. Co. v. Byrne, 100 Fed. 359, 40 C. C. A. 402). It is, however, the duty of a common carrier under the common law to serve the public for reasonable compensation without unreasonable or unjust discrimination in the reception or delivery of freight; and this rule of the common law by the adoption of the Constitution of this state became and has remained the law of this sovereignty. Root v. Long Island R. E. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643; Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712; Armour Packing Co. v. Edison El. Co., 115 App. Div. 55, 100 N. Y. Supp. 605; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; 3 Elliott, Railroads, 1468; 22 Wyman, Pub. Serv. Corp. § 1300.

[2] It is also the well-settled law that it is competent for the Legis-

lature to regulate not only the business of common carriers but also the business of warehousemen. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Cotting v. Kansas City Stock Yards Co., 183 U. S. 92, 22 Sup. Ct. 30, 46 L. Ed. 92; Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490; State v. Columbus, G. L. & C. Co., 34 Ohio St. 572, 32 Am. Rep. 390; Baker v. State, 54 Wis. 368, 12 N. W. 12; Webster Telephone Case, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; Delaware, L. & W. R. Co. v. Central Stock Yard Co., 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855.

[3] It is alleged and satisfactorily appears that the plaintiffs have no adequate remedy at law. By a long course of business between them and the defendant there has been established a custom by which they have been afforded the same unrestricted right of access to the pens containing their stock as has been afforded to their competitors in business. It now appears that the same freedom is continued as to their competitors, but that the pens containing plaintiffs' stock are locked and they are greatly delayed in obtaining access thereto, to their serious inconvenience and to the inconvenience of their customers, and that this course of business is calculated to cause irreparable loss to them by losing opportunities for sales of their stock. By the long-established custom to which reference has been made, intending buyers pass freely into the pens and inspect stock, and negotiations for sales are conducted with them by the representatives of the owners of the stock. It is manifest that the restrictions imposed by the defendant seriously discriminate against the plaintiffs in favor of their competitors.

The defendant's only authority for operating the stockyards is derived from its statutory authority to maintain and operate a railroad. The Legislature has conferred authority upon it to acquire lands by condemnation upon the theory that it is to use them *to serve the public,* and, in my opinion, public policy requires the extension of the common law to apply to any business conducted by a transportation corporation as incidental to its business as a common carrier. If this be not so, then every state statute and every federal statute designed to secure from the public tranportation corporations equal facilities for all shippers will be frustrated. Of what avail is it that the carrier is prohibited from discriminating with respect to rates, if it may discriminate with respect to facilities either at the point of shipment or the point of delivery? If the court is powerless to intervene on behalf of the plaintiffs on the facts now presented for adjudication, then the defendant is at liberty to contract with one shipper to receive into its stockyards and care for his stock and afford him an opportunity of exhibiting it there for sale without other charge than for the actual expense in feeding and caring for the stock, or without charge even for those items, and to charge another shipper the same freight rate and to require him to remove his stock from its cars and premises within a reasonable time after its arrival at the point of destination, and to refuse to care for or feed the stock after its arrival or to afford the owner facilities for exhibiting it for sale while on the defendant's premises. In the early days when the courts declared it to be the duty of common

carriers to serve the public without unjust discrimination, carriers neither conducted warehouses nor stockyards; but the warehouse and stockyard business as conducted by common carriers under their charters as transportation corporations is incidental to their business as common carriers and is directly connected therewith. On principle, therefore, the same rule should be applicable to the warehouse and stockyard business with respect to discrimination as to the transportation of freight. The common law is elastic; and it expands to meet changed conditions and methods of transacting business. I do not say that it is the duty of the defendant to establish and maintain a stockyard; but I hold that, since it has established and does maintain a stockyard without other authority than its charter as a transportation corporation and as incidental to its transportation business, it is its duty, even though there be no statute enjoining such duty, to serve the public, whom it has invited by this long-existing custom and still invites to make use of its stockyards, without unjust discrimination, and that it is within the province of the court to enforce this duty by mandamus or injunction. See Delaware, L. & W. R. Co. v. Central Stock Yard Co., supra.

In most of the cases which have come before the courts, the question arose with respect to the performance of a statutory duty or an express contract obligation; but in the Webster Telephone Case, supra, it was held to be the duty of a telephone company which assumed and undertook to supply a public demand to serve all the public alike without discrimination, although the Legislature had not enjoined such duty upon it. That decision was placed upon the ground that the telephone company was a public service corporation and that, having derived its authority from the public, it was its duty to serve the public without discrimination.

In Delaware, L. & W. R. Co. v. Central Stock Yard Co., 43 N. J. Eq. 71, 10 Atl. 490, the vice chancellor, on an application for a temporary injunction, expressed the opinion that the defendant stockyard company in that case in effect owed the duty to the public to serve all alike without discrimination on the theory that the business of a stockyard company and of a common carrier are quite similar. On the final hearing, however, the vice chancellor adhered to the general views originally expressed but pointed out that the question presented was not the right of an individual to have his stock yarded but whether the plaintiff, a transportation corporation, could compel the defendant to receive stock from it, and that there was no analogy between the duties of a common carrier and those performed by the defendant, which was not a transportation corporation or common carrier and merely maintained a private stockyard. The opinions in the Webster Telephone Case, supra, and Delaware, L. & W. R. Co. v. Central Stock Yard Co., supra, tend to sustain the views which I have expressed.

The learned counsel for the defendant insists that the evidence does not show unjust discrimination for the reason that it appears that the plaintiffs have asserted claims for the loss of live stock after the stock has been delivered from the cars into the stockyards, and that

one of their consignors brought an action against the defendant to enforce such liability. It appears that in some instances competitors in business of the plaintiffs or their consignors asserted claims against the defendant for the loss of live stock while in the stockyards, and that some of these claims were adjusted and others were abandoned without suit. The only difference shown by the evidence in the relations between the plaintiffs and the defendant and the competitors of the plaintiffs and the defendant is, on this one point, that thus far no action has been brought by the latter to enforce a disputed liability for the loss of stock while in the stockyards of the defendant. The defendant was doubtless at liberty to make and promulgate general rules applicable alike to all of its customers similarly situated, but there is no evidence of the adoption or promulgation of such rules. It is perfectly clear from the evidence that the defendant has arbitrarily attempted, by discriminating against the plaintiffs in the manner shown, to compel them to waive or release in advance any and all claims for the loss of stock delivered into the pens in the defendant's stockyards, although the defendant retains the right of access to the pens for the purpose of feeding and caring for the stock for which it receives compensation as stated. It has not attempted to exact releases or an agreement on this point from the plaintiffs' competitors, but it insists that the threat of the plaintiffs and the action by one of their consignors to hold the defendant liable is sufficient to warrant it in locking the pens the moment the stock is driven into them from the cars until the plaintiffs consent to accept the defendant's count of the number of head of stock, or consent to recount the stock with a representative of the defendant and to accept a delivery of the stock, and in effect consent to a termination of the liability of the defendant as a common carrier, although the stock would still be permitted to remain in the yards of the defendant. The defendant evidently wishes to force an agreement in advance on the part of the plaintiffs that from and after such count the stock shall be held by the defendant at the risk of the plaintiffs. The defendant has no right to discriminate against plaintiffs merely because they will not agree with it in advance with respect to what its duty or liability in such case is. The attorneys for the respective parties draw attention to the fact that the Legislature has now given the public service commission jurisdiction over stockyards as well as over common carriers, and it appears that the Legislature has embraced in the terms "transportation of property" every "service in connection with the receiving, delivery, * * * storage and handling of the property transported" (Pub. Serv. Com. Law [Consol. Laws, c. 48; Laws of 1910, c. 480], § 2, subd. 14; Id. § 2, subd. 21, added by Laws of 1913, c. 506; Id. § 25); but that does not deprive the plaintiffs of redress at the hands of the court and has no special bearing on the questions presented for decision.

The plaintiffs, therefore, are entitled to have the defendant enjoined not from locking the pens but from discriminating between the plaintiffs and their competitors in business with respect to access to the pens and with respect to affording facilities for the exhibition

of stock to prospective buyers in negotiating sales thereof, and from locking the pens containing the stock of the plaintiffs unless pursuant to some general rule applicable to and enforced alike against the plaintiffs and all of their competitors similarly situated, and for judgment for the costs of the action.

Judgment accordingly.

(158 App. Div. 429)

DOOLEY v. PROCTOR & GAMBLE MFG. CO.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

1. NAVIGABLE WATERS (§ 37*)—GRANTS OF LAND UNDER WATER—VALIDITY.
Under 1 Rev. St. (1st Ed.) pt. 1, c. 9, tit. 5, § 67, as amended by Laws 1850, c. 283, authorizing the commissioners of the land office to grant lands under the waters of navigable rivers or lakes, but providing that no such grant shall be made to any person other than the proprietor of the adjacent lands, and that any such grant that shall be made to any other person shall be void, and section 69, extending their powers to the lands under water adjacent to and surrounding Staten Island, a grant to lands under water adjacent to Staten Island was not void on its face, although the grantee did not own the adjacent lands.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201–226, 285; Dec. Dig. § 37.*]

2. QUIETING TITLE (§ 7*)—CLOUD ON TITLE—VOID INSTRUMENT.
A title which is obviously void on its face is not a cloud on the title of the true owner, and a suit in equity cannot be maintained to set it aside.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14–33; Dec. Dig. § 7.*]

3. NAVIGABLE WATERS (§ 37*)—LANDS UNDER WATER—CONFLICTING GRANTS—VALIDITY OF JUNIOR GRANT.
A grant of lands under water by the commissioners of the land office conveyed nothing until a former grant of the same lands was set aside, even though the former grant was invalid.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201–226, 285; Dec. Dig. § 37.*]

4. QUIETING TITLE (§§ 10, 44*)—TITLE OF PLAINTIFF—SUFFICIENCY OF EVIDENCE OF TITLE.
One suing to quiet title to land in the possession of the defendant must establish by a fair preponderance of the evidence that she possesses a title superior to that of her adversary and to that of the government, where her adversary claims through the government, or must possess equities which will control the title in her adversary's name, must succeed upon the strength of her own title, and not on the weakness of her adversary's title, and, if her title is called in question, must prove a title either from the original patentee, from some grantee in possession, or from one who is a common source of title of both parties.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36–42, 89–92; Dec. Dig. §§ 10, 44.*]

5. NAVIGABLE WATERS (§ 37*)—LAND UNDER WATER—GRANT—TITLE.
Under 1 Rev. St. (1st Ed.) pt. 1, c. 9, tit. 5, § 67, as amended by Laws 1850, c. 283, authorizing the commissioners of the land office to grant lands under navigable waters, but providing that no grant shall be made to any person other than the proprietor of the adjacent lands, and that any such grant to any other person shall be void, and section 69, extending their powers to the lands under water adjacent to and surround-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing Staten Island, an action could not be maintained to quiet plaintiff's title to, remove a cloud from, and enjoin defendant's interference with, lands under water in front of plaintiff's uplands, which were in defendant's possession under a grant from the commissioners, without showing the ownership of such uplands when the grant was made, the first deed in her chain of title being two years subsequent to the grant, since, for equity to set aside conveyances as a cloud on the title, plaintiff must be in possession of the property, or there must be other circumstances giving equitable jurisdiction.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201–226, 285; Dec. Dig. § 37.*]

Appeal from Special Term, Richmond County.

Action by Ann Dooley against the Proctor & Gamble Manufacturing Company. From a judgment for plaintiff (77 Misc. Rep. 398, 137 N. Y. Supp. 737), defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, THOMAS, and STAPLETON, JJ.

William A. Shortt, of New York City, for appellant.

Calvin D. Van Name, of New York City, for respondent.

BURR, J. On December 21, 1880, the people of the state of New York, acting through its commissioners of the land office, granted to William R. Grace by letters patent a parcel of land in the town of Northfield, at Staten Island, in the county of Richmond. The westerly and northerly boundary lines were thus described:

"Commencing at a monument where the westerly boundary of the premises hereby conveyed intersects the southerly shore of the Kill von Kull, and running thence north seventy-seven degrees fifteen minutes east one hundred and fifty feet, thence north fifty degrees twenty minutes east two hundred and ninety feet, thence due north seventy feet, thence north fifty-five degrees thirty minutes west two hundred sixty-four feet, thence north forty-six degrees thirty minutes east one hundred and fifty-two feet, thence due north eighty feet, thence north forty-six degrees thirty minutes west two hundred and seventy-five feet, thence north four degrees forty-five minutes east twelve feet six inches, to the northerly line of the pier and bulkhead line as established by the Legislature of the state of New York, and thence along that line south eighty-five degrees fifteen minutes east six hundred and thirty feet."

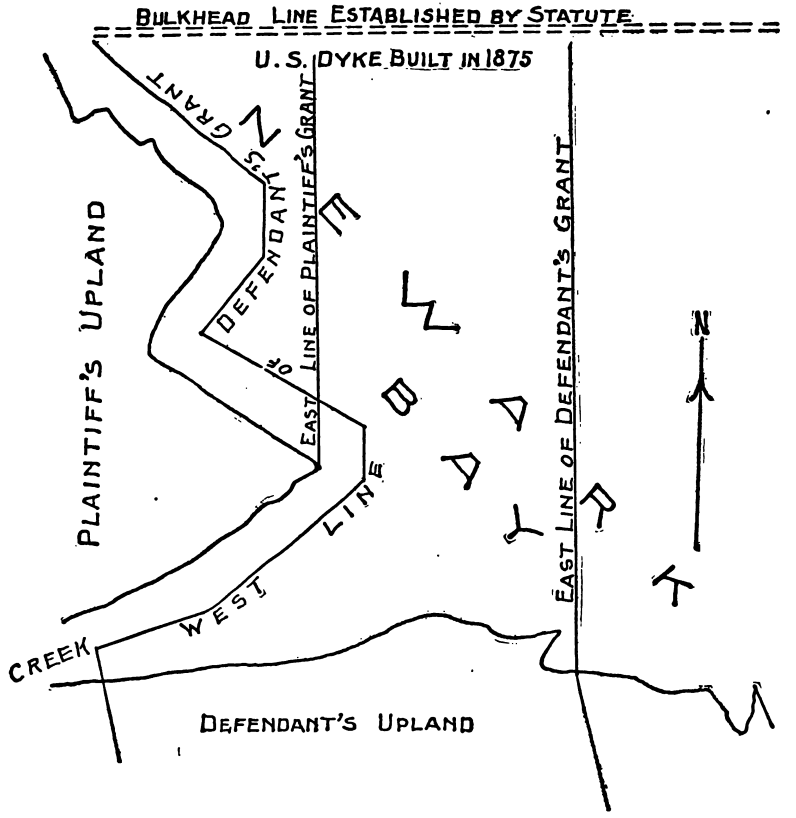
This grant was recorded in the office of the clerk of Richmond county on January 19, 1883. Defendant has since purchased and is now the owner of such title as he thereby acquired. On March 8, 1887, the people of the state of New York, acting through said commissioners, granted to William Dooley a parcel of land in said township the easterly boundary line of which was therein described as follows:

"Beginning at the easternmost point of the meadow of William Dooley, on the north side of Lawrence's creek, where the said creek empties into Newark Bay, said point being distant one thousand and ninety-two feet and bearing north six degrees and twelve minutes east (true) from the New York state survey monument No. 283, and running thence due north (true) five hundred and thirty-three feet into the waters of Newark Bay," etc.

This grant was recorded in said clerk's office on March 12, 1887. Plaintiff has succeeded to such title as William Dooley acquired there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by. The following diagram shows the westerly boundary line of the land granted to Grace in 1880 and the easterly boundary line of the land granted to Dooley in 1887:



It may be observed that the latter grant overlaps the former. The land and water lying between these two lines constitutes the locus in quo of this controversy. Commencing in the year 1906, and subsequently thereto, defendant constructed thereon a dock and a trestle bridge leading to the same, and has filled in a portion thereof, and threatens to continue so to do. In August, 1910, this action was commenced, and has resulted in a judgment to the effect that the grant contained in the letters patent to Grace was void and of no effect as to any portion of the land under water north of the upland claimed by plaintiff as shown on said diagram, and west of the easterly line of the letters patent to Dooley also shown thereon, that defendant has no title to said lands, and that it should be permanently enjoined from placing any material thereon or from maintaining its present dock and structures on the same. From this judgment defendant appeals.

At the date of the grant to Grace, the statute defining the powers of the commissioners of the land office was as follows:

"The commissioners of the land office shall have power to grant in perpetuity or otherwise, so much of the lands under the waters of navigable rivers or lakes, as they shall deem necessary to promote the commerce of this state, or proper for the purpose of beneficial enjoyment of the same by the adjacent owner, but no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other person shall be void." 1 Revised Statutes, 208, § 67, as amended Laws of 1850, chap. 283.

"The powers of the commissioners shall also extend to the lands under water, adjacent to and surrounding Staten Island." Id. § 69.

The physical facts conceded or established by proof, as they existed at that time, were as follows: Grace was the owner of the upland shown on said diagram marked thereon "Defendant's Upland." It does not appear who was the owner at that time of the upland marked "Plaintiff's Upland." About 1875 the United States government had erected a dyke, as shown thereon, the westerly end of which was distant not more than 50 feet from the northwest corner of the upland now claimed by plaintiff. South of said dyke, before any structures were placed on the land under water, the water was not more than 3 feet deep at mean high tide, and at low tide the land was exposed, and consisted of mud flats except where the creek shown on said diagram emptied into the Kill von Kull, at which point the water did not exceed 2 or 3 feet in depth.

[1, 2] Before considering the question of the validity of the letters patent through which defendant claims, at least as to so much thereof as has been held by the judgment in this action to be void, we must determine whether upon the evidence here introduced plaintiff is in a position to raise the question. The grant to Grace was not void upon its face. If such were the case, no suit in equity could be maintained to set it aside, "because it is said that a title obviously void does not constitute even a cloud upon the title of the true owner." Moores v. Townshend, 102 N. Y. 387, 7 N. E. 401.

[3] So much of the grant to Dooley as overlapped that conveyed nothing, at least until the former grant was set aside. Boggs v. Merced Mining Co., 14 Cal. 279; Townsend v. Trustees of Brookhaven, 97 App. Div. 316, 89 N. Y. Supp. 982. "The king cannot grant the same thing in possession to one which he or his progenitors have granted to another." Townsend v. Trustees of Brookhaven, supra; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570. "Individuals can resist the conclusiveness of the patent only by showing that it conflicts with *prior* rights vested in them." Boggs v. Merced Mining Co., supra; Peabody Gold Mining Co. v. Gold Hill Mining Co. (C. C.) 106 Fed. 241.

[4, 5] If we correctly understand plaintiff's contention, it is, to quote from the opinion of the learned court at Special Term, that:

"The action may properly be regarded as one to quiet title and to remove a cloud thereon, and incidentally to enjoin defendant's interference with lands under water to which plaintiff's title is established."

Accepting this statement for the purposes of this case, we think that plaintiff's proof fails. Certainly this is not the statutory action to determine claims to real property, for concededly plaintiff is not

in possession of the land affected by the judgment entered herein, but defendant is. Code of Civil Procedure, §§ 1638, 1639. Disregarding, as we must, the grant made to plaintiff's predecessor in title in 1887, and viewing her rights only as those of a riparian proprietor, with an easement of access to Newark Bay over waters lying to the north thereof, we consider, first, the rules applicable to such a situation; and, second, the evidence in this case.

As to the rules, plaintiff must establish by a fair preponderance of the evidence that she possesses a title superior to that of her adversary, and, of course, to that of the government through whom her adversary claims, or she must possess equities which will control the title in her adversary's name. Boggs v. Merced Mining Co., supra. In such case plaintiff must succeed upon the strength of her own title, and not on the weakness of her adversary. 32 Cyc. 1329; Townsend v. Trustees of Brookhaven, supra. If her title is called in question, as is the case here, she must prove such title (1) either from the original patentee; (2) from some grantee in possession; or (3) from one who is a common source of title of both parties. 32 Cyc. 1331.

"We have been unable to find any case where a party out of possession has been allowed to sustain an action quia timet to remove a cloud upon title, except when it was specially authorized by statute, or when special circumstances existed affording grounds for equitable jurisdiction aside from the mere allegation of legal title. * * * In all the cases cited to the effect that equity will entertain jurisdiction to set aside * * * conveyances as a cloud upon title, the party bringing the action was in possession of the property, or other circumstances gave equitable jurisdiction." Moores v. Townshend, supra.

No "other circumstances" sufficient to confer equitable jurisdiction to set aside the Grace patent may be found, unless at the time of the said grant plaintiff or her predecessors in title were the owners of and in possession of the "adjacent" uplands. The Grace patent was delivered in 1880. As we have pointed out, there is no evidence in this case as to the ownership or possession at that time of the uplands now owned by plaintiff, and upon the strength of which, if at all, the plaintiff must succeed. The first deed in plaintiff's chain of title is one from Clifford A. H. Bartlett, a referee under a judgment of foreclosure and sale made in 1882, more than two years after the date of the deed to Grace.

The cases principally relied upon by plaintiff (Lally v. New York Central & H. R. R. R. Co., 123 App. Div. 35, 107 N. Y. Supp. 868; Town of Brookhaven v. Smith, 188 N. Y. 75, 80 N. E. 665; Rumsey v. New York & New England R. R. Co., 114 N. Y. 423, 21 N. E. 1066; same case, 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600; Saunders v. N. Y. C. & H. R. R. R. Co., 144 N. Y. 75, 38 N. E. 992, 26 L. R. A. 378, 43 Am. St. Rep. 729; and Barnes v. Midland R. R. Terminal Co., 193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962) are without exception cases where the title of plaintiff or his predecessors to the upland, prior to the date when defendant obtained the grant which was attacked, was either admitted or proved, and in the case of Barnes v. Midland R. R. Terminal Co., supra, the grant attacked contained an express condition that no structure should

be erected upon the foreshore which should prevent any person from the reasonable use thereof between high and low water mark.

Inasmuch as other evidence may be introduced upon a new trial of this action, we do not now express an opinion upon the validity of defendant's grant, nor determine whether, in view of the irregular course of the shore, consisting of flats wholly exposed at low tide and traversed in some places by crooked channels, the land commissioners did not have jurisdiction to determine how these flats should be divided among the owners of the adjacent uplands, so as to give to each proprietor a fair and equal portion thereof, nor when plaintiff's cause of action accrued with reference to the running of the statute of limitations. Gould on Waters (3d Ed.) 326; Moran v. Horsky, 178 U. S. 205, 20 Sup. Ct. 856, 44 L. Ed. 1038; Curtner v. United States, 149 U. S. 662, 13 Sup. Ct. 985, 1041, 37 L. Ed. 890.

Upon the present evidence, this action may not be maintained, and the judgment appealed from must be reversed upon questions of fact as well as law, and a new trial must be granted; costs to abide the final award of cost. All concur except HIRSCHBERG, J., not voting.

(82 Misc. Rep. 48.)

SILVERHEELS v. MAYBEE et al.

(Supreme Court, Equity Term, Cattaraugus County. August, 1913.)

1. INDIANS (§ 32*)—PROPERTY—OWNERSHIP—VALIDITY OF STATUTES.

Jurisdiction over Indians and their property, which is vested in Congress and in the United States courts, does not invalidate the provisions of the Indian Law (Consol. Laws, 1909, c. 26; Laws 1909, c. 31, § 46) purporting to regulate the ownership of property by Indians and to create and provide courts for the trial of controversies between them.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 4, 52, 53, 57, 58; Dec. Dig. § 32.*]

2. INDIANS (§ 32*)—JUDGMENT OF PEACEMAKERS' COURT—ENFORCEMENT—DEFENSE IN BAR.

A suit in equity under Indian Law (Consol. Laws 1909, c. 26) § 52, to enforce a judgment of the Peacemakers' Court of the Allegany Reservation of the Seneca Nation of Indians is not barred by a judgment of the council of such nation, rendered long prior to the commencement of the action in the Peacemakers' Court, and invalid because based on the report of referees appointed by such council without statutory authority.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 4, 52, 53, 57, 58; Dec. Dig. § 32.*]

3. INDIANS (§ 27*)—JUDGMENT OF PEACEMAKERS' COURT—ENFORCEMENT—PROOF OF JUDGMENT.

In a suit in equity under Indian Law (Consol. Laws 1909, c. 26) § 52, to enforce a judgment rendered by the Peacemakers' Court of the Allegany Reservation of the Seneca Nation of Indians, proof of the judgment of the Peacemakers' Court by parol, and by the subsequent judgment on a remittitur, was sufficient, where it appeared that the original record of the judgment had been lost.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 19, 20; Dec. Dig. § 27.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. JUDGMENT (§ 713*)—RES JUDICATA.

A release given by plaintiff was no bar to a suit in equity under Indian Law (Consol. Laws 1909, c. 26) § 52, to enforce a judgment of the Peacemakers' Court of the Allegany Reservation of the Seneca Nation of Indians, where the validity and effect of the release could and should have been litigated in the action in the Peacemakers' Court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234–1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

Action in equity by Joel Silverheels against Hattie Maybee and others, to enforce a judgment rendered by the Peacemakers' Court of the Allegany Reservation of the Seneca Nation of Indians. Judgment for plaintiff.

J. M. Seymour, of Salamanca, for plaintiff.

E. D. Northrup, of Ellicottville, for defendants Maybee and Bomberry..

LAUGHLIN, J. This is a suit in equity founded on section 52 of the Indian Law (Consol. Laws, c. 26), to enforce a judgment rendered by the Peacemakers' Court of the Allegany Reservation of the Seneca Nation of Indians on the 18th day of March, 1895, in an action duly instituted in said court by the plaintiff herein against Emeline Jimeson, the predecessor in title of the defendants to the lands to which the judgment relates. Both parties to the action in the Peacemakers' Court were Seneca Indians, and they resided on the Allegany Indian reservation in the county of Cattaraugus. The parties to this action are likewise all Seneca Indians, and the defendant Tallchief resides on the Cattaraugus reservation, while the other defendants reside on the other reservation.

The action which the plaintiff brought in the Peacemakers' Court was to recover the possession of a tract of land consisting of about 32 acres, embraced in the Allegany reservation in Cattaraugus county, and title and possession thereto were awarded to the plaintiff by the said court. The defendant in that action duly appealed from the judgment of the Peacemakers' Court to the council of the Seneca Nation of Indians, and the appeal was duly heard and was thereafter decided by said council on the 6th day of April, 1907, and resulted in an affirmance of the judgment of the Peacemakers' Court. A remittitur from the council of the Seneca Nation of Indians embodying its decision on the appeal was thereafter duly filed with the Peacemakers' Court, and an order making the judgment of the council of the Seneca Nation of Indians the judgment of the Peacemakers' Court was thereupon duly made and recorded in the book of records of the Peacemakers' Court, and it was therein directed, ordered, and adjudged that the defendant in that action surrender the possession of said premises to the plaintiff therein within 20 days. The defendant in that action never surrendered possession to the plaintiff, and she died on or about the 27th day of May, 1907, while in possession thereof, leaving her surviving a daughter, the defendant Hattie Maybee, in possession thereof. The order of the Peacemakers' Court, which required the defendant in the action in that court to surrender possession of the premises to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the plaintiff therein within 20 days, was served on the defendant Hattie Maybee on or about the 19th day of October, 1907, and possession of the premises was duly demanded of her. She declined to surrender possession, and has ever since remained in possession, and has executed certain conveyances of different parts of the premises to the other defendants. A writ of assistance was duly issued by the Peacemakers' Court under date of December 31, 1907, to the marshal of the reservation for the county of Cattaraugus, requiring him to deliver possession of the premises to the plaintiff, and he attempted to execute the writ, but was resisted by the defendant Hattie Maybee, who was then in possession, and he did not succeed in executing the writ, and he and his successors have ever since failed to execute the same, although repeatedly requested so to do.

[1] The learned counsel for the defendants who have appeared in the action interposed various objections to the maintenance of the action. They related to the jurisdiction of the court, to the construction of the statute under which the action is brought, and to the effect of the adjudication and records of the Peacemakers' Court. The principal contention made by the counsel for the defendants is that jurisdiction over Indians and their property is vested exclusively in the Congress of the United States and in the United States courts, and that therefore the provisions of the Indian Law enacted by the Legislature of the state of New York, purporting to regulate the ownership of property by Indians and to create and provide courts for the trial of controversies between them, are unconstitutional and void, and that section 52 of the Indian Law, under which this action was brought, only authorizes actions to enforce orders, directions, and judgments of the Peacemakers' Court for the payment of money.

The Legislature of this state long ago assumed to create and confer authority upon Peacemakers' Courts for the Allegany, Cattaraugus, and Tonawanda reservations, and to authorize the prosecution and enforcement in the state courts of demands and rights of action concerning which jurisdiction was not conferred upon the Peacemakers' Court. Laws 1847, c. 365, § 8; Laws 1859, c. 374; Laws 1863, c. 90, § 7; Laws 1892, c. 679, § 47; Laws 1893, c. 229; Indian Law (Consol. Laws, c. 26; Laws 1909, c. 31, § 46); Laws 1845, c. 150; Laws 1813, R. L. c. 92, § 2; Laws 1847, c. 365, § 14; Laws 1863, c. 90, § 13; Laws 1892, c. 679, § 5; Indian Law (Consol. Laws 1909, c. 26), § 5. The Legislature has also by chapter 252 of the Laws of 1900 assumed to ratify and confirm an amended constitution for the Seneca Nation of Indians, prescribing a form of government substantially in accordance with the statutory form of government theretofore prescribed by the former Indian Law (Laws 1892, c. 679, as amended), made and adopted by conventions of said Indians held on the 15th day of November, 1898.

The interesting and learned arguments presented by counsel for the defendants in support of his contentions that the provisions of the Indian Law in question are unconstitutional and void, that the court is without jurisdiction, and that the Legislature has only authorized the enforcement in the state courts of orders, directions, and judg-

ments for the recovery of money, would merit an opinion if there were no precedents controlling upon the trial court; but it appears that all of those questions have been authoritatively decided adversely to the defendants. See Jimeson v. Pierce, 78 App. Div. 9, 10, 79 N. Y. Supp. 3; Id., 102 App. Div. 618, 92 N. Y. Supp. 331; Hatch v. Luckman, 155 App. Div. 765, 118 N. Y. Supp. 689, 140 N. Y. Supp. 1123; Peters v. Tallchief, 121 App. Div. 309, 106 N. Y. Supp. 64; Matter of Printup, 121 App. Div. 322, 106 N. Y. Supp. 74. See, also, Jones v. Gordon, 51 Misc. Rep. 305, 99 N. Y. Supp. 958; Terrance v. Crowley, 62 Misc. Rep. 138, 116 N. Y. Supp. 417; People ex rel. Cusick v. Daly, 78 Misc. Rep. 657, 138 N. Y. Supp. 817, affirmed in 158 App. Div. 892, 143 N. Y. Supp. 1137.

By the express provisions of section 46 of the Indian Law, Peacemakers' Courts of the Allegany and Cattaraugus Reservations are given "exclusive jurisdiction * * * to hear and determine all questions and actions between individual Indians residing thereon involving the title to real estate on such reservation"; and by said section Peacemakers' Courts on either of said reservations are given jurisdiction in such cases where either of the parties to the controversy resides on the Allegany reservation and either of the other parties thereto resides on the Cattaraugus reservation. By section 47 of the Indian Law the Peacemakers' Court on each reservation is required to cause an entry to be made in a record book "of all matters heard and determined by them" as a court, stating the names of the parties to the action or proceeding, a brief statement of the subject thereof and their findings, and the date of their decision and the time within which it is to be complied with. Section 50 of the Indian Law authorizes an appeal from the decision of the Peacemakers' Court to the council of the Nation and provides that "The decision of the council shall be conclusive." Said section 52 of the Indian Law is as follows:

"If any party shall fail to comply with, or fulfill the directions or finding of the peacemakers in any matter heard or determined by them in pursuance of law, within the time fixed by such determination, the party in whose favor such determination may be, shall be entitled to recover the amount awarded to him, by such determination with costs, in an action in justice's court before any justice of the peace of the county in which such reservation or a part thereof is situated, in which action, a copy of the record of such determination, certified to by said clerk, shall be conclusive evidence of the right of recovery, and of the amount of such recovery, and executions shall be awarded to enforce the collection of the judgment obtained thereon in the same manner and with the like effect as against white persons, and the property and person of the defendant in such action shall be liable to seizure and sale or imprisonment, as in like cases against white persons. In case the action or proceeding is one not within the jurisdiction of justice's courts, the application may be made to a court having jurisdiction of actions of the same nature."

The last sentence of this section was added as an amendment to section 53 of the former Indian Law (Laws 1892, c. 679) by chapter 253 of the Laws of 1900.

In Jimeson v. Pierce, supra, it was held that said last amendment to the Indian Law relates to remedies, and authorizes the enforcement of judgments of the Peacemakers' Courts theretofore rendered, as

well as those rendered subsequently, and authorized a court of equity to confirm and enforce a judgment of the Peacemakers' Court.

[2] The only remaining questions are whether the maintenance of the action is barred, whether the cause of action has been released, and whether the judgment of the Peacemakers' Court was rendered in conformity with the Indian Law enacted by the state Legislature. The defendants pleaded and proved as a bar to this action a judgment of the council of the Seneca Nation of Indians rendered on the 23d day of March, 1888, on an appeal taken to said council in an action brought in the Peacemakers' Court, wherein this plaintiff and one Rose Silverheels were plaintiffs and Emeline Jimeson was defendant, for the recovery of the same property, and in and by which it appears that on said appeal said council assumed to create and appoint a Referee's Court, and which judgment purports to be based on the report of the Referee's Court so appointed, and in and by said judgment said council undertook to adjudge that the plaintiffs in that action should pay to the estate of one Mary Paterson the sum of $350, which the court found had been paid to the plaintiffs by her "before they entered any proceeding for the same cause upon the estate." It was stipulated upon the trial that the amount decreed by said judgment to be paid by the plaintiff and said Rose Silverheels to the estate of Mary Paterson had not been paid. I am of opinion that this action was not barred by said judgment of the council of the Seneca Nation of Indians. That was rendered long prior to the commencement of the action by the plaintiff in the Peacemakers' Court upon which this suit is based. The judgment of the Peacemakers' Court rendered in the former action has not been proved; but it appears by the record of the proceedings of the Peacemakers' Court in the action on the judgment on which this suit is based that in said former action the Peacemakers' Court awarded possession of the premises to the plaintiff. It also appears that the validity and effect of the former judgment of the council of the Seneca Nation of Indians was fully presented to and litigated before the Peacemakers' Court in the later action to enforce the judgment in which this suit is brought. My attention has not been called to any statute, and I have been unable to find any, conferring authority upon the council of the Seneca Nation of Indians on an appeal to appoint referees or to create a Referee's Court and render judgment on the report of the referees or the Referee's Court; nor has attention been drawn to any statute conferring jurisdiction on the Seneca Nation of Indians on an appeal to enter judgment, in effect, enjoining the bringing of an action. It appears that the Peacemakers' Court on the trial of the action to enforce the judgment in which this suit is brought, on full presentation of the facts and objections to the maintenance of that action based on the former judgment, to which reference has been made, and of various other objections to the validity of the former judgment of the council of the Seneca Nation of Indians, overruled the objections to the maintenance of the action, and by the affirmance of the judgment by the council of the Seneca Nation of Indians on the appeal it must, so far as this court is concerned, be presumed that it was adjudged that the

former judgment was invalid, and was not a bar to the maintenance of the later suit.

[3] The defendants make the further objection that the judgment of the Peacemakers' Court has not been properly proved. It appears that the original record of that judgment has been lost, but the judgment has been satisfactorily proved by parol evidence and by the subsequent judgment on the remittitur. There is much force in the contention of counsel for the plaintiff that it is the judgment of the Peacemakers' Court rendered on the remittitur from the council of the Seneca Nation of Indians that he is seeking to enforce. That judgment appears to be in proper form, and the original judgment signed by all the members of the Peacemakers' Court was proved in evidence, as was also the record of the Peacemakers' Court into which it was copied. The only defect that appears to me in the proof is the failure to prove the original judgment on the appeal rendered by the council of the Seneca Nation of Indians; but the plaintiff has proved all records that are in existence, so far as could be ascertained by diligent search and inquiry, and I am of opinion that he has sufficiently established his right to maintain the action.

[4] The defendants also pleaded and proved a release executed by the plaintiff on the 27th day of October, 1882, entered in the Indian Record Book, in and by which, in consideration of the payment to him of $300 by Mary S. Paterson, who it appears by other evidence was his grandmother, he released all his interest in the estate of his mother, Louisa Redeye, then deceased. The validity and effect of that release could have been, and should have been litigated in the action in the Peacemakers' Court upon which this action is based if the defendants claim anything by virtue of it, and it constitutes no bar to this action.

It follows that the plaintiff is entitled to judgment confirming the judgment of the Peacemakers' Court on the remittitur from the council of the Seneca Nation of Indians on the appeal, and for the enforcement of the said judgment by the delivery of the possession of the property to him, together with costs of the action to be taxed.

Judgment accordingly.

(158 App. Div. 491)

MANN v. FRANKLIN TRUST CO.

(Supreme Court, Appellate Division, Second Department. September 23, 1913.)

1. BANKS AND BANKING (§ 134*)—DEPOSITS—OFFSETTING INDEBTEDNESS.

A bank, which was induced to accept a note in renewal of one previously given by the maker's false representations as to his financial condition, could, upon discovery of the fraud, rescind the transaction, cancel the credit given, and offset the note against the maker's deposit to the amount thereof.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353–374; Dec. Dig. § 134.*]

2. TRIAL (§ 177*)—DIRECTED VERDICT—EFFECT OF MOTION—WITHDRAWAL.

Where plaintiff, after moving for a directed verdict, and after defendant had joined in such motion, but before the verdict had actually been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rendered, requested the submission to the jury of certain specified questions, it was error for the court to direct a verdict, although it was doubtful if the jury could have reached any other conclusion, since the action of the parties in jointly moving for a directed verdict does not reach the irrevocable stage until the verdict is actually pronounced by the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

Appeal from Kings County Court.

Action by Frank Mann, as executor of Gottfried Westernacher, deceased, against the Franklin Trust Company. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and THOMAS, CARR, STAPLETON, and PUTNAM, JJ.

Henry Schoenherr, of Brooklyn, for appellant.

John Hill Morgan, of Brooklyn, for respondent.

STAPLETON, J. The judgment from which the plaintiff appeals was entered upon a verdict directed by the court in favor of the defendant.

[1] The plaintiff's testator was a depositor in the banking institution of the defendant. On May 26, 1911, the defendant discounted the note of the testator for $3,000, due September 25, 1911. On the due day he paid $300 and obtained a renewal, giving a note for $2,700, due January 25, 1912. The bank required from the defendant a written statement, setting forth his financial condition, before it would give him the credit.

There was evidence which would authorize the jury to determine that the statement was false, misleading, and fraudulent in material particulars, that the defendant was deceived by the statement, and that the loan was made and extended by the defendant in reliance upon the statement. On May 24, 1911, the testator represented himself to the defendant to be worth $74,493.02. The testator died the 30th day of October, 1911. His estate was insolvent. There was no proof that he suffered any unexpected financial disaster in the meantime. The plaintiff was appointed and qualified as the executor of his last will and testament. At the time of the testator's death there was a balance of $755.05 on deposit with the defendant to his credit. The plaintiff brought this action to recover that sum. The defendant, having discovered the fraud in the statement aforesaid, elected to disaffirm and rescind the transaction and cancel the credit given. In its answer it alleged, as a defense, the facts herein referred to, and demanded that the note be set off as against the deposit to the amount thereof. That the relief invoked by the defendant may be given, if the facts pleaded by it were proved, is well established. Bradley v. Seaboard Nat. Bank, 167 N. Y. 427, 60 N. E. 771; Andrews v. Artisans' Bank, 26 N. Y. 298; Flatow v. Jefferson Bank, 135 App. Div. 24, 119 N. Y. Supp. 860; Peyman v. Bowery Bank, 14 App. Div. 432, 43 N. Y. Supp. 826.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] The judgment must be reversed, however, because the court directed a verdict for the defendant, despite the request of the plaintiff to go to the jury upon specific questions of fact, after the defendant had joined with the plaintiff in a motion for the direction of a verdict; the verdict not having actually been rendered by the jury, upon the direction, before the motion to submit the specific questions was made. The courts, in solicitous recognition of the jury's province as ultimate arbiter of the facts, have too firmly and consistently countenanced this practice to permit an abrogation of the rule, even in a case where it is doubtful if the jury could have reached any other conclusion. Second Nat. Bank v. Weston, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283; Cullinan v. Furthmann, 70 App. Div. 110, 111, 75 N. Y. Supp. 90; Eldredge v. Mathews, 93 App. Div. 356, 357, 87 N. Y. Supp. 652; Maxwell v. Martin, 130 App. Div. 80, 83, 114 N. Y. Supp. 349. There are in the case questions which the jury alone could determine in the first instance, unless the right to determine them was committed to the court by the joint and irrevocable action of the parties to the litigation. The action of the parties, in jointly moving for the direction of a verdict, does not reach the irrevocable stage until the verdict is actually pronounced by the jury.

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur.

(158 App. Div. 440)

ECKERSLEY v. CURRAN et al.

(Supreme Court, Appellate Division, Second Department. September 23, 1913.)

ABSENTEES (§ 6*)—PROPERTY—DEPOSITS IN COURT.

More than 7 years after the disappearance of plaintiff's intestate, under circumstances justifying the presumption at the expiration of 7 years that he was dead, in an action to partition land, of which his uncle died intestate, it was ordered that the share of the proceeds of a sale to which plaintiff's intestate would have been entitled, if living, should be paid to the county treasurer, for the benefit of such intestate or such other persons as might be entitled thereto. Nearly 30 years thereafter plaintiff was appointed administratrix, and applied for the payment to her of such deposit, without offering any proof as to the date of her intestate's death. *Held*, that the application was properly denied, as it was not shown that the fund was an asset to which she was entitled, since, if her intestate died before the uncle, he took no title, if he died without issue, no title could be traced through him, and if he died after the uncle, and before the sale, the deposit retained the nature of land, and the administratrix was not entitled to it.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 12, 13; Dec. Dig. § 6.*]

Appeal from Special Term, Kings County.

Action by Ellen Eckersley, as administratrix of Michael Curran, deceased, against James T. Curran and others. From an order denying plaintiff's application for the payment to her of a certain fund, she appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Daniel De V. Harned, of New York City, for appellant.
Robert P. Beyer, Deputy Atty. Gen., for respondents.

THOMAS, J. Plaintiff's half-brother, Michael Curran, born in Astoria, N. Y., on December 23, 1834, lived there with his father and stepmother until 1861, when he entered the federal army, but reappeared at his sister's home about the fall of 1863, and stated that he had deserted and had been quietly living in the city of New York, and expressed the view that he would not be found, as he had enlisted under the name of Richard Rockett. He stated that he might re-enlist, and that in that case his sister would certainly be informed of him. After some two weeks at home he disappeared, and nothing has been heard or seen of him since that time by his family. He was unmarried. In June, 1880, his uncle died intestate, seised of certain real property, which was sold in February, 1883, in an action of partition, wherein by final judgment it was provided:

"And it appearing to the court by all the proceedings herein and by said interlocutory judgment that the defendant Michael Curran and the unknown defendants above mentioned were served with the summons herein by the publication thereof, and that neither said defendant Michael Curran nor said unknown defendants have appeared in this action, and that said defendant Michael Curran would, if living, be entitled to the remaining one-sixth share of said proceeds, but that it could not with reasonable dilgence be ascertained whether said defendant Michael Curran was living or not, or whether, if living, he has a wife, or whether, if deceased, he left a widow or children or descendants, or whether he left a last will, or whether he ever made any disposition of his interest in said premises, or, if said defendant Michael Curran is deceased, whether he died prior to or since the death of Rev. Michael Curran, deceased, mentioned in said interlocutory judgment, it is further ordered, adjudged, and decreed that said referee pay the said remaining equal one-sixth share of the residue of said proceeds to the treasurer of the county of Kings to the credit of this action, to be invested in permanent securities at interest for the benefit of said defendant Michael Curran or said unknown defendants, or such other person or persons as are entitled thereto, until claimed by him or them, or his or their legal representatives; but such payment so to be made to said county treasurer shall be without prejudice to the right of any party to this action, or of any other person interested in said share, at any time to make application therefor, or for any part thereof, or for a different disposition of the same, upon such terms and conditions as to this court may seem proper and just, and that any party to this action may apply at any time for such other or further relief in the premises as may be just and proper."

Such share is now deposited with the treasurer of the state. On February 21, 1912, by a decree adjudging that Michael Curran was dead, letters of administration upon his estate were issued to the plaintiff, and she moves to receive the deposit, and the state appears. Has she title to it? When did Michael Curran die? If he died before the uncle, he took no title; and if he died without issue, no title can be traced through him. If he died after the uncle, and before the sale of the land, the deposit retains the nature of land, and the administratrix is not entitled to it. If he died after the sale, his administratrix, duly appointed, is entitled to the fund. But there is no evidence that he died at such time as entitles the administratrix to take the money. The judgment in the partition action intended that the money

should be paid to any person proving title to it. The plaintiff asserts title in her representative capacity, and clearly she does not show that the fund is an asset which she is entitled to take. It is now nearly 50 years since Michael disappeared, under such circumstances as to justify the presumption that he was dead at the expiration of 7 years after 1863. This was explained painstakingly by Mr. Fisher, referee in a previous and similar application, and it is not perceived why the administratrix should move again without further information of the date of the death.

In the partition action the court could have proceeded on the presumption that Michael died before his uncle, and adjudge the fund to those entitled if they were made proper parties. But the present order should be affirmed, without costs. All concur.

(82 Misc. Rep. 300)

HALL v. CITY OF OLEAN et al.

(Supreme Court, Special Term, Erie County. September 15, 1913.)

1. DEDICATION (§ 18*)—ACTS CONSTITUTING—DESCRIPTIONS IN CONVEYANCES.
Where the deeds of plaintiff and his predecessors referred to and recognized the official map of a town, the dedication of the street in front of plaintiff's lot as shown on the map cannot be questioned, although the deeds of plaintiff and several of his predecessors described the tract as running to the street "as now opened and worked."
[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 33–36; Dec. Dig. § 18.*]

2. DEDICATION (§ 35*)—ACCEPTANCE—ADOPTION OF OFFICIAL MAP.
Where the act incorporating a village recognized a certain map as the official map thereof, and provided that the territory within certain lines, referring to the map in the description, should constitute the village, there was an acceptance of the dedication of the streets as shown on the map within the lines laid down, particularly as there were also numerous references to the map in the records of the town.
[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 68–71, 75, 76; Dec. Dig. § 35.*]

3. ADVERSE POSSESSION (§ 8*)—PROPERTY SUBJECT TO PRESCRIPTION—PROPERTY DEDICATED FOR HIGHWAY.
Title to land included in a street which has been dedicated and accepted cannot be acquired by adverse possession as against the public.
[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 14, 27, 43–57; Dec. Dig. § 8.*]

4. MUNICIPAL CORPORATIONS (§ 657*)—STREETS—DISCONTINUANCE BY ABANDONMENT.
It rests with the municipality to open up so much of a tract dedicated and accepted for a street as public necessity may, from time to time, require, and failure to work and use a part thereof does not constitute an abandonment of such part.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.*]

Action by Ira T. Hall against the City of Olean and another. On motion to have a temporary injunction previously issued against defendant made permanent. Denied, and temporary injunction vacated.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John K. Ward, of Ellicottville, for plaintiff.
Henry Donnelly, of Olean, for defendants.

BISSELL, J. The plaintiff moves to have made permanent a temporary injunction which he secured in the above-entitled action restraining the defendant the city of Olean from an alleged unlawful taking of his property in a proceeding for straightening and improving Green street. The plaintiff is the owner of a lot in the city of Olean which is described in his deed as follows:

"A part of block number one hundred and twenty-one, according to a map of the village of Olean made by T. J. Gosseline, Esq., bounded as follows: Commencing at a point one hundred and thirty-six feet west from a point in the west line of Fourth street eleven rods south of Irving street * * * thence south to Green street *as now opened and worked*, being about 193.96 feet; thence east along Green street as now opened thirty-six feet; thence north parallel to the west line of Fourth street to the north line of said premises * * * thence west on said line thirty-six feet to place of beginning."

It may be gathered from this description that the tract is a narrow strip of land lying parallel to Fourth and Fifth streets about midway between them and abutting on Green street. This whole block, including the plaintiff's property, creates a "jog" on Green street, which does not exist on the T. J. Gosseline map of the city. The city authorities in straightening Green street must necessarily cut back a part of the plaintiff's lot included in the "jog," and the carrying out of this plan constitutes the alleged unlawful taking of the plaintiff's property now sought to be restrained.

The plaintiff holds, through mesne conveyances from one Samuel A. Brown. The deed from Samuel A. Brown to his grantee describes the premises as above, "to Green street as now opened and worked." Each deed in turn employs the same words down to and including that of the plaintiff. Samuel A. Brown acquired the property by quitclaim deed from Louisa B. Howard and others. This deed reads simply "to Green street." It is clear, therefore, that Samuel A. Brown attempted to convey a strip of land lying along Green street contiguous to but not a part of the tract described in his grantor's deed. It may be further stated that the deeds of the plaintiff and of all of his predecessors were given in recognition of and in accordance with the T. J. Gosseline map.

[1] The claims of the plaintiff are based therefore on adverse possession. It is urged that the strip of land in controversy was never dedicated, or, if it were dedicated, that it was never accepted by the proper authorities by express act or by user; that meanwhile the rights of the plaintiff have become vested and ought not now to be disturbed. We do not think the facts sustain this position. It is conceded that Green street between Fourth street and Fifth street has been opened to and used and worked by the public for over 50 years, though the particular plat in question has never been so used. Whether constructive user of the whole may be founded on these facts we do not undertake to determine, as our view of the case makes it unnecessary. Further, it is not disputed that the Gosseline map is the official map of the city, and has been on file in the Cattaraugus county clerk's of-

fice since 1836. All of the deeds of the plaintiff's predecessors in title recognized this map. Such facts would be sufficient to dispose of any question that might be raised on the ground of dedication. Elliott on Roads and Streets (3d Ed.) § 128. We do not understand, however, that the learned counsel for plaintiff seriously contests this point, but relies chiefly on the proposition that there has been a failure of acceptance.

[2] In the act of incorporation of the village of Olean the Gosseline map was the official map and recognized as such. This act (Laws of 1858, chapter 70) refers to it in the following words:

"The territory within the following limits in the town of Olean, Cattaraugus county, New York, shall constitute the village of Olean * * * beginning at the north bank of the Alleghany river, at the south end of Fifteenth street, as described on a map of the village of Olean made by T. J. Gosseline, Esq."

This was a clear acceptance of all the land described in the Gosseline map within the lines laid down, and including, of course, the property now claimed by the plaintiff on Green street between Fourth and Fifth streets. This same map receives further recognition in subsequent amendatory acts of the Legislature. If additional evidence of acceptance were necessary, it may be found in the affidavits offered by the defendant, showing numerous references to the Gosseline map in the official records of the village and city of Olean. We are therefore of the opinion that the land indicated on the Gosseline map between Fourth and Fifth streets was dedicated to and duly accepted by the public. Elliott on Roads and Streets (3d Ed.) § 168; City of Buffalo v. D., L. & W. R. Co. (Sup.) 39 N. Y. Supp. 4.

[3, 4] This being so, no rights, by adverse possession or otherwise, were acquired by the plaintiff or his predecessors in title which were good as against the public. The fact that the municipality has hitherto opened and worked only a part of the land dedicated is of no consequence. The tract having been dedicated and accepted, it rested with the defendant to open up, from time to time, as much as seemed necessary for the use and enjoyment of the public. Such a course did not constitute abandonment of the part not actually used heretofore.

The injunction must therefore be vacated. Let an order be entered denying the motion for a permanent injunction, and vacating and setting aside the temporary injunction, with $10 costs of this motion to be paid by the plaintiff.

(158 App. Div. 419)

VILLAGE OF HAVERSTRAW v. ECKERSON et al.

(Supreme Court, Appellate Division, Second Department. September 23, 1913.)

1. CONTEMPT (§ 60*)—PROCEEDINGS TO PUNISH—ADMISSIBILITY OF EVIDENCE—CONCLUSIVENESS OF PRINCIPAL JUDGMENT.
In contempt proceedings for the disobedience of an order requiring the defendant to fill an excavation on his land so as to furnish lateral support for a street, evidence as to the necessity of the fill is inadmissible, since that question was finally determined by the principal judgment.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 183–187; Dec. Dig. § 60.*]

2. CONTEMPT (§ 20*)—PUNISHMENT—FINE.
Where a defendant, who was able to fill an excavation on his land as required by a judgment of the court, refused to do so, it was within the power of the court to impose a fine upon him without any proof of loss on the part of the plaintiff in the action, under Judiciary Law (Consol. Laws 1909, c. 30) § 753, giving the court power to punish by fine and imprisonment a party to an action for any disobedience to the lawful mandate of the court, since a judgment is a mandate of the court under Code Civ. Proc. § 3343.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58–62; Dec. Dig. § 20.*]

3. CONTEMPT (§ 30*)—PUNISHMENT—IMPRISONMENT.
The court could also, both under its inherent equity powers and under Judiciary Law (Consol. Laws 1909, c. 30) § 774, expressly giving it authority, imprison the defendant until he caused the excavation to be filled.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 91, 93, 94; Dec. Dig. § 30.*]

4. CONTEMPT (§ 75*)—PUNISHMENT—INDEMNITY TO INJURED PARTY.
Under Judiciary Law (Consol. Laws 1909, c. 30) § 773, providing that where a disobedience to a judgment has occasioned loss to another party the court may impose a fine sufficient to indemnify the aggrieved party, which shall be paid to him, the court cannot impose upon a lot owner who has refused to comply with an order to fill an excavation on his lot a fine to be paid to the village equal to the costs of filling the excavation where the village had not filled the excavation nor proved any present loss.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 258–260; Dec. Dig. § 75.*]

Appeal from Special Term, Rockland County.

Action by the Village of Haverstraw against J. Esler Eckerson and others. From an order of the Special Term adjudging the defendant Eckerson guilty of civil contempt of court, he appeals. Affirmed.

See, also, 152 App. Div. 891, 136 N. Y. Supp. 1149.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Abram F. Servin, of Middletown, for appellant.

Alonzo Wheeler, of Haverstraw (William McCauley, of Haverstraw, on the brief), for respondent.

BURR, J. The affidavits presented in this proceeding and the testimony taken therein clearly establish that it is within the power of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant Eckerson to comply with the provisions of the judgment entered in the above-entitled action, requiring him to fill the excavation made upon his land to the extent prescribed by the said judgment, and that his refusal so to do is contumacious and willful. There is evidence from one of the tenants in occupation of a part of the land leased by him for brickmaking purposes that there is nearly or quite sufficient refuse material on his land to make the necessary fill, and that when said tenant attempted to use the same for that purpose defendant interfered to prevent him. This evidence is uncontradicted.

[1] The affidavits introduced by defendant relative to the necessity for fill upon the clay bottom are wholly irrelevant. That question was finally determined upon the trial of the action, and by the judgment entered therein. Village of Haverstraw v. Eckerson (No. 2) 140 App. Div. 896, 125 N. Y. Supp. 1148, affirmed 204 N. Y. 635, 97 N. E. 1118.

[2] The only questions open for discussion, therefore, arise in connection with the punishment inflicted. The fine of $250, irrespective of proof of any actual loss or injury to plaintiff, was within the power of the court, and is justified. Judiciary Law, Consolidated Laws, c. 30 (Laws of 1909, c. 35) § 773.

[3] Equity also has inherent as well as statutory power to enforce compliance with its decrees by imprisoning a capable but contumacious defendant until he yields obedience. 4 Pomeroy's Eq. Jur. (3d Ed.) § 1317. The statute provides that:

"A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in either of the following cases: * * * 3. A party to the action * * * for the nonpayment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court." Judiciary Law, supra, § 753.

"Where the misconduct proved consists of an omission to perform an act or duty, which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed." Id. § 774.

A judgment is a mandate of the court. Code Civ. Proc. § 3343, subd. 2. The judgment entered in the above-entitled action establishes the right of plaintiff, as against defendant, to lateral support of a public street to the extent specified therein, and defendant's disobedience to its requirements defeats, impairs, impedes, or prejudices that right. It is proper, therefore, that defendant should be imprisoned until he obeys.

[4] In addition thereto:

"If an actual loss or injury has been produced to a party to an action * * * by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court." Judiciary Law, supra, § 773.

If we assume that the exception has no application, the evidence introduced upon plaintiff's part as to the necessary cost of the fill is too vague and indefinite to afford a basis for measuring the extent of its loss or injury. Defendant Eckerson, however, states in his affidavit that the cost of the required fill will be at least $15,000; and, so far as the amount of the fine is concerned, this might be adopted if the evidence showed any present loss or injury to plaintiff resulting from defendant's failure to obey the provisions of the judgment in this regard. To affirmatively establish such actual loss or injury is essential. Moffat v. Herman, 116 N. Y. 131, 22 N. E. 287; Socialistic Co-Op. Pub. Ass'n v. Kuhn, 164 N. Y. 473, 58 N. E. 649; Snow v. Shreffler, 148 App. Div. 422, on page 433, 132 N. Y. Supp. 895. It may be that plaintiff would have authority to go upon defendant's land and make the prescribed fill for the purpose of abating a nuisance (2 Wood on Nuisances [3d Ed.] 1285), but it has not done so. Up to the present time it has expended nothing for that purpose. If the fine of $20,000 which has been imposed, and which was intended to represent the cost of the fill, was paid over to plaintiff, there is no certainty that it would be expended for that purpose.

Because, therefore, there is no satisfactory evidence of actual present loss or injury to plaintiff, the order must be modified by striking out the provision for the fine of $20,000, and by making the provision for defendant's imprisonment until compliance with the judgment absolute, instead of in the alternative to the payment of said fine; and as thus modified it should be affirmed, without costs. All concur.

(82 Misc. Rep. 290)

HERENDEEN v. WILSON et al.

(Supreme Court, Special Term, Erie County. September, 1913.)

INDEMNITY (§ 15*)—CONTRACT—CONSTRUCTION—PERSONS SECURED.

Defendants, to induce B. to purchase stock in a corporation, contracted jointly and severally that one of them should save B. harmless from any liability as the holder of the stock, and should, within 60 days after demand, purchase from her at par all the shares and pay her therefor in cash. *Held*, that such undertaking was for the personal benefit of B., and was not enforceable by the administrator of B.'s legatee, to whom she bequeathed the stock.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36-40, 42-47; Dec. Dig. § 15.*]

Action by James H. Herendeen, as administrator of the estate of Charles W. Edgerton, deceased, against Benton H. Wilson and others. Judgment for defendants.

Eugene L. Dominick, of Buffalo, for plaintiff.

Dirnberger & Augspurger and George A. Orr, all of Buffalo, for defendants.

BISSELL, J. On the 9th day of March, 1896, Susan Bradnack purchased 25 shares, at the par value of $100 per share, of the capital stock of Wilson & Co., a corporation of the state of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

The defendants Benton H. Wilson, Robert W. Wilson, Mollie D. Wilson, Lillie M. Wilson, Clara A. Wilson, together with Walt Wilson, now deceased, executed a bond to the said Susan Bradnack, by the terms of which they declared themselves bound to her, jointly and severally, in the sum of $4,000, subject to the condition—

"that if the said Benton H. Wilson shall well and truly indemnify and save harmless the said Susan Bradnack from any and all liability as the holder and owner of such shares of stock to be purchased by her, and shall, within sixty days after demand, purchase from the said Susan Bradnack, at the par value thereof, all of such shares of stock, and pay to the said Susan Bradnack the par value of such shares in cash, then this obligation shall be void, otherwise it shall remain in full force and virtue."

Susan Bradnack, the obligee, died, and devised and bequeathed the stock in question to one Charles W. Edgerton. Her will was admitted to probate, and Charles W. Edgerton came into possession of the stock, and on April 3, 1900, caused it to be transferred to his name on the books of the corporation. During the year 1904 Edgerton died, and letters of administration were duly issued to the plaintiff, and on the 6th day of June, 1911, the plaintiff caused a demand to be made on Benton H. Wilson that he purchase the stock according to the terms of the bond. The demand was refused, and the plaintiff now brings this action to enforce the obligation of the bond.

The question arising by demurrer to the complaint is whether or not an action can be maintained on this bond by the devisee of the obligee named therein. We think it cannot. The principles of interpretation applicable to contracts in general govern also in contracts of suretyship. (Baylies on Sureties, p. 111; Bennett v. Draper, 139 N. Y. 266, 34 N. E. 791, and cases there cited), subject, however, to the rule of strict construction in favor of sureties (32 Cyc. 73).

The intention of the parties must be gathered from the language of the instrument, and, if necessary, from the surrounding circumstances. Bennett v. Draper, supra; Baylies on Sureties, supra.

"The contracts of sureties are to be construed like other contracts, so as to give effect to the intention of the parties. In ascertaining that intention we are to read the language used by the parties in the light of the circumstances surrounding the execution of the instrument, * * * but when the meaning of the language used has been thus ascertained, the responsibility of the surety is not to be extended or enlarged by implication or construction, and is strictissimi juris." People v. Backus, 117 N. Y. 196, at page 201, 22 N. E. 759, at page 760.

These settled principles of construction must be borne in mind in examining the bond under consideration. The question may be thus stated: Was it the intention of the parties that the bond should be enforceable in the hands of the successors in title of the obligee? If so, why is it not so declared in the instrument? A strict construction of the language of the bond would indicate that when once the demand is made by Susan Bradnack, then the money shall be payable to her, "her executors, administrators and assigns," but although the obligee is named several times in the instrument, in no case is reference made to any successors in title. Why was this careful distinction made, except to express the intention of the parties? There are

no allegations of fact in the complaint from which it can be reasonably and fairly implied that a strict construction of the language of the bond fails to express the intention of the parties; and, in the absence of such allegations of fact, a strict construction must prevail.

It has been urged that this contract of surety must be distinguished from one of surety for the debts of another, that this contract of surety inheres in the property itself, which is subject to no changes or mutations which the bondsmen could not foresee, and that the bondsmen ought to give an actual added value to the property which was sold to the obligee, and that this inherent obligation ought to be enforceable, if not by her assigns, at least by her estate, and her successors by devise. It is further urged that, however hard the bargain, the defendants freely and voluntarily entered into it, and it is not the province of the court to relieve them of their obligations merely because they are hard. Whatever weight this argument may be entitled to, we do not think that it is controlling here. To adopt this view would make it necessary to believe that the defendants had intended to enter into a perpetual obligation, and to enter into it under the following circumstances: Presumably when the stock was bought, it was, and for a long time thereafter continued to be, of great value, or of such value that the holder desired to retain it. This is evident from the fact that no application was made by the defendant under the terms of the bond during the lifetime of the obligee, Susan Bradnack, nor of her devisee, Charles W. Edgerton. And although the present plaintiff, as administrator, has had possession of the stock since 1904, he made no demand upon the bond until June 6, 1911, 15 years after the purchase of the stock. It must be presumed that the stock was of satisfactory value at the time of its purchase, and this would be reasonable ground for the defendants' willingness to insure the stock during the life of the obligee. But is it conceivable that these defendants would willingly undertake such surety against all the mutations of time and circumstance and into the hands of whomsoever the stock might come, without limit of time? We cannot believe such was their intention, and unless such intention can be proved, this theory must be unavailing, and the language of the instrument must remain our sole guide.

The case of Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379, is one of the authorities relied upon by the plaintiff, and, although containing several statements which, taken out of their context, would seem to be favorable to the plaintiff's contention, it does not, we think, control here. In the first place, in that case the obligee was the agent of the plaintiff, and therefore his rights in the transaction were the rights of the plaintiff. Even if that were not so, however, the case would not apply, for that was an action upon a guaranty of a mortgage securing a note. Surely it may be assumed that the assignability of a guaranty of a mortgage is in the contemplation of the parties in the absence of a plain statement to the contrary. In fact, in this same opinion Justice Earl says, in overruling the case of Smith v. Starr, 4 Hun, 123, which, by the way, is also relied upon by the plaintiff in this action:

"There is nothing personal about the guaranty of the payment of a mortgage, and it can be made so only by very express and plain language."

It does not seem necessary to point out that no such presumption of intention as to assignability exists in the present case as in the case of a guaranty of a mortgage.

The plaintiff also cites Everson v. Gere, 122 N. Y. 290, 25 N. E. 492, which is a case of a surety upon a promissory note. What was said above in respect to a bond and mortgage is, of course, even more potent in the case of surety on a promissory note. The very essence of a promissory note is assignability, and the parties to a contract of surety thereon are so conclusively presumed to have intended its assignability that nothing but the clearest statement to the contrary would relieve them of liability.

We think it unnecessary to discuss in detail the remaining cases cited by the plaintiff. In every instance the assignment of the contract of surety with the property was reasonably within the contemplation and intention of the parties. Such does not appear to have been the fact in the case at bar, and we are therefore of the opinion that the demurrer should be sustained, and judgment entered for the defendants with costs.

Let an order be prepared accordingly.

In re VON BERNUTH'S ESTATE.

(Surrogate's Court, New York County. March 1, 1913.)

1. TAXATION (§ 879*) — INHERITANCE TAX — TRANSFERS SUBJECT — GIFTS IN CONTEMPLATION OF DEATH.

A husband and wife deposited money belonging to the wife with a trust company, at the same time signing a statement declaring that they were joint owners of the money; that future deposits made by either of them should be their joint property; that either one, before or after the death of the other, might sign drafts or orders on the deposit and receive the money thereon; and that at the death of either the survivor should take absolute and single ownership of the balance then due. A few days before the wife's death, but at a time when she had no reason to apprehend an early death, she asked the husband to draw $15,000 and use it in the purchase of an automobile and stock securities for himself. He did withdraw this amount and placed it to his personal account. *Held*, that while as against the bank the husband had the right to draw the money on deposit, and upon the wife's death acquired the absolute right of ownership to the amount then on deposit, the wife did not, in the absence of any contract or agreement with the husband, divest herself of her ownership of the fund during her life; and hence the balance on deposit at her death was subject to the tax imposed by the Transfer Tax Statute (Consol. Laws 1909, c. 60, §§ 220–245) on gifts intended to take effect at or after death.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. § 879.*]

2. TAXATION (§ 879*)—INHERITANCE TAX—TRANSFERS SUBJECT—GIFTS IN CONTEMPLATION OF DEATH.

The $15.000 withdrawn by the husband in the wife's lifetime was not a gift made in contemplation of death, and was not taxable.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. § 879.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. GIFTS (§ 18*)—"GIFT INTER VIVOS"—ESSENTIALS.

To make a valid "gift inter vivos," the donor must divest herself of dominion over the subject of the gift and deliver it to the donee.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 29–33; Dec. Dig. § 18.*

For other definitions, see Words and Phrases, vol. 4, pp. 3091–3093; vol. 8, p. 7671.]

Proceeding to assess the transfer tax on the estate of Caroline De Forest Von Bernuth, deceased. From an order of the appraiser assessing the tax, the executor appeals. Reversed and report remitted to the appraiser for correction.

John Larkin, of New York City, for petitioner.
Thomas E. Rush, of New York City, for state comptroller.

FOWLER, S. [1, 2] This appeal is taken by the executor from the order assessing a tax upon the decedent's estate. In June, 1912, the decedent and her husband deposited a sum of money with the Title Guarantee & Trust Company, and at the time of making the deposit they signed a statement declaring that they were joint owners of the money then deposited, and that any future deposits made by either of them should be their joint property—

"that is either one of us before or after the death of the other may sign drafts or orders on said account and receive the money thereon before or after the death of the other, and at the death of either the survivor shall take absolute and single ownership of the balance then due the account."

From the affidavits submitted to the appraiser it appears that none of the husband's money was deposited in this account, but that the deposit consisted entirely of decedent's money. About five days before the death of decedent she asked her husband to draw $15,000 from the account and to use this sum in purchasing for himself an automobile and stock securities. The husband drew the said amount of $15,000 and placed it in his personal account. At the time of decedent's death there was a balance of $2,034.58 on deposit in the joint account. The appraiser included this amount, together with the $15,000 deposited in the husband's personal account, in the taxable assets of decedent's estate. The executor contends that this was error; that neither the $2,034.58 nor the $15,000 is subject to a transfer tax as part of decedent's estate. The transfer tax statute provides that a tax shall be imposed when the property is transferred by will, by the intestate laws, or as a gift given in contemplation of death, or intended to take effect at or after death. If the transfer is effected in any other way it is without the statute, and therefore not subject to a tax. The decisions of the courts of this state upon the question of the taxability of the interest of the survivor in a joint account are not uniform. In the Matter of Stebbins, 52 Misc. Rep. 438, 103 N. Y. Supp. 563, it appeared that the money deposited belonged to the decedent, and that the deposit was made "Julia A. and H. H. Stebbins, either or the survivor of them may draw." It was held that the money on deposit at the death of the decedent was not subject to a transfer tax. In the Matter of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Kline, 65 Misc. Rep. 446, 121 N. Y. Supp. 1090, the money was deposited in the joint names of decedent and his wife. Part of the money belonged to each at the time the deposit was made. The account was payable to either or the survivor. The court held that such portion of the money deposited as did not belong to the survivor at the time the deposit was made was taxable. In the Matter of Spring, 75 Misc. Rep. 586, 136 N. Y. Supp. 174, mortgages were assigned to the decedent and her daughter by instruments which contained provisions that the survivor of the two assignees should become the absolute owner of the bonds and mortgages, and that neither should have power to affect the rights of the last survivor. It was held that one-half of the value of the bonds and mortgages was taxable upon the death of the decedent. To the same effect is Matter of Pitou, 79 Misc. Rep. 384, 140 N. Y. Supp. 919. While joint ownership of personal property is now recognized by the courts (Kelly v. Beers, 194 N. Y. 49, 86 N. E. 980, 128 Am. St. Rep. 543) and by the statute law of the state (section 144 of the Banking Law [Consol. Laws 1909]), the respective rights and interests of the joint owners do not seem to be definitely fixed. As a matter of fact the expression "joint owners" when applied to personal property is not definitely descriptive; it conveys no well-defined meaning as to the respective rights of the owners of the property. For instance, in the matter under consideration all the money deposited with the trust company belonged to the decedent at the time the deposit was made. As soon as the money was deposited the decedent and her husband became joint owners of it. But immediately thereafter, and while the so-called joint ownership continued, the husband could draw the entire sum so deposited and use it for any purpose he desired. In other words, as soon as he drew it from the bank it became his individual property. It was joint property while it was in the bank; it became individual property as soon as it was drawn out. But if there was joint ownership of the deposit, each of the owners would have some right to the property, and this would be inconsistent with an absolute right on the part of either to dispose of all the property. Therefore it would appear that the expression is neither accurate nor definite. The deposit of money under circumstances similar to those in this matter would seem to constitute, not a joint ownership of the property, but a right on the part of either to draw any part of the money on deposit, with the absolute right in the survivor to the amount on deposit at the death of the other party to the arrangement. The right of the survivor to the amount on deposit is settled by authority. Kelly v. Beers, supra. As none of the property deposited with the trust company belonged to decedent's husband before the deposit was made, his right to draw any part of it or to take possession of what remained after the death of his wife must have been derived, either from a contract with the decedent, or through a gift from her. There is no evidence of any contractual obligation assumed by the husband as a consideration for obtaining the right to draw the money deposited by the decedent. This right must therefore have been a gift from the decedent.

[3] There was not, however, a valid gift inter vivos of all the

money on deposit, because in order to make such a gift it would be necessary that the donor should divest herself of dominion over the subject of the gift and deliver it to the donee. Gegan v. Union Trust Co., 129 App. Div. 184, 113 N. Y. Supp. 595, affirmed 198 N. Y. 541, 92 N. E. 1085. But the decedent did not divest herself of dominion over the property; she reserved the right to draw all of it and use it for her own purposes. The husband had, so far as the bank was concerned, the same right as the decedent to draw all the money on deposit, and the bank could not refuse payment to him. Whether the decedent could compel him to repay to her any sum withdrawn by him from the bank would depend upon the terms of the contract or agreement entered into by the parties at the time the deposit was made. The appraiser's report does not contain any evidence of such a contract or agreement. The declaration of joint ownership filed with the bank would justify the bank in paying the entire deposit to either the decedent or her husband, but I am inclined to think that it did not of itself divest the decedent of the right of ownership in the fund, and that she did not intend by such declaration that her husband could withdraw the entire amount on deposit and use it for his own purposes. The fact that she did not make a gift of the entire amount so deposited to her husband indicates that she did not desire to relinquish her right of ownership to the property. To the right which the husband had during the lifetime of his wife to draw any part of the money from the bank was added, upon her death, the absolute right of ownership to the amount then on deposit. This latter right he did not have before and could not have until her death. It was therefore a gift intended to take effect at her death within the meaning of the transfer tax statute (Consol. Laws 1909, c. 60, §§ 220–245), and the amount on deposit in the so-called joint account at the date of decedent's death is subject to a tax. That the deposit was made in the particular form above described for purposes of convenience rather than with the intention of conferring the right of ownership upon the husband is apparent from the affidavit made by her husband, in which it is stated that about five days before decedent's death she asked him to draw $15,000 from the bank and to use it in the purchase of an automobile and stock securities for himself. If it was understood between them that he had an equal right with her to the money on deposit, it would not be necessary for her to authorize him to draw $15,000 and use it for the purchase of property that was to belong to him. The $15,000 was withdrawn from the joint account by decedent's husband before her death and was deposited by him in his personal account. It was therefore a valid gift from the decedent to her husband. While it appears that this gift was made five days before decedent's death, it is alleged that at the time of making the gift she had no reason to apprehend her early demise, and as this allegation was not contradicted by the State Comptroller it cannot be held that the gift was made in contemplation of death. It is therefore exempt from taxation. The order fixing tax will be reversed, and the appraiser's report remitted to him for correction as indicated.

(82 Misc. Rep. 30.)

In re HALLIGAN'S ESTATE.

(Surrogate's Court, New York County. July, 1913.)

1. TRUSTS (§ 59*)—CONSTRUCTION—RIGHT TO REVOKE.
Where decedent deposited money in savings banks in his own name as trustee for his wife, and handed to his wife passbooks showing such fact, which books were subsequently kept at their home, but at no time declared that he was making a gift to her, the trust was revocable until his death.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 78–81; Dec. Dig. § 59.*]

2. GIFTS (§ 18*)—INTER VIVOS—VALIDITY—"GIFT INTER VIVOS."
It is essential to a valid "gift inter vivos" that there be a delivery to the donee of the thing constituting the gift, with an intention by the donor to transfer the right of ownership in and dominion over such thing.
[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 29–33; Dec. Dig. § 18.*
For other definitions, see Words and Phrases, vol. 4, pp. 3091–3093; vol. 8, p. 7671.]

3. TAXATION (§ 879*)—TRANSFER TAX—PROPERTY SUBJECT.
Money deposited by decedent in trust for his wife was subject to a transfer tax, where the trust was not irrevocable until his death and the property passed to her as a gift intended to take effect at or after death.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. § 879.*]

In the matter of the estate of James Halligan, deceased. From an order entered upon the report of a transfer tax appraiser fixing the tax, the executrix appeals. Affirmed.

Thomas E. Rush, of New York City (George Thoms, of New York City, of counsel, and Theodore du Moulin, of New York City, on the brief), for state comptroller.

Steele, De Friese & Steele, of New York City (Godfrey Goldmark, of New York City, of counsel), for Elizabeth A. Halligan.

COHALAN, S. The decedent died on the 9th day of September, 1912, a resident of this state. At various times prior to the date of his death he opened accounts with savings banks in this city, the caption of each account being "James Halligan, in trust for Elizabeth A. Halligan." The transfer tax appraiser found that the entire amount remaining on deposit with these banks at the date of decedent's death was the sum of $27,517. He included this amount in the taxable assets of decedent's estate. From the order entered upon his report the executrix has taken this appeal.

[1] Elizabeth A. Halligan, the executrix herein, was the wife of the decedent. She claims that the $27,517 deposited in the name of the decedent in trust for her was her individual property, having been given to her by the decedent as a gift inter vivos. The affidavits submitted to the appraiser on behalf of the estate allege that the decedent consulted with his wife before opening the accounts in the various savings banks, and that in some instances she went with him to the banks at the time the accounts were opened; that the decedent handed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

over to her the savings bank books showing the deposits made in the banks, and that she had possession of these books "at our place of residence" at the time of decedent's death.

[2] In order to constitute a valid gift inter vivos there must be a delivery to the donee of the thing constituting the gift, coupled with an intention on the part of the donor to transfer to the donee the right of ownership in and dominion over the property. Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531; Gannon v. McGuire, 160 N. Y. 476, 55 N. E. 7, 73 Am. St. Rep. 694; Hemmerich v. Union Dime Sav. Inst., 205 N. Y. 366, 98 N. E. 499. It is conceded that all the money deposited by the decedent as trustee for his wife belonged to him. The affidavits submitted to the appraiser on behalf of the estate do not allege that the decedent told his wife at the time he made the deposits that he was giving the money to her, nor do they allege that he said anything about a gift when he gave her the bank books. There is no allegation that the decedent gave the money deposited in the various banks as a gift to his wife. The circumstances surrounding the deposit and the possession of the books by the decedent's wife are entirely consistent with the assumption that the deposit was made in the name of decedent in trust for his wife as a matter of convenience, and that the books were given to her for the purpose of safe-keeping. Matter of Bolin, 136 N. Y. 177, 32 N. E. 626; Kelly v. Beers, 194 N. Y. 49, 86 N. E. 980, 128 Am. St. Rep. 543. As the court said in the Matter of Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900:

"A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as the delivery of the passbook or notice to the beneficiary."

But delivery of the passbook will not in itself make the trust irrevocable; there must be words of gift or a declaration that the depositor is thereby giving to the cestui que trust the money to the credit of the depositor in the bank which issued the passbook. Matthews v. Brooklyn Savings Bank, 208 N. Y. 508, 102 N. E. 520.

[3] As the decedent did not make a valid gift inter vivos of the money deposited in trust for his wife, and the trust was not irrevocable until the death of the decedent, the property passed to her as a gift intended to take effect at or after death, and is therefore, subject to a tax. Matter of Kline, 65 Misc. Rep. 446, 121 N. Y. Supp. 1090; Matter of Von Bernuth, 143 N. Y. Supp. 672.

Order fixing tax affirmed.

In re SZABO'S ESTATE.

(Surrogate's Court, New York County. October 30, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 24*) — ALIENS — RIGHT TO ADMINISTER — VICE CONSUL.

Where a subject of Hungary died testate but her property passed as in cases of intestacy, due to the death of the sole beneficiary under the will prior to the death of testatrix, the Austria-Hungarian vice consul was authorized to apply to the surrogate's court for the removal of the executor and for letters of administration to be issued to himself as the representative of testatrix's next of kin under the express provisions of the Austria-Hungary Treaty of June 26, 1871, art. 8 (17 Stat. 825), and the most favored nation clause of the Spanish Treaty of July 3, 1902, arts. 21, 27 (33 Stat. 2114, 2119), made applicable to Austria-Hungary by articles 4b and 15 of its treaty with the United States.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 132–140; Dec. Dig. § 24.*]

Judicial settlement of the estate of Rusena M. Szabo. Application by the Austria-Hungarian vice consul to revoke letters testamentary granted on such estate and to such consul as administrator, etc. Granted.

Arpad A. Kremer, of New York City, for petitioner.
Charles Goldzier, of New York City, for executor.

FOWLER, S. The testatrix was a subject of Austria-Hungary at the time of her death. She left a will admitted to probate by the Surrogate's Court of this county, upon which letters testamentary were issued to the respondent. The will effected no disposition of her property by reason of the fact that the sole beneficiary designated therein predeceased her. Her personal property, of which her estate consists, therefore passes as in cases of intestacy, and her next of kin entitled to the same are subjects of Austria-Hungary. The vice consul of that nation has brought this proceeding to remove the respondent and revoke his letters upon the grounds alleged in the petition and which are sufficient for the purpose, and the allegations are not disputed. The only question presented is as to the right of the consul to maintain the proceeding. I have no doubt that he has the right. This right is conferred on the consul by article 8 of the treaty of June 26, 1871 (17 Stat. 825), between his country and the United States, which gives to the consuls general, consuls, vice consuls, and other officials therein mentioned the right to apply to the judicial authorities within their district for the purpose of protecting the rights of their countrymen. It is further assured to him by articles 21 and 27 of the Spanish treaty of 1902 (33 Stat. 2114, 2119), entered into by Spain and this country, which is made applicable to Austria-Hungary by articles 4b and 15 of its treaty with the United States (17 Stat. 824, 831), which secures to its consuls general, consuls, vice consuls, and other designated officers the same privileges, powers, liberties, and immunities as similar functionaries of the most favored nation. The Spanish treaty with this country (1902, arts. 21 and 27) gives to consuls general, con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suls, vice consuls, and certain other mentioned officials the right to represent the absent next of kin of the citizens or subjects of their country who shall die within their consular jurisdiction for the purpose of protecting their rights and interest. Under these treaties there is no doubt of the ability of the vice consul who has initiated this proceeding to maintain it. Carpigiani v. Hall, 172 Ala. 287, 55 South. 248; Von Thodorovich v. Franz Josef Ben. Ass'n (C. C.) 154 Fed. 911; In re Alexander Nagy, N. Y. Law Jour., July 31, 1909, Surr. Decs. 1909, p. 464; Estate of Vincenzo Baglieri (Sur.) 137 N. Y. Supp. 175.

Application to revoke the letters of respondent granted. Notice decree for settlement.

In re VUKELIC'S ESTATE.

(Surrogate's Court, Monroe County. December 5, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 24*)—RIGHT TO APPOINTMENT OF ADMINISTRATOR.

The treaty between the United States and Austria-Hungary of June 26, 1871 (17 Stat. 831), by article 15 confers upon consular officers the same immunities and privileges granted to functionaries of the same class of the most favored nations. The treaty between United States and Sweden, proclaimed March 20, 1911 (37 Stat. 1487), by article 14 provides that, where a citizen of either country dies intestate in the other, the consular representatives of the nation to which deceased belongs shall, so far as the laws of either country will permit, have the right to be appointed administrator. *Held*, that the consular representative of the emperor of Austria is entitled to administer upon the estate of a subject of such emperor dying intestate in this county, leaving property therein to be administered.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 132–140; Dec. Dig. § 24.*]

Application for the removal of an administrator appointed for the estate of Mile Vukelic, deceased. Application granted.

John A. Millener, of Rochester, for administrator.

Geo. F. Slocum, of Rochester, for De Nyiri, Austrian Consular Agent.

BROWN, S. Application for the removal of the administrator heretofore appointed of the above-named estate and for the appointment of the consular agent of the Austria-Hungarian monarch for the Buffalo district, which district includes the county of Monroe.

It appears that Mile Vukelic, the decedent, died in the city of Rochester, Monroe county, N. Y., on or about the 8th day of August, 1912, at the age of 22 years; that at the time of his death he was a resident of the town of Gates in said county; that he left no will and died possessed of certain personal property within this state, the value of which, as stated in the petition, will not exceed the sum of $50; that the decedent left no real property, and that a cause of action exists in favor of the administrator of said decedent for the benefit of his next of kin by special provision of law; that the amount of damages

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to be recovered are unknown, and that it is impracticable to give a bond sufficient to cover the probable amount to be recovered therein; that the decedent was at the time of his death a subject of his majesty the Emperor of Austria and Apostolic King of Hungary; that the decedent left him surviving no widow and no descendant and left surviving a father, Marke Vukelic, residing at Rogulje, Austria-Hungary, as his only next of kin; that the petitioner herein, John de Nyiri, of the city of Buffalo, N. Y., is the consular agent of his majesty the Emperor of Austria and Apostolic King of Hungary for the consular district of Buffalo, which district includes the county of Monroe; that heretofore, and on or about the 10th day of September, 1912, one Nicholas Vukelic, claiming to be a first cousin of said decedent, filed a petition in the Surrogate's Court of Monroe county asking that letters be issued to him, and thereupon, without notice to the petitioner herein, letters of administration were issued to the said Nicholas Vukelic on or about the 10th day of September, 1912. The motion before the court is to set aside said appointment and to appoint said consular agent administrator of the deceased.

The rule of this court requires that notice should have been given to the consular agent, or a waiver of such notice secured from him, by the administrator heretofore appointed upon his application for appointment, but we shall not decide this application simply because that rule was violated, but we will consider the merits of the application and determine the application in this instance on the merits alone.

In the treaty between the United States and Sweden (37 Stat. 1487), proclaimed at Washington March 20, 1911, the second paragraph of article 14 of the treaty reads as follows:

"In the event of any citizens of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul general, consul, vice consul general, or vice consul of the nation to which the deceased may belong, or in his absence, the representative of such consul general, consul, vice consul general, or vice consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate."

The treaty with Austria-Hungary, art. 15 (17 Stat. 831), as well as the treaty with Italy, art. 17 (20 Stat. 732), confers upon consular officers the same liberties, prerogatives, immunities, and privileges granted to functionaries of the same class of the most favored nation. Under this clause, whatever rights and privileges are granted to the consular officers of the kingdom of Sweden are available to consular officers of the same grade representing the monarchy of Austria-Hungary and the kingdom of Italy.

Counsel for the first appointed administrator calls the court's attention to the decision of the United States Supreme Court in Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453, as authority for the position originally taken by the counsel for such administrator. By careful consideration of that case, however, it will be seen that that decision turned upon the proper construction to be given to the

word "intervene" in that portion of the treaty of the United States with Argentina which secured to the consular officers therein specified "the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased." The United States Supreme Court held that the word "intervene" did not authorize or provide for the appointment of any of the consular officers mentioned in the article as administrators of the estate of any decedent referred to therein. Since that decision authority for the right of a consular officer of a foreign government to administration upon the estate of one of his majesty's subjects must be looked for elsewhere than in the treaty with Argentina, and that authority is unmistakably found in the treaty with Sweden, of which a portion material to this subject is above quoted.

In the discussion of the Rocca v. Thompson Case, Justice Day, in his opinion, in arriving at the conclusion that the words of the Argentina treaty were not sufficient to justify the appointment of the Italian consul or his representative, called attention to the fact that treaties are generally very carefully drawn, and that, if in that treaty those words were meant to include appointment of the consul or his representative, language would have been so used as to make it clear that that was the intention, and cites the treaty with Sweden as showing that in that case clearer and different language was used relative to such appointments. That treaty was not capable of application to the case before the United States Supreme Court, because the issues therein arose in 1908, before the adoption of the treaty with Sweden.

Two cases involving the application of this treaty have recently been decided by Surrogate Fowler of the county of New York. One decision is in the Estate of Vincenze Baglieri, Deceased, reported in 137 N. Y. Supp. 175, in which the learned surrogate holds that under the Swedish treaty and the treaty between the United States and Paraguay of 1859, and the application of the "most favored nation" clause in the treaty with Italy, so far as they relate to the powers and rights of consular officers with reference to the administration of the estates of citizens of their respective countries, were conferred on like representatives of the Italian government, and held that it was obvious that the consul general of Italy was entitled to letters of administration on the estate of the intestate, who was a citizen of Italy and died in this country, in preference to the petitioner, who was a brother of the intestate and one of his next of kin. Subsequently, in the estate of Rusena M. Szabo, Deceased, reported in 143 N. Y. Supp. 678, Surrogate Fowler also held that the vice consul of the Emperor of Austria-Hungary had a right to have letters testamentary issued to a person named as executor in the will of the deceased revoked, where the will effected no disposition of her property, by reason of the fact that the sole beneficiary designated therein predeceased her, her personal property, which were the assets of her estate, passing as in cases of intestacy, and her next of kin, entitled thereto, are subjects of Austria-Hungary. He holds that this right is conferred by article 8 of the treaty of June 26, 1871 (17 Stat. 825) between Austria-Hungary and the United States, and further assured by articles 21 and 27 of the Spanish treaty of 1902 (33 Stat. 2114, 2119).

I am of the opinion that, under the provisions of our treaty with Austria-Hungary and the provisions of the treaty with Sweden and Paraguay, the representative of the consul of the Emperor of Austria-Hungary is entitled to letters of administration upon the estate of a subject of the Emperor of Austria-Hungary dying intestate in this county, leaving property to be administered therein, and that as a matter of right the petitioner herein, as such consular agent of his majesty the Emperor of Austria and Apostolic King of Hungary, for the district of Buffalo, is entitled to letters of administration upon the estate of Mile Vukelic, the deceased, and that the letters heretofore issued to Nicholas Vukelic should be revoked, and thereupon letters issued to the said John de Nyiri as such consular agent, upon his filing his oath of office and a bond, in form and amount to be approved by this court. Let an order be entered accordingly, without costs to either party as against the other.

(82 Misc. Rep. 10.)

In re ZIEGLER et al.

(Surrogate's Court, New York County. July, 1913.)

1. WILLS (§ 684*)—CONSTRUCTION.

Under a will providing that the accumulated income of testator's estate should be kept "with" the corpus of the estate until his son attained his majority, such income did not become part of the corpus of the estate, but was payable to the son upon attaining his majority; the income of a trust estate which is accumulated during the minority of the life beneficiary not being susceptible of being added to the corpus when such beneficiary reaches his majority, and of being thereafter held with the principal of the trust fund, but it being essential that such accumulation be paid to the beneficiary upon attaining his majority.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614–1628; Dec. Dig. § 684.*]

2. PERPETUITIES (§ 9*)—VALIDITY—INCOME.

While under Real Property Law (Consol. Laws 1909, c. 50) § 61, and Personal Property Law (Consol. Laws 1909, c. 41) § 16, a trust for the accumulation of income during the minority of a testator's son and for his benefit is valid, yet under Personal Property Law, § 16, subd. 3, a trust for accumulation for testator's son, not payable to the testator's son immediately upon attaining his majority, but to be held thereafter payable to adults in the event of the death of the cestui que trust before reaching the age of 25, will be void as to that portion directing retention after minority and payment to adults.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 67–73; Dec. Dig. § 9.*]

3. WILLS (§ 684*)—CONSTRUCTION—PRINCIPAL AND INCOME.

Expenses incurred by the executors in making permanent improvements, which increased the value of the land and caused it to sell at a higher price, and thus added to the value of the corpus of the estate and the interests of the remaindermen, were chargeable to principal and not to income.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614–1628; Dec. Dig. § 684.*]

4. EXECUTORS AND ADMINISTRATORS (§ 513*)—BINDING EFFECT—ACCOUNTING.

Where upon an annual accounting made by executors and trustees of an estate, expenditures for improving real estate belonging thereto were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charged to income, and all interested persons appeared but made no objection to the decree entered, such decree was binding on them until reversed, and could not be attacked in a collateral proceeding, such as a subsequent accounting.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267–2291; Dec. Dig. § 513;* Judgment, Cent. Dig. § 1070.]

Proceedings on the Judicial Settlement of the Account of E. Matilda Ziegler and others, as executors and trustees under the will of William Ziegler, deceased. Decreed according to opinion.

William J. Underwood, of New York City, for executors and trustees.

Swan & Moore, of New York City (John M. Bowers, of New York City, of counsel), for William Ziegler, Jr.

Patton & Patton, of New York City; for George W. Brandt.

COHALAN, S. The executors and trustees under the last will of the decedent having filed in this court an account of their proceedings, objections thereto were filed by George W. Brandt, a contingent remainderman, upon the following grounds: First, that the income from the estate should not be kept separate, but should be added to the corpus; second, that the unexpended balance of income was not payable to William Ziegler when he arrived at the age of 21, but that it became a part of the corpus of the estate and is to be disposed of in the manner provided for the payment and distribution of the corpus.

William Ziegler, the cestui que trust and residuary legatee under the will of the decedent, objects to the account upon the ground that the sum of $332,384.31 has been charged by the trustees against income instead of against capital.

A proper disposition of the objections raised by Brandt requires a construction of the following provisions of decedent's will:

"5. All the rest and residue of my estate I give, devise and bequeath to my son William, after and subject to the following provisions: 6. I appoint my said wife, William S. Champ, William J. Gaynor and also my said son, at the age of twenty-one years, my executors under this will. They shall take, care for and invest my estate in safe securities, collect all the rents and incomes, pay out of the same all necessary charges and expenses and all annuities or sums given by this will, and also for the support and education of my son William what may be necessary. The balance of income they shall invest in safe securities and keep with the corpus of my estate until my said son comes twenty-one years of age. After he comes of age he shall receive the entire net income. When he comes twenty-five years of age they shall turn over to him another one-quarter of the said corpus. They shall turn over to him another quarter thereof at the age of thirty, another at the age of thirty-five and the last quarter at the age of forty. If he should die before me without lawful issue or before he gets the said corpus, then the corpus, or the part of it he has not received, to go to my brothers and sisters and their heirs."

[1] While there is no direction in paragraph 6 to pay the entire balance of accumulated income to his son, William, when he arrives at the age of 21, the gift of the rest and residue of the estate contained in paragraph 5 necessarily includes the income produced by such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

residue, except as limited by the provisions of the succeeding paragraph. That paragraph provides that only so much of the income as may be necessary for his support and education shall be paid to him until he arrives at the age of 21, but that the balance shall be accumulated and invested until that time. When that time arrives there is no further restriction placed upon his right to the possession of the accumulated income, and he immediately becomes entitled to it. If the testator did not intend to give the accumulated income to his son when he arrived at the age of 21 it would be unnecessary for him to add to the words "the balance of income they shall invest in safe securities and keep with the corpus of my estate" the qualifying clause "until my said son comes twenty-one years of age." Without the latter clause it would be clear that the testator intended that the accumulated income should become part of the corpus of the estate, to be paid in the manner provided for the disposition of the corpus; but by adding "until my said son comes twenty-one years of age" the testator clearly indicated that the accumulated income was not to become a part of the corpus and paid to his son at the times and in the proportion prescribed by that part of the will disposing of the corpus. Besides, the testator does not say that the accumulated income shall form a part of the corpus of the estate or that it shall be intermingled with the trust funds, but that it shall be kept with the corpus of the estate; that is, retained by the trustees with the corpus of the estate until the time for payment arrives. But the income of a trust estate which has been accumulated during the minority of a life beneficiary cannot be added to the corpus when such beneficiary reaches his majority and thereafter held in trust with the principal of the trust fund, but such accumulation must be paid to the beneficiary upon his attaining his majority. Tweddell v. New York Life Ins. & Trust Co., 82 Hun, 602, 31 N. Y. Supp. 764. As the testator did not intend that the accumulated income should become part of the corpus, he must have intended that it should be paid to his son when he attained his majority.

[2] While a trust for the accumulation of income during the minority of testator's son and for his benefit would be valid (Real Prop. Law [Consol. Laws 1909, c. 50] § 61; Per. Prop. Law [Consol. Laws 1909, c. 41] § 16), a trust for accumulation, which would not be payable to the testator's son immediately upon his attaining his majority, but which would be held by the trustees after the termination of such minority and payable to adults in the event of the cestui que trust dying before reaching the age of 25, would be void as to that portion which directed the retention of the accumulations in the hands of the trustees after the minority of the beneficiary and their payment to adults. Per. Prop. Law, § 16, subd. 3; Barbour v. De Forest, 95 N. Y. 13; Pray v. Hegeman, 92 N. Y. 508. Even if the will were construed so as to hold that there is no provision made for the payment of the accumulated income, it would nevertheless go to the person entitled to the next eventual estate, namely, the testator's son. Duncklee v. Butler, 38 App. Div. 99, 56 N. Y. Supp. 491. Accumulations vest in a minor immediately, and if he die during his minority, the accumulations become a part of his estate. Smith v. Campbell, 75 Hun, 155,

26 N. Y. Supp. 1087; Smith v. Parsons, 146 N. Y. 116, 40 N. E. 736. It is therefore evident that the income accumulated by the trustees during the minority of testator's son, William Ziegler, should be paid to him when he arrived at the age of twenty-one.

[3] At the time of decedent's death he owned considerable unimproved and unproductive real estate, and the executors, who, under the will of the decedent, were given a power in trust to sell the real estate, expended large sums of money in improving it. They thus materially increased the value of the real estate, and sold it for a much higher price than they could have obtained for it without the improvements effected by them. The proceeds of the sale of this real estate were turned over by the executors to themselves as trustees, and the trustees thereupon charged to income account the expenditures made in the improvement and sale of the real estate. The cestui que trust contends that the expenses incurred in improving the real estate and effecting its sale should be charged to the corpus. The improvements made by the executors to the realty were permanent improvements. They increased the value of the land, caused it to sell at a higher price and thus added to the value of the corpus and the interests of the remaindermen. The amount expended in such improvements and in effecting advantageous sales of the property should therefore be deducted from the corpus of the estate. The cost of permanent repairs to realty should be charged against the capital of the estate. Stevens v. Melcher, 152 N. Y. 552, 46 N. E. 965; Chamberlin v. Gleason, 163 N. Y. 214, 57 N. E. 487. It would therefore appear that the cost of improvements effected by the executors upon the unimproved real estate held by the testator at the time of his death should be charged to corpus and not to income.

[4] But it appears that in the accounts filed by the executors and trustees in the years 1906, 1907, 1908, 1909, 1910, and 1911, decrees of this court were entered providing that such expenses for the improvement and sale of the real estate should be charged to income and not to principal. The question was not litigated before the court, no objection having been made by either party to the proposed decree. William Ziegler, who makes the objection at the present time, appeared in all of these accountings by a special guardian duly appointed by this court, and he made no objection to the decrees directing that the amounts expended in improving the realty should be charged to income and not to principal. As the court had jurisdiction to enter the decree, and as all the parties appeared or duly waived notice of appearance, the decrees heretofore entered upon the accountings in this matter must be regarded as conclusive, and subject only to attack upon a direct proceeding to review them. Bolton v. Schriever, 135 N. Y. 65, 31 N. E. 1001, 18 L. R. A. 242; Matter of Elting, 93 App. Div. 516, 87 N. Y. Supp. 833. Upon the former accountings the court had power to decide every question involved, and it must be presumed that it properly performed its duty. All the parties were before it, and the infant was represented in the manner provided by statute, and if the question as to the proper fund against which the expenses of improving the real estate should be charged was not decided, it

could have been, and the parties are therefore bound by the decrees as to every matter that could have been tried or decided in the accountings. O'Donoghue v. Boies, 159 N. Y. 106, 53 N. E. 537. The only question that could be raised at this time as to the decrees heretofore entered by this court is the question of jurisdiction, and as the jurisdiction of the court is established by the allegation of the necessary jurisdictional facts, the decrees cannot be attacked in a collateral proceeding. The decrees being conclusive so long as they are unreversed, the parties are bound by them. Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425, 76 N. E. 480; Matter of Peck, 131 App. Div. 81, 115 N. Y. Supp. 239. Therefore the decree of this court upon the previous accountings cannot be disturbed in this proceeding. In so far, however, as the unimproved real estate has been improved and sold by the executors since the last accounting, and the proceeds turned over to themselves as trustees, the expenses incurred in the improvement and sale of the property will be charged to the corpus of the estate and not to the income.

Submit decree in accordance with this decision, and tax costs on notice.

Decreed accordingly.

(82 Misc. Rep. 336)

In re MULLIGAN.

(Surrogates' Court, New York County. October 9, 1913.)

1. WITNESSES (§ 140*)—COMPETENCY—EXECUTRIX—CLAIMS FOR INDEBTEDNESS PAID.

Where an executrix paid claims of her husband against testator for counsel fees and money loaned, she was incompetent to testify to a conversation between testator and her husband in support of the claims on objections being made to her claim of credit therefor in her account, under Code Civ. Pro. § 829, declaring that a person shall be incompetent to testify as to transactions and communications with persons since deceased, etc.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 598–618; Dec. Dig. § 140.*]

2. WITNESSES (§ 140*)—COMPETENCY—EXECUTRIX—CLAIMS FOR INDEBTEDNESS PAID.

A creditor of a person since deceased, whose claim has been paid by the executrix, is a competent witness in her favor to establish the claim in order that the executrix may be allowed credit therefor in her account.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 598–618; Dec. Dig. § 140.*]

3. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS—PROOF—UNSUPPORTED TESTIMONY OF CLAIMANT.

A claim for money loaned to testator and for legal services rendered to him during his lifetime, not sustained by any written evidence, could not be established by the uncorroborated evidence of the claimant and his wife, who should be regarded as parties in interest.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901–903½, 1858, 1861–1863, 1865, 1866, 1871–1874, 1876; Dec. Dig. § 221.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS—EVIDENCE—RELEVANCY—SURROUNDING CIRCUMSTANCES.

On an issue as to whether a loan had been made by an attorney to his client, since deceased, evidence of circumstances surrounding the client at the time, showing that he was not in necessitous circumstances or in need of money, was admissible, especially where there was no written evidence of the loan.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901–903½, 1858, 1861–1863, 1865, 1866, 1871–1874, 1876; Dec. Dig. § 221.*]

Judicial settlement of the account of Agnes K. Mulligan, as executrix of John Hartmann, deceased. Objections having been filed to credits claimed by the executrix for payments made by her to her husband for a counsel fee, for money alleged to have been loaned, and for services rendered to the testator in his lifetime, such claims, except as to the counsel fee of $250, were expunged after hearing.

William A. Keating, of New York City (Leslie J. Tompkins, of New York City, of counsel), for executrix.

Osborne, Lamb & Garvan, of New York City (Gilbert D. Lamb, of New York City, of counsel), for contestant.

FOWLER, S. Judgment has been long delayed in this matter, in which objections were filed to the account of the executrix and the hearings on the objections brought on before the surrogate. The hearings were very prolonged, the evidence is voluminous, and the matter has already occupied too much time, to the prejudice of important matters pending in this court. It is only in much poorer estates than this that the surrogate can be expected to hear in person such matters as those here involved. Such matters are referable properly to referees designated for the purpose.

The executrix in her account charges herself with property in the sum of $18,653.50. This is the dead man's estate. She credits herself with the payment to her husband of $250 counsel fee and expenses of administration. Mr. Mulligan is an attorney and counselor at law and, as it happens, the husband of the executrix herself. She also credits herself with $315 paid to William A. Keating for the collection of a $3,000 note with interest, and with the large sum of $7,075.33 paid to the said William G. Mulligan for disbursements, money claimed to have been loaned by him to John Hartmann, the deceased, during his lifetime and for professional services said to have been rendered by Mr. Mulligan to the late Mr. Hartmann during the latter's life. The widow of the deceased, who is in law entitled to all the surplus over the debts, has filed objections to these three items just noticed. The objection to the item of $315, paid to William A. Keating for the collection of the $3,000 note, was, however, withdrawn upon the hearing and is out of the case.

The testimony given in on the disputed items discloses that the deceased had considerable domestic trouble of no very serious kind. He and his wife in later life disagreed about money and they were at times not on the best of terms, and it is claimed that Mr. Hartmann was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fearful that Mrs. Hartmann would obtain possession of some of his property, of which he was very careful, and he was desirous of placing the estate that he possessed so as to prevent his wife from gaining control of any of it. It is conceded that Mr. Hartmann had been arrested in New Jersey for an assault on his wife. This was hardly due to his wife's action. The public authorities were responsible for this prosecution. In any event, then it was that a friend of Mr. Hartmann and Mr. Mulligan told Mr. Hartmann that Mr. William G. Mulligan, an attorney and counselor at law at No. 461 East Tremont avenue, in the borough of the Bronx, was a good man and that he had better go to call on this lawyer, who would probably be able to advise him in his difficulties. The deceased accordingly called on Mr. Mulligan professionally and had many conferences with him. Mr. Mulligan about this time drew a will for the deceased, in which Agnes K. Mulligan, the present executrix, Mr. Mulligan's wife and associate with him in business, was named sole executrix. In time Mr. Hartmann came to die, and Mrs. Mulligan as the sole executrix named in the will took charge of his estate and almost immediately proceeded to pay out of it to her husband, as she states in her account, the relatively large items which are now objected to by Mrs. Hartmann, the testator's widow, and which are the subject of this judicial investigation before me. It may be that the close relationship existing between Mr. Mulligan and the executrix did not influence her action in the premises; but certainly this relationship and the circumstances hereafter indicated are quite sufficient to place upon her the burden of showing the propriety of payments by her to her own husband most clearly and by good and preponderating proofs. I am surprised that educated persons of delicate sensibilities should have allowed themselves even to drift into the position disclosed on the hearing in this matter and by the account of the executrix. The executrix herself was trained in the law. As persons trained in the elevated and most responsible profession of the law, both Mr. and Mrs. Mulligan ought willingly to bear the burden if they are unable fully to discharge the obligation cast upon them by even unfortunate or unfavorable circumstances. In respect of the execution of trusts by lawyers, I am inclined to be very strict in my inferences, as lawyers particularly are bound by professional obligations, in addition to the obligations ordinarily imposed by conscience and good faith on trustees. The dignity of the profession of the law and the welfare of society are not promoted by any indulgence to lawyers in respect of their dealings with their clients. In such matters the lawyers' proofs should be always high in order to prevail in this court.

[1] In a proceeding of this character, the accountant executrix, who has paid bills of the kind objected to, is in law held incompetent to testify to a conversation between the payee and the deceased, if she seek to be allowed the payment of such bills. Section 829, Code Civ. Pro.; Matter of Smith, 153 N. Y. 124, 47 N. E. 33; Matter of Knibbs, 108 App. Div. 134, 96 N. Y. Supp. 40.

[2, 3] But it has been held that the party whose claim is paid is competent to testify, as he is not a party to the proceeding or interested in the event, nor does the executrix derive title through or under such

creditor. Section 829, Code Civ. Pro.; Glennan v. Rochester Trust, etc., Co., 152 App. Div. 316, 136 N. Y. Supp. 747; Matter of Frazer, 92 N. Y. 239. I was at some pains to follow these precedents on the hearing, although to my mind both Mr. and Mrs. Mulligan would have been incompetent as witnesses at common law, which seems to me to afford the more just rule. The Code and the rulings of our courts thereon have, however, rendered Mr. Mulligan competent to give evidence of these transactions with the late Mr. Hartmann, and these rulings I obeyed. But Mr. Mulligan's testimony is insufficient of itself. He is virtually the claimant against the dead man's estate, and the unsupported testimony of claimants is generally regarded as insufficient in such cases. Beckett v. Ramsdale, L. R. 7, Ch. D. 177.

The principal issues concern the validity of the claims for professional services rendered by William G. Mulligan during the lifetime of the deceased, amounting to $4,655.33, and the amounts paid William G. Mulligan for moneys loaned to John Hartmann during his lifetime, amounting to $2,380, both of which large items were paid by the executrix; she then being the wife of the alleged creditor. These she paid quickly, though the account discloses she contests the funeral bill for the burial of Mr. Hartmann. The claims in question are supported solely by the testimony of Mr. and Mrs. Mulligan and Edward Mulligan, a brother and employé of Mr. Mulligan. No written contract between Mr. Mulligan and Mr. Hartmann, as to amounts to be charged by Mr. Mulligan for his alleged professional services, was produced, and I do not think that there ever was such a written contract. These professional services are set forth in the bill of particulars and are as follows: For the collection of $14,303.35 from Pratt & McAlpin, former attorneys for Mr. Hartmann, $1,430.33. It appears that this particular sum was out on bond and mortgage; that Pratt & McAlpin, attorneys for John Hartmann, really collected this money from the mortgagor; and that Mr. Hartmann desired only to take possession of this money, and almost all that Mr. Mulligan did was to make an oral demand on Messrs. Pratt & McAlpin by calling them up on the telephone and telling them that he wanted the money paid over on behalf of Mr. Hartmann. The money was speedily paid over, but not, I think, through Mr. Mulligan's professional activities. Yet for this Mr. Mulligan charged the estate $1,430.33, pursuant, as he testifies, to an agreement with Mr. Hartmann that he was to receive 10 per cent. of whatever he collected. That Mr. Hartmann could ever have agreed to pay to Mr. Mulligan 10 per cent. for the collection of money I am not thoroughly persuaded. At least I think more evidence is required in law in this instance. The money then belonged to the thrifty Mr. Hartmann and was merely resting in the hands of his former attorneys, Messrs. Pratt & McAlpin, by reason of their having collected the principal when the mortgage held by Mr. Hartmann fell due, and was paid off in due course. Messrs. Pratt & McAlpin were always ready to pay it over on demand. If Mr. Hartmann agreed to pay the 10 per cent., certainly Mr. Mulligan is entitled to receive it, but the only evidence as to this agreement was given either by Mr. Mulligan himself or by Mrs. Mulligan, both interested witnesses. It

seems to me that this is not enough in this case, as the circumstantial evidence rebuts this claim sufficiently to put Mrs. Mulligan, the executrix, to better and more disinterested proof of this item than any disclosed on the hearing.

The balance of the claim paid to Mr. Mulligan for his counsel fees is made up of services rendered by him from January 1, 1907, to March 4, 1909, and there are very few days in all that time, according to the very rough and inartificial bill of particulars furnished by Mr. Mulligan, that Mr. Hartmann did not call and spend at least two hours and sometimes as high as six hours in conference with Mr. Mulligan. What they talked about is not disclosed. It is true that Mr. Hartmann had been arrested for assaulting his wife and that Mr. Mulligan performed some slight professional services with reference to this arrest in New Jersey, but both Mr. and Mrs. Wenninger testify that Mr. Mulligan said he would make no charge for such services. It appears that divorce proceedings were also threatened by Mrs. Hartmann, and that then Mr. Mulligan prepared agreements between John Hartmann and his wife in an attempt to settle their matrimonial differences. Mr. Hartmann and his wife were, as matter of fact, finally reconciled, and an agreement was signed by which Mrs. Hartmann was to receive certain moneys, viz., $40 a month. No divorce proceedings were begun.

[4] Mr. Mulligan also drew a will for the deceased, but all the other professional services rendered by him on his own showing consist of conferences. As Mr. Hartmann's estate was not great and his condition in life was that of a relatively poor man, the subject-matter of these conferences could have been of no great importance. The fact was that Mr. Hartmann was induced to occupy rooms over the business office occupied by Mr. Mulligan and his wife. Mr. Hartmann himself thus was a neighbor and not engaged in any business. He had been prior to this, I believe, a tailor by occupation and had amassed some little estate. It would appear from the bill of particulars that Mr. Hartmann, being out of business, stopped at the Mulligan office nearly every day; in fact, the bill of particulars shows that from 1907 to 1909 he was apparently charged for almost every minute of the time he passed with Mr. Mulligan. All these conferences and services outside of the collection of the $14,303.35, for which $1,430.33 was charged, are aggregated and a lump sum of $3,255.33 charged. Mr. and Mrs. Mulligan alone testify to the value of this kind of professional services. No proof is given that any bill was ever rendered for them to Mr. Hartmann, except the testimony of Mr. and Mrs. Mulligan themselves that they gave him a statement of some kind. The statement in question was not, however, found among Mr. Hartmann's other papers. To my mind, the circumstantial evidence on this point, offered in behalf of the dead Mr. Hartmann, is not consistent with the evidence of Mr. and Mrs. Mulligan. At the time of his death Mr. Hartmann had not a bill outstanding, except $30, due to a doctor for services during his last illness. He was a careful, thrifty, prompt payer of debts, was Mr. Hartmann. This, it is argued, would indicate that Mr. Hartmann was a man who paid all his bills when they were

presented and did not let them accumulate for two or three years, as in this instance in dispute. Indeed, Mr. Pratt, his former attorney, testified that Mr. Hartmann always insisted on moderate charges and on paying his law bills immediately. In such a case as this, the testator's circumstances are, I think, some evidence according to precedent. Dowling v. Dowling, 10 Ir. Ch. L. R., 236.

The item of $2,380, money said to have been loaned to Mr. Hartmann by Mr. Mulligan between March 23, 1907, and January 30, 1908, is made up as follows: March 23d, loan to Mr. Hartmann, $800; April 2, 1907, $40; January 3, 1908, $40; January 24, 1908, $400; January 25, 1908, $275; January 27, 1908, $100; January 29, 1908, $400; January 30, 1908, $325. No vouchers whatever were produced corroborative of these alleged loans. The only proof that this money was ever loaned to Mr. Hartmann is the testimony of Mr. Mulligan and his wife and Edward Mulligan, a brother of Mr. Mulligan. The transactions were stated, I think, to have been in cash. Mrs. Mulligan testified that at the time each loan was made a receipt was taken, and that these receipts were all lost. This is most unfortunate under the circumstances for this executrix, for at the time of these alleged loans to Mr. Hartmann it appeared that Mr. Mulligan was in the possession of a $10,000 mortgage made or assigned to Mr. Hartmann and of $4,000 in cash, for which he had given Mr. Hartmann a promissory note, signed by himself and his wife, this executrix. It seems extraordinary that if Mr. Mulligan had then $4,000 of Mr. Hartmann's money on hand that Mr. Hartmann should wish to borrow money from Mr. Mulligan. The explanation of this discrepancy, given by Mr. Mulligan himself, is that Mr. Hartmann had agreed to the payment of $40 a month to his wife, and that Mr. Hartmann wanted to keep his money intact, so as to produce a sufficient income to meet the agreement with the wife, and that he did not want to break into his principal in any way, and besides that he did not want his wife to know that he was possessed of this money. To my mind any one of these reasons surpasses three. It does appear also from the testimony of Mr. Wenninger that he had paid Mr. Hartmann $700 in cash just before Mr. Mulligan states he let Mr. Hartmann have $800, and it also appears that Mr. Hartmann had had in cash at that time $303.35 out of the $14,303.35 collected from Messrs. Pratt & McAlpin. Now, Mr. Hartmann was in no business at that time, and his mode of life was very small. This would indicate that there was no apparent necessity for Mr. Hartmann's procuring a loan at that particular time from Mr. Mulligan. This is of course very negative evidence, but it finds some support in the books. Dowling v. Dowling, supra.

In regard to the $250 counsel fees paid to Mr. Mulligan in the matter of the probate of the will and the transfer tax and the accounting, etc., I think the objection should be overruled, as that is a fair and reasonable sum.

I am of the opinion, in so far as the objection to the payment of counsel fees in the sum of $4,655.33 is concerned, that an allowance of $250 to cover all, including the collection of the $14,303.35 from Pratt & McAlpin, would have been ample compensation for Mr. Mulli-

gan, and that amount I am willing to allow to the executrix, but no more. With regard to the loans alleged to have been made by Mr. Mulligan to Mr. Hartmann, amounting to $2,380, I am convinced that insufficient evidence has under the circumstances of this case been given to sanction their repayment by the executrix out of the funds of the estate, and that the executrix should be surcharged in her account with the amount of the same. Settle decree accordingly.

(82 Misc. Rep. 25.)

In re TURNER'S ESTATE.

(Surrogate's Court, New York County. July, 1913.)

1. TAXATION (§ 886½*)—TRANSFER TAX—PROPERTY SUBJECT.
   Where the power of appointment of the remainder, given by will to the last surviving life tenant, was not absolute but was contingent on all testatrix's children dying without leaving issue surviving them, the remainders were taxable at 1 and not at 5 per cent.
   [Ed. Note.—For other cases, see Taxation, Dec. Dig. § 886½.*]

2. PERPETUITIES (§ 6*)—VALIDITY—RESTRICTION ON ALIENATION.
   Where a nonresident testatrix devised her real estate to trustees with direction to pay the income to her three daughters during their respective lives and upon the death of any one to pay her share to her issue or, if none, to her surviving sisters, and upon the death of the daughters without issue the property was to be disposed of according to the will of the daughter last dying, and where none of the daughters had issue at testatrix's death, the trust was void as suspending the power of alienation for more than two lives in being in violation of Real Property Law (Consol. Laws 1909, c. 50) § 42.
   [Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4–47, 49–53, 56; Dec. Dig. § 6.*]

3. WILLS (§ 70*)—VALIDITY—WHAT LAW GOVERNS.
   The validity of a provision of a nonresident's will disposing of New York real estate is governed by New York laws.
   [Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 184–186; Dec. Dig. § 70.*]

In the matter of the estate of Sarah Buckley Turner, deceased. From an order assessing and affixing a transfer tax, the executrices appeal. Reversed.

Adolph Sonnenthal, of New York City, for State Comptroller.
Whitridge, Butler & Rice, of New York City, for petitioners.

COHALAN, S. The appeal by the executrices from the order assessing a tax upon the decedent's estate presents for determination the following questions: First, whether the remainders after the life estate of decedent's children are taxable at 5 per cent. or 1 per cent.; second, whether the appraiser erred in his valuation of the decedent's real estate in this county.

The decedent, who was a resident of Italy, died on the 9th day of August, 1912, leaving real estate situate in this state. Her will was duly admitted to probate in this county. The executrices contend that under the provisions of the will the powers of appointment given to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

decedent's children are contingent, and that, in the event of the grantees failing to exercise the power, the property passes to decedent's grandchildren, who are beneficiaries of the 1 per cent. class. The appraiser reported that the remainders are taxable as passing to beneficiaries of the 5 per cent. class.

[1] If the powers of appointment are contingent, the remainders are presently taxable at 1 per cent. Matter of Burgess, 204 N. Y. 265, 97 N. E. 591. If, however, the powers of appointment are absolute, the remainders over which such powers may be exercised are not taxable until such time as the powers have actually been exercised. Matter of Howe, 86 App. Div. 286, 83 N. Y. Supp. 825, affirmed 176 N. Y. 570, 68 N. E. 1118. It is therefore necessary for the surrogate to construe the will of the decedent in order to determine whether the powers of appointment are contingent or absolute and whether the remainders are taxable at 5 per cent. or 1 per cent. The following are the clauses of the will that are material to the questions under consideration:

"I appoint as executrices of this my will and as trustees of my real estate in the city of New York my daughters Ellinor and Juliet or the survivor of them, and I hereby give and bequeath to my said daughters and to my daughter Jeanie a life interest in my said real estate. But shall there be issue of the said marriage or marriages, the child or children shall succeed to his, her or their mother's life interest in her share of my said real estate, which share shall pass to such child or children absolutely and in fee immediately upon the decease of my last surviving daughter in equal shares or in such shares as their mother or mothers, my said daughter or daughters, shall have directed by any deed of appointment or by her or their last will and testament, and shall any of my said daughters decease unmarried, her or their share of my real estate shall pass to her or their sister or sisters during their life or lives, and upon the decease of the last of my daughters the life interest or interests which she may have enjoyed in the said trust estate shall be divided absolutely and in fee between any of the issue of my three daughters, and the same shall succeed per stirpes and not per capita. And shall all of my said three daughters decease leaving no issue surviving, then, and in such event, my said property shall pass absolutely to such person or persons as my last surviving daughter shall appoint by her last will and testament or by any deed of appointment, and failing any such disposition by will or by power of appointment, I hereby give and bequeath the said property absolutely to my next of kin."

The decedent was survived by her three daughters, Ellinor B. Turner, Juliet Turner, and Jeanie Turner Coppinger, aged 54, 46, and 44 years, respectively, at the date of decedent's death. Ellinor and Juliet were unmarried; Jeanie was married but had no issue. It is evident that the power of appointment given to the last survivor is contingent upon all the decedent's children dying without leaving issue them surviving.

[2] But an examination of the will suggests the important question as to whether the trust is not invalid as suspending the power of alienation for more than two lives in being.

[3] The decedent left no personal property in this state. Therefore her will, in so far as it attempts to dispose of real estate, is to be construed in accordance with the laws of this state. Code Civ. Pro. § 2694; Matter of Majot, 199 N. Y. 29, 92 N. E. 402; White v. Howard,

46 N. Y. 144. Section 42 of the Real Property Law (Consol. Laws 1909, c. 50) provides that:

"Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate."

It is not sufficient that the property might under certain contingencies vest so that it would be alienable during the lives of two persons in being at the date of decedent's death, as the violation of the statute is not cured by the happening of fortuitous circumstances which permit such a vesting of the estate during two lives in being as would prevent an illegal suspension. Morton Trust Co. v. Sands, 122 App. Div. 691, 107 N. Y. Supp. 698. If the condition or limitation is such that it may by any possibility limit the power of alienation to more than two lives in being at the time of the creation of the estate, the grant is inoperative and void. Schettler v. Smith, 41 N. Y. 328; Lee v. Tower, 124 N. Y. 370, 26 N. E. 943. Applying these principles to the will under consideration, it appears that, as none of the children of the decedent had issue at the time of her death, the remainder was not vested and the property could not under these circumstances be aliened until the death of the last of the three daughters, because the will provides that, upon the death of the first of the daughters who may die without leaving issue her surviving, her share shall be paid to the surviving daughters during their lives. This means that the surviving sisters shall enjoy the share of the income to which their deceased sister was entitled. It does not say that her share of the estate will be paid to the surviving daughters. This direction that the share of the income of a deceased daughter shall be paid to the surviving daughters shows that the intestate intended that the trust estate should remain undivided until the death of the last survivor. Upon the death of the next daughter who may die without leaving issue, her share of the income, together with one-half of her deceased sister's share, is to be paid to the surviving daughter, but no part of the trust fund would then be alienable by the last survivor, because the will provides that it is only in the event of her dying without issue that she may dispose of the property by power of appointment; and, as it cannot be said while she is living that she may not have issue, it is not until her death that the property can be aliened. It therefore appears that, in the event of decedent's three daughters dying without issue them surviving, the power of alienation of decedent's real estate in this state would be suspended for more than two lives in being at the time of the creation of the estate. The trust is therefore void (Farmers' Loan & Trust Co. v. Kip, 192 N. Y. 266, 85 N. E. 59; Leach v. Godwin, 198 N. Y. 35, 91 N. E. 288), and the decedent died intestate as to the real estate situated in this state. As the property descends to decedent's children, its value is presently taxable at the rate of 1 per cent.

Upon the hearing before the appraiser, real estate experts were examined on behalf of the estate in order to show the value of decedent's real property in this county. A real estate expert was also examined

on behalf of the state comptroller. There was a material difference between their estimates of the value of decedent's real property. The appraiser adopted the valuation of the state comptroller's expert. An examination of the testimony shows that this valuation was not unreasonable or unwarranted, and the surrogate, therefore, will not interfere with the finding of the appraiser.

The order fixing tax will be reversed, and the appraiser's report remitted to him for correction as indicated.

Order reversed.

(82 Misc. Rep. 1.)

In re BARTHOLOMEW'S WILL.

(Surrogate's Court, Schoharie County. July, 1913.)

1. WILLS (§ 858*)—LAPSED LEGACY—DISPOSITION.

A testator, after giving $1,000 to his wife, gave the use of all his property over and above the $1,000 to his wife until their youngest child arrived at the age of 21, at which time, of the property "not above bequeathed to my wife," he gave $1,000 to a daughter, and the balance to a son. *Held*, that the bequest to the son was not a residuary bequest, there being no apparent intention that he should take whatever should fail to pass by the prior provisions of the will, but was merely a bequest of the balance of the particular fund remaining after taking $1,000 from the estate; and hence, the wife having died before the testator, the legacy to her lapsed and passed as in case of intestacy to the children equally.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2173–2183; Dec. Dig. § 858.*]

2. WILLS (§ 487*)—CONSTRUCTION—SURROUNDING CIRCUMSTANCES.

In arriving at the scope and meaning of a clause in a will disposing of a balance or residuum, the court will look, not only at the language employed, but the surrounding circumstances, to determine the testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026–1032; Dec. Dig. § 487.*]

3. WILLS (§ 671*)—NATURE OF ESTATES CREATED—TRUSTS.

A testator, after a legacy to his wife, gave to her the use of all of his real and personal estate, over and above such legacy, until their youngest child arrived at the age of 21, at which time it was to be divided, the daughter to receive $1,000 and the son the balance. The wife was appointed executrix but died in the testator's lifetime. At the time of his death the daughter was aged 5, and the son 9, and neither owned any property in their own right. The testator left personal property worth $6,500 and a house and lot worth $1,000, which was in substantially the same form as when the will was made. *Held*, that, giving consideration to the will as a whole, to the surrounding circumstances, and to the presumption that the testator intended to provide for his children's support during their minority, the property was given to the executrix under an implied trust to apply the income to the support of the wife and children during the minority of the daughter.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1577, 1578, 1586; Dec. Dig. § 671.*]

4. TRUSTS (§ 156*)—EXECUTOR AS TRUSTEE—EXECUTION OF TRUST BY ADMINISTRATOR WITH WILL ANNEXED.

Such trust being annexed to the office of executrix, and there being no personal confidence expressed in the discretion of the person named as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

executrix, the trust might be executed by the administrator with the will annexed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 201, 202; Dec. Dig. § 156.*]

5. WILLS (§ 487*)—CONSTRUCTION—SURROUNDING CIRCUMSTANCES.

A testator's intention is not to be determined exclusively by the words used, but by such words weighed in the light of the surrounding circumstances when the will was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026–1032; Dec. Dig. § 487.*]

6. WILLS (§ 455*)—CONSTRUCTION—CARRYING OUT GENERAL INTENTION.

Where, upon a perusal of the whole will, a general scheme is found to have been intended and provided for, which is consistent with the rules of law, it is the duty of the courts to effectuate this main purpose of the testator; and, to accomplish this, words and phrases may be given a meaning other than that which would attach to them if standing alone, and words may be rejected, supplied, or transposed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 972, 973, 976; Dec. Dig. § 455.*]

7. TRUSTS (§ 25*)—CREATION—SUFFICIENCY OF LANGUAGE USED.

To create a trust, no particular formula of words need be used; it is not essential to use the words "trust" or "trustee," or that there should be a direct devise in terms to the trustee, or that an authority to receive the rents and profits should be conferred in express language, it being sufficient if the intention to create the trust can be fairly collected from the instrument, what is implied from the language used being deemed to be expressed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 34–37; Dec. Dig. § 25.*]

Proceeding for the probate of the will of Jerome Bartholomew, in which the construction of the will was put in issue. Will admitted to probate and construed.

G. L. Danforth, of Middleburgh, for proponent.

W. H. Golding, of Cobleskill, special guardian of William Bartholomew, infant.

W. H. Sidney, of Central Bridge, special guardian of Catherine Bartholomew, infant.

BEEKMAN, S. The will provides:

"First. After all my lawful debts are paid and discharged, I give and bequeath to my beloved wife Christina Bartholomew the sum of One Thousand Dollars absolutely. Also I give and bequeath to my said wife the use of all my real and Personal Estate over and above the One Thousand Dollars until our youngest child arrives at the age of twenty-one years. At which time the Real and Personal Property not above bequeathed to my wife, I give and bequeath as follows. To my daughter Catherine Bartholomew the sum of One Thousand Dollars and to my son William Bartholomew the balance of all my Estate both Real and Personal.

"Likewise, I make, constitute and appoint my wife Christina Bartholomew to be executrix of this, my last Will and Testament, hereby revoking all former Wills by me made, with full power to sell any or all Real Estate for the purpose of carrying out the terms of my will.

"In Witness Whereof, I have hereunto subscribed my name," etc.

The testator's wife, who was named as legatee and executrix, died before the testator. Testator left his daughter, Catherine, aged five,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and his son, William, aged nine, as his only next of kin and heirs at law. Neither the wife nor the children owned any property in their own right. The testator left personal property valued at about $6,500 and a house and lot worth about $1,000, and the property which he left was in substantially the same form as when the will was made. Upon the probate of the will the construction thereof was expressly put in issue in pursuance of section 2624 of the Code.

There were no objections to the probate of the will, which was duly executed, and the testator was competent to make a will, and was not under restraint, and a decree will be entered admitting the same to probate and appointing the petitioner, Charles Durham, the general guardian of the infants, administrator, etc., with the will annexed, upon his giving a bond to be approved by the surrogate.

[1, 2] The construction of the will in accordance with the intention of the testator and the rules of law is not without difficulties. Neither the court nor the able attorneys who have submitted briefs have been able to find any adjudicated case presenting the same conditions. The legacy of $1,000, bequeathed to the wife in the first-quoted sentence of the will, lapsed. Does this $1,000 fall into any residuary clause, or did the testator die intestate as to that? There is no "residuary clause" in the will within the accepted and usual meaning of that term. In arriving at the scope and meaning of a clause disposing of a balance or residuum, "the court will not only look at the language employed, but the surrounding circumstances, to determine what the intention of the testator was." Kerr v. Dougherty, 79 N. Y. 349. There is no apparent intention that William should take whatever should fail to pass by the prior provisions of the will.

"The intention of the testator in disposing of his residuary estate is to be ascertained, not by what occurred long after the execution of his will, but by what was, apparently, or presumably, in his contemplation, at the time he was making it." Matter of Hoffman, 201 N. Y. 255, 94 N. E. 993.

He first gives the $1,000 to his wife absolutely. Then he makes provision that his wife shall have "the use of property *over and above* the one thousand dollars." Finally he again carves out and separates the $1,000 from the residue by bequeathing the real and personal "*not above bequeathed to my wife,*" to the son and daughter in proportions stated, thus showing his intention that, in the event of his wife's dying before his death, the word "balance" should not include the $1,000. He could not have intended that in case of his wife's death his son should take the entire $1,000 and that his youngest child, his daughter, should not share in that fund. The bequest to William of the "balance" was a residue of a particular fund, the sum left after carrying out all provisions of the will—a residue of a residue. He assumed that the $1,000 would pass to his wife, and, in making no provision for the failure of that legacy we must assume that his intention was that, in case his wife predeceased him, the $1,000 should pass to his next of kin equally, namely, to his son and daughter.

The said legacy of $1,000 first mentioned in the will lapsed, and the amount thereof is payable, as in intestacy, to the testator's children equally, share and share alike. This determination is amply supported

by Kerr v. Dougherty, 79 N. Y. 327–346; Hadcox v. Cody, 75 Misc. Rep. 569, 135 N. Y. Supp. 861; Matter of Woolley, 78 App. Div. 224, 79 N. Y. Supp. 513; Matter of Dewitt, 113 App. Div. 790, 99 N. Y. Supp. 415.

[3-5] The next question which arises in the construction of the will is, What becomes of the use of the real and personal property over and above the first $1,000 bequeathed, from the death of the testator to the time when the daughter shall arrive at her majority? We must search for the testator's intention, being guided not exclusively by the words of the will itself, but by such words weighed in the light of the surrounding circumstances when the will was made. McGoldrick v. Bodkin, 140 App. Div. 196–198, 125 N. Y. Supp. 101.

"It is rare that any two wills will be found drafted in precisely similar form, and that the various decisions apply the rules of construction to the different cases as they arise, bearing in mind that the chief thing to be accomplished is to ascertain the intent of the testator if the same can be gathered from the will as a whole, and the construction adopted seems to be what the testator desired." Matter of Freel, 49 Misc. Rep. 380, 385, 99 N. Y. Supp. 505, 508.

It seems clear that the testator intended that all his property (except the first $1,000 bequeathed)—that is, the principal fund—should be kept together and intact until his daughter should arrive at 21 years of age, and that until that period arrives only the income should be used; the property being left in the hands of his executrix, to whom he gave the power to sell his real estate. When he employs the words "use of all my real and personal estate," etc., he means rents, income, interest, and profits.

For what purpose is the income to be used? How are the infant children to be provided for during the minority of the youngest child? They owned no property. The wife had no separate estate. It cannot be possible that the father would be so unnatural as not to allow the support of his penniless infants to enter into the plan and scope of his will.

"It is the legal duty of a father to support his children during their infancy, according to his ability; and although the legal obligation is not continued upon his estate after his death, yet every parent recognizes the moral obligation, and so natural is the feeling that in any ambiguous case it may be presumed that the parent was acting under its influence. The courts have acted on this principle." Vail v. Vail, 10 Barb. 69, 71, 72.

We can lay hold on the very significant words in the will, "until our youngest child arrives at the age of twenty-one years." Those words let us look into the mind of the testator, and show that he was planning for the support of *both* children, and was particularly solicitous that the youngest child, who would need maintenance until she should arrive at 21, should be provided for in the meantime, and then should have her $1,000. While he desired his son to finally have the larger portion of the corpus of the estate, he was not willing that the estate should be separated and paid out until the daughter should have enjoyed her share of the income during the full term of her minority. The daughter was the youngest, presumably the one needing the greatest care; therefore he intended that she should receive an equal

share in the income, although she was not to have so large a share in the principal. Giving consideration to the will as a whole and to the surrounding circumstances, it seems that the testator intended that the property was to be held by his personal representative, his executrix or whoever might administer his estate, during the minority of the youngest child, the income to be applied to the support of his wife and two children.

The trust being annexed to the office of executrix, and there being no personal confidence expressed in the discretion of the person named as executrix, and the executrix and wife having died, the trust may be executed by the administrator with the will annexed, and the property is to be held in trust by the administrator with the will annexed, and the children are each entitled to one-half of the rents, interest, income, and profits during the minority of the youngest child. How else are they to be supported?

"The law favors equality among children in the distribution of estates, and in cases of doubtful construction it selects that which leads to such a result." Stokes v. Weston, 142 N. Y. 433, 439, 37 N. E. 515, 517.

Therefore it is certainly equitable, and seems to follow the intention of the testator, that the children during the daughter's minority should have the equal benefit of the rents and income.

[6] The Court of Appeals has held that the strict language used in some portions of a will must give way to the purpose of arriving at the meaning of the testator, based upon a perusal of the whole document. Upon such perusal, if a general scheme can be found to have been intended and provided for in the instrument, and such general scheme is consistent with the rules of law, and so may be declared valid, it is the duty of courts to effectuate the main purpose of the testator. To accomplish such object the meaning of words and phrases used in some parts of the will must be diverted from that which would attach to them if standing alone, and they must be compared with other language used in other portions of the instrument, and thus the general meaning of all the language must be arrived at. Roe v. Vingut, 117 N. Y. 204, 212, 22 N. E. 933.

The court may, and it is its duty to, subordinate the language to the intention; it may reject words and limitations, supply or transpose them to arrive at the correct meaning. Phillips v. Davies, 92 N. Y. 199. In this case if the words "and children" are supplied after the words "to my said wife," the intention of the testator would have more plainly appeared on the face of the instrument. The entire instrument, taken together with the circumstances of the testator, evince the intention of the testator that the children should share equally in the use of the estate during the daughter's minority.

[7] To carry out these intentions, while no trust was in terms created, one should be implied to enable the executrix or her successor to perform the duties imposed; that is, the executrix, or whoever might administer the estate, was a trustee of the corpus of the estate, the income of which was to be applied as hereinabove expressed. Matter of Young, 145 N. Y. 535–537, 40 N. E. 226. No particular formula of words need be used to create a trust. To create a trust

it is not essential that the words "trust" or "trustee" should be used, or that there should be a direct devise in terms to the trustee, or that the authority to receive the rents and profits should be conferred in express language. It is sufficient if the intention to create a trust under the statute can be fairly collected from the instrument, and what is implied from the language used is, as in other instruments, deemed to be expressed. Morse v. Morse, 85 N. Y. 53, 60.

As to the powers of the administrator with the will annexed to perform and carry out the terms of the will as hereinabove construed, the following cases are in point: Matter of Clark, 5 Redf. Sur. 466; Matter of Post (Sur.) 9 N. Y. Supp. 449, and cases cited therein.

It may be that this will may be construed upon the application of different principles, but it seems to me that whatever principles are invoked will lead to an enjoyment by these children of an equal portion of the income during the minority of the daughter and the payment to her of $1,000 upon her arrival at 21 years, and the payment to her brother of the balance of the trust fund. Any other result would not only be contrary to the intentions of the father, but would work out hardship and injustice to the daughter. Every will must be read with due regard to its peculiar provisions and the circumstances attendant upon its making, and that construction should be preferred which works out what would be the testamentary disposition of a normal man. It must be presumed that a normal father would not by his will discriminate against his infant daughter during her minority. Under this will the debts, funeral expenses, expenses of administration and commissions must first be paid. The $1,000 first mentioned in the will lapsed and is payable as hereinabove expressed. The residue, including the real estate and the proceeds thereof, if sold by the administrator, is to be held in trust by the administrator with the will annexed, he having the power under the will to sell the real estate, the interest, income, rents, issues, and profits being payable equally to the son and daughter until the daughter arrives at the age of 21 years, when the daughter is to be paid $1,000 and the son the balance of the trust fund, he then to come into possession of the real estate if still unsold.

A decree will be prepared according to the foregoing views.

Decreed accordingly.

(82 Misc. Rep. 330)

In re FARMERS' LOAN & TRUST CO.

In re WALLACH'S WILL.

(Surrogate's Court, New York County. October 16, 1913.)

1. WILLS (§ 533*)—CONSTRUCTION—DESIGNATION OF DEVISEES—TAKING PER STIRPES OR PER CAPITA.

Under a devise to testator's children in equal proportion, and in case of the death of any child to go to the child's issue, but if none then to be divided between the surviving children of the testator and the issue of any deceased child, the issue of a deceased child take the share of their parent, rather than per capita with the testator's children, since the term "issue" is only used simpliciter with respect to the issue of a deceased child, and it is apparent that it was the intention of the testa-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tor that the issue of a deceased child should only take their parent's share.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1147; Dec. Dig. § 533.*]

2. WILLS (§ 524*) — CONSTRUCTION — DESIGNATION OF DEVISEES — SURVIVING CHILDREN.

The term "surviving children," as used in the will, means those living at the time of the death of any child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. § 524.*]

3. WILLS (§ 533*)—CONSTRUCTION—DESIGNATION OF DEVISEES—TAKING PER STIRPES OR PER CAPITA.

In the limitation to the issue of any deceased child, the term "issue" is used simpliciter, and the interest falling to the issue of any deceased child is to be distributed among such issue per capita, and not per stirpes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1147; Dec. Dig. § 533.*]

4. WILLS (§ 524*)—CONSTRUCTION—DESIGNATION OF DEVISEES—"ISSUE."

A devise to testator's children, on the death of any one his interest to be divided among the surviving children and the "issue" of any deceased child of the testator, includes issue of a deceased child conceived, but not yet born, at the death of any of the testator's children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. § 524.*

For other definitions, see Words and Phrases, vol. 4, pp. 3782–3792; vol. 8, p. 7693.]

In the matter of the judicial settlement of the accounts of the Farmers' Loan & Trust Company, as substituted trustee under the will of Samson Wallach. Decree entered construing the said will.

See, also, 140 App. Div. 908, 127 N. Y. Supp. 1119.

Austin & McLanahan, of New York City (George C. Austin, of New York City, of counsel), for Mr. Moses.

Leventritt, Cook & Nathan, of New York City (Alfred A. Cook and Franklin H. Mills, both of New York City, of counsel), for Mrs. Gertrude W. Borg.

Leslie J. Tompkins, of New York City, special guardian of Joseph Kaempfer, Vivian Wallach, and Albert J. Erdmann, Jr.

Dawson Coleman Glover, of New York City, special guardian for Edith W. Erdmann.

FOWLER, S. In order to settle the decree in this matter, and facilitate a distribution by the substituted trustee of the estate of the testator, it is necessary for the surrogate to construe the will of Samson Wallach, deceased. The testator left him surviving seven children, four sons and three daughters. His residuary estate was devised and bequeathed by the following clause of the will:

"Third. I give, devise and bequeath all the rest, residue and remainder of my property and estate, real and personal, unto my executors hereinafter named, in trust for the following uses and purposes, to wit: to divide the same into seven equal shares, for which purpose they shall have full power and authority to dispose of and convert any part of my estate into money, and to collect and receive the interest and income thereof, and after paying taxes, insurance, interest, repairs and other necessary expenses, to pay over

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the net income of one of said equal shares to each of my four sons, Leopold Wallach, Joseph G. Wallach, Emanuel Wallach and Hirsch Wallach, semi-annually until they shall severally attain the age of thirty years, and upon my said sons severally attaining the age of thirty years to pay and deliver over to each of my said sons one of said equal shares. And as to the remaining three equal shares, to pay the net income of one of said shares to each of my daughters, Fanny Moses, the wife of Max Moses, Lena Wallach and Gertie Wallach, semi-annually during their natural lives. And upon the death of any daughter leaving issue, then to pay the principal of said share and any unexpended interest thereon to such issue."

The limitations contained in the third clause are modified and completed by the following provisions of the will:

"Fourth. In the event of the death of either of my said sons before attaining the age of thirty years leaving issue, the share of the son so dying shall be paid over to and distributed among the issue *equally, share and share alike;* but if such son so dying shall leave no issue, then such share shall be paid over and distributed among my surviving children and the issue of any deceased child.

"Fifth. In the event of the death of any or either of my said daughters without issue, the share of such deceased daughter shall be distributed among my surviving children and the issue of any deceased child."

[1] Lena Wallach, one of the daughters of testator, died September 28, 1912, without issue. Leopold Wallach, a son of testator, died February 1, 1908, leaving issue. Emanuel, another son, died January 15, 1908, leaving issue. Joseph, another son, died about January 1, 1890, leaving issue. One son and two daughters of the testator are now living, having survived their sister Lena. The question is: What becomes of the corpus of the estate or property held on trusts for the benefit of Lena, the trust having terminated and the corpus being ready for distribution? The trustee is interested in this question only in so far as to see to it that the distribution is in accordance with the will. The guardians of the issue of testator's deceased children urge that under the principle repeated by this court in the Matter of Bauerdorf, 77 Misc. Rep. 655, 656, 138 N. Y. Supp. 673, 682, the distribution must be per capita among the surviving children of testator and the issue of his deceased children. Counsel for the surviving children of the testator, on the other hand, contend for the contrary, in so far as the surviving children of testator are concerned.

In the Matter of Bauerdorf the surrogates of this county had occasion to observe that the legal term "issue" employed simpliciter in testamentary limitations is taken to intend all descendants, and, furthermore, that they shall take per capita, issue having ancestors alive sharing concurrently. The authorities were examined and the modifications, or minor premises, of the principal rule were noticed. It was stated in the opinion in that case that the principal rule yields to "a faint glimpse of a different intention" on the part of a testator. Ferrer v. Pyne, 81 N. Y. 281. The accuracy of the decision in the Matter of Bauerdorf is not questioned in this cause, but it is claimed in substance, by counsel for the adult children of testator, that in the will now here the term "issue" is used simpliciter only in respect of the issue of deceased children of testator, and that this will stands for a different construction from that involved in Matter of Bauerdorf, and

in this I think they are generally right. A careful inspection of the testamentary limitations here for construction discloses a difference.

The will of Mr. Wallach, it will be observed, carried his residuary estate to trustees to be divided into seven equal shares. Four of these shares were to be held in severalty on trusts for testator's four sons nominatim. Three of the shares were to be held in severalty on trusts for testator's three daughters, nominatim. When a daughter came to die, if she had issue, the corpus of the one-seventh so held in trust for her was to go to her issue absolutely or in fee simple. If she died without issue, the will provides that then the corpus of her one-seventh shall be distributed among my surviving children and the issue of any deceased child." The last contingency has happened. The question is: What distribution did the testator intend by the fifth clause of his will?

It is apparent from the will now before me that the testator had in mind primarily the interests of his own children as a class, and that each of them should benefit equally inter se in his estate. In the case of the death of any one of them, being a cestui que trust, testator directed that the corpus of the trust estate should go to the issue of the one so dying, and failing such issue be distributed among his own surviving children and the issue of his deceased children.

In the limitation over of the remainders or executory interests in the estate held on trusts for the benefit of his daughter, testator contrasts his surviving children with the "issue" of any of his deceased children. The term "issue," in other words, is used in this limitation simpliciter only in respect of testator's descendants more remote than his children. It had no application to the "issue" of testator himself. In so far as his own children were concerned, testator contemplated a stirpital division, which takes this case out of the rule applied in Matter of Bauerdorf. That testator ever contemplated that his surviving children should take on an equality with the "issue" of his deceased children is not apparent from the scheme and context of the entire will. It is only in the absence of a contrary intention that the rule followed in Matter of Bauerdorf applies. Here such contrary intention is apparent.

In Ferrer v. Pyne, supra, at the time of making his will the testator had three children living and there were five grandchildren, who were children of a deceased daughter, Irene, and one grandchild, who was a son of another deceased daughter, Isabella. The will bequeathed separate legacies to the three living children and a legacy to the children of Irene and the residuary estate was divided equally between one daughter, who was named, the children of Irene, the son of Isabella and a son of a deceased. It was held that the residuary estate should be distributed per stirpes and that the children of Irene took as a class. The court found a sufficient intention to have the children of the deceased daughter take as individuals instead of collectively. In Vincent v. Newhouse, 83 N. Y. 505, the facts were somewhat similar, except that the children of the testator's son were children of a living son, instead of children of a deceased child of testator. But the court again found sufficient intention to have the children take collectively, instead of individually.

[2] There is here a plain limitation of a definite interest to those of testator's children who should survive their sister Lena. The rule in Bauerdorf's Case has nothing to do with the limitation to the surviving children of the testator who should survive their sister Lena. The surviving children of testator mentioned in the fifth paragraph are those surviving at the time of the death of the daughter Lena. Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697, 116 Am. St. Rep. 536; Rasquin v. Hamersley, 152 App. Div. 522, 137 N. Y. Supp. 578, affirmed without opinion 208 N. Y. 630, 102 N. E. 1112; Teed v. Morton, 60 N. Y. 502.

[3] I hold that the corpus held by the trustees for the benefit of Lena Wallach must be distributed as follows: One-sixth each to the three surviving children of testator; one-sixth to the issue of Leopold Wallach, deceased; one-sixth to the issue of Emanuel Wallach, deceased; and one-sixth to the issue of Joseph Wallach, deceased. In the limitation over after Lena's death to the "issue" of each of the deceased children of testator, the term "issue" is used by testator simpliciter, and the rule followed in Matter of Bauerdorf applies; that is to say, the one-sixth falling to the respective issue of any deceased child of testator is to be distributed among such issue per capita, and not per stirpes.

[4] But there is another point suggested here, and it had better be disposed of: From the memorandum submitted by the trustee, it would appear that an infant, Edith W. Erdmann, has been recently made a party to this proceeding. She is the sister of Albert J. Erdmann, Jr., and a grandchild of Leopold Wallach, one of the sons of the testator. Edith W. Erdmann was born April 1, 1913, and Lena Wallach, whose share is the subject of the controversy, died on the 28th day of September, 1912. As all the descendants who were alive at the time of the death of Lena Wallach are included within the term "issue," it would seem that Edith W. Erdmann must also be included. Hone v. Van Schaick, 3 Barb. Ch. 488, 509; Marsellis v. Thalhimer, 2 Paige, 35, c. 40, 21 Am. Dec. 66. The court said in the latter case:

"It is now the settled law, both in England and here, that the infant after conception, but before its birth, is in esse for the purpose of taking the remainder or any other estate or interest which is for the benefit of the infant. Stedfast v. Nicoll, 3 Johns. Cas. 18; Swift v. Duffield, 5 Serg. & R. (Pa.) 38."

The common law has only reached the stage of the Roman law. It was a very old maxim of the Roman jurisprudence, "Nasciturus pro jam nato habetur quoties de commodo ejus agitur."

Settle decree accordingly.

(158 App. Div. 502.)

VANTA et al. v. MASSACHUSETTS BONDING & INS. CO.

(Supreme Court, Appellate Division, First Department. October 24, 1913.)

1. INSURANCE (§ 641*)—ACTION—REPLY TO NEW MATTER IN ANSWER.
In an action on a burglary insurance policy, plaintiffs should have been required, on an application for such relief, to reply to defenses setting up a breach of warranty with respect to a previous application and declination of insurance, and a previous cancellation of a burglary insurance policy, and a breach of warranty with respect to a burglar alarm system and maintenance thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1626, 1628, 1629; Dec. Dig. § 641.*]

2. INSURANCE (§ 644*)—ACTION—BILL OF PARTICULARS OF DEFENSE.
In an action on a burglary insurance policy, in which the answer alleged breach of warranty with respect to a previous application and declination of insurance, and a previous cancellation of a similar policy, defendant should not have been required to furnish a bill of particulars concerning such defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1625; Dec. Dig. § 644.*]

Appeal from Special Term, New York County.

Action by Harry Vanta and another against the Massachusetts Bonding & Insurance Company. From an order denying a motion to require plaintiffs to reply to the second separate defense, and requiring defendant to furnish a bill of particulars before plaintiffs would be required to reply to the first defense of the answer, defendant appeals. Reversed, and motion to require a reply granted.

See, also, 142 N. Y. Supp. 1149.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Joseph L. Prager, of New York City, for appellant.

Philip J. Dunn, of New York City, for respondents.

PER CURIAM. [1, 2] This action is to recover $2,000 for alleged loss by burglary under a policy of insurance issued by the defendant to the plaintiffs. The first defense sets up a breach of warranty with respect to a previous application and declination of insurance, and previous cancellation of a burglary insurance policy issued to the plaintiffs prior to the issuance of the policy alleged in the complaint. The second defense alleges a breach of warranty with respect to a required burglar alarm system and maintenance thereof. The learned court should have granted the motion, and directed the plaintiff to reply to each of these defenses. The defendant should not have been required to furnish a bill of particulars respecting the facts set up in the first defense.

The order appealed from should therefore be reversed, with $10 costs and disbursements, and the motion requiring a reply to each of the defenses granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(158 App. Div. 498)

EINSTEIN v. EINSTEIN.

(Supreme Court, Appellate Division, First Department. October 24, 1913.)

PLEADING (§ 90*)—ANSWER—AFFIRMATIVE DEFENSE—DENIAL.

Under Code Civ. Proc. § 500, providing that an answer must contain either a general or specific denial, or a statement of new matter constituting a defense or counterclaim, a denial cannot be incorporated in that section of an answer consisting of an affirmative defense, except to deny the existence of some fact alleged in the complaint in order to perfect the answer as a complete affirmative defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 184, 185, 187, 190, 194; Dec. Dig. § 90.*]

Appeal from Special Term, New York County.

Action by Manuela N. Einstein against Monroe Einstein. From an order denying motion to strike from affirmative defense a denial of material allegations of the complaint, plaintiff appeals. Order reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Jacob H. Corn, of New York City, for appellant.

James B. Kilburn, of New York City, for respondent.

McLAUGHLIN, J. Action to recover damages for alleged alienation of the affections of Arthur Einstein, plaintiff's husband.

The answer alleges:

"I. On information and belief defendant denies the allegations contained in paragraph fourth of said complaint that he at all times or at any times exercised and exerted an influence and control over the mind of Arthur Einstein.

"II. On information and belief defendant denies the allegations contained in paragraphs fifth, sixth, and seventh of said complaint."

For a separate defense the "defendant repeats the allegations of paragraphs I and II of this answer as though herein again alleged," and then sets forth certain facts to the effect that at or about the time defendant first learned of the marriage between plaintiff and Arthur Einstein the latter was, and for some time prior thereto had been, and had since continued to be, of unsound mind, in consequence of which he was, by order of the court, committed to an institution for the care and treatment of the insane.

The plaintiff moved to strike from the separate defense the denials of the paragraphs of the complaint above quoted. The motion was denied, and she appeals.

Section 500 of the Code of Civil Procedure provides that an answer must contain (1) a general or specific denial of each material allegation of the complaint controverted by the defendant, and (2) a statement of any new matter constituting a defense or counterclaim.

The separate defense here set up is the statement of new matter, and a denial of the allegations of the complaint has no place therein. A defense of new matter as contemplated in the section is based on the theory of confession and avoidance; i. e., that, even conceding the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

truth of the allegations of the complaint, the establishment of the new matter set forth prevents a recovery. The new matter pleaded must be such as could not be proved under the denials. If it could, then it is not new matter, but belongs under a denial, which is negative. The denials contained in the answer enable defendant to controvert the facts upon which the plaintiff bases her right to recover. The only effect of incorporating such denials in the affirmative defense is to prevent the plaintiff, in advance of the trial, testing the sufficiency thereof. A denial has no place in an affirmative defense, except when it becomes necessary to deny the existence of some fact alleged in the complaint in order to perfect the answer as a complete affirmative defense. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 N. Y. Supp. 214; Rochkind v. Perlman, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151; Stern v. Marcuse, 119 App. Div. 478, 103 N. Y. Supp. 1026; Frank v. Miller, 116 App. Div. 855, 102 N. Y. Supp. 277; Waltham Mfg. Co. v. Brady, 67 App. Div. 102, 73 N. Y. Supp. 540; Stieffel v. Tolhurst, 55 App. Div. 532, 67 N. Y. Supp. 274; Mendleson v. Margulies, 157 App. Div. 666, 142 N. Y. Supp. 825.

The order appealed from, therefore, is reversed with $10 costs and disbursements, and the motion granted with $10 costs. All concur.

(158 App. Div. 501)

EINSTEIN v. EINSTEIN.

(Supreme Court, Appellate Division, First Department. October 24, 1913.)

Appeal from Special Term, New York County.

Action by Manuela N. Einstein against Julius Einstein. From an order denying a motion to strike from an affirmative defense a denial of the material allegations of the complaint, plaintiff appeals. Order reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Jacob H. Corn, of New York City, for appellant.

James B. Kilburn, of New York City, for respondent.

McLAUGHLIN, J. This appeal is from an order denying a motion to strike out, as irrelevant and redundant, certain allegations of the complaint set forth in an affirmative defense.

The question presented is precisely similar to the one considered in an action by this plaintiff against Monroe Einstein, 143 N. Y. Supp. 706, decided herewith. For the reasons stated in the opinion in that case, the order here appealed from is reversed, with $10 costs and disbursements, and the motion granted with $10 costs. All concur.

(82 Misc. Rep. 296)

GAIL v. ATLANTIC COAST LINE R. CO.

(Supreme Court, Special Term, Erie County. September, 1913.)

REMOVAL OF CAUSES (§ 79*)—TIME—TIME TO PLEAD—EXTENSION—DEFAULT JUDGMENT.

Judiciary Act (Act Cong. March 3, 1911, c. 231) § 29, 36 Stat. 1095 (U. S. Comp. St. Supp. 1911, p. 142), provides that any party entitled to remove a suit may file a petition, duly verified, in the state court at the time, or any time before defendant is required, by the laws of the state, or the rule of the state court in which the suit is brought, to answer

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or plead to the declaration. *Held* that, where plaintiff took default for defendant's failure to plead, and thereafter the court granted an order opening the default, and extending defendant's time to "plead or otherwise move" for 20 days from August 6, 1913, an application to remove duly made August 25th following was in time, since the order extending the time to plead or otherwise move also extended defendant's time to remove the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139–160; Dec. Dig. § 79.*]

Action by Adelbert D. Gail against the Atlantic Coast Line Railroad Company. On motion for an order removing the cause to the federal court. Granted.

White & Babcock and Edward Payson White, both of Buffalo, for plaintiff.

Stewart & Shearer, of New York City, and Thomas R. Wheeler, of Buffalo, for defendant.

BISSELL, J. The defendant secured an order removing this case to the United States court on August 4, 1913; but this order was not entered and filed in the Erie county clerk's office, together with the bond presented upon the application, until August 8, 1913. The time to plead had expired on August 6, 1913, and on August 8th the plaintiff took judgment by default in this action.

On August 18, 1913, the court granted an order opening the judgment taken by the plaintiff by default, and extended the time of the defendant to "plead or otherwise move" 20 days from August 6, 1913, and at the same time the court granted a motion on behalf of the plaintiff which vacated the order of August 4, 1913, removing this case to the United States court, on the ground that an erroneous recital was contained in said order.

On August 25, 1913, the day before the time to "plead or otherwise move" expired, an application was made to this court, on a new set of papers, for an order removing the case to the United States court. The papers presented were regular, and a proper bond was presented and approved at the time by this court. These have been filed in the county clerk's office.

The only question now raised by the plaintiff is whether or not this application was made in time. The plaintiff contends that after the time to plead had originally expired, and default judgment had been taken, the defendant lost the right to remove the case to the United States court.

Section 29 of the Federal Judiciary Act of 1911 provides as follows, in prescribing the procedure for removal of causes to the federal courts:

"Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the District Court of the United States, he may make and file a petition, duly verified, *in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such suit is brought to answer or plead to the declaration or complaint of the plaintiff. * * *"

Inasmuch as the time of the defendant was extended to "plead or otherwise move," in accordance with the language of the order of this court, from August 6th to August 26th, and inasmuch as this application was made before the last date, the defendant is within the requirement of the statute, because it has made and filed its petition *before it was required* to plead by the law of the state or the rule of the state court.

The latest case upon the subject, and the only one which we have been able to find under the new Judiciary Act passed in 1911, is that of Hansford v. Stone-Ordean-Wells Co. (D. C.) 201 Fed. 185. This case arose in Montana, and it appeared that on October 17, 1912, one day before the defendant was required to answer or plead to the plaintiff's complaint, a stipulation was entered into and signed by the counsel for both parties, extending the time for the defendant to plead up to and including October 28, 1912. On October 26th the defendant filed the proper removal papers. The plaintiff contended that these were not filed in time. The court in its opinion, at page 186, said in part:

"The laws of Montana and the rules of the said state court authorize stipulations for extension of time like unto that herein. No order of court is necessary to vitalize them. They operate proprio vigore. Their effect is that the defendant is not 'required' to answer or plead to the complaint until at the time when the stipulated time is on the point of expiration, and such is the effect of the stipulation in this case. No default could have been entered against the defendant until after that time. 'Required' in the removal act has reference to the time when the defendant, to avoid any default, must necessarily answer or plead to the complaint. Until that time comes, and at it, whether fixed by statute, or rule, or by agreement between the parties, whether it is the time originally limited, or that time extended, the right of removal continues, and can be exercised. Extending the time to answer or plead, to defend, the principal thing, extends the time for removal, to choose the forum wherein to defend, an included incidental thing. The time to plead is the measure of the time to remove—is the time to remove. The federal law and the state law must be read together. The former prescribes a limitation; the latter the extent of it."

In the case of Quilhot v. Hamer (C. C.) 158 Fed. 188, which arose in New York, the plaintiff took judgment by default against the defendant on December 12, 1906. On April 2, 1907, the defendant applied for an order opening the default, and vacating the judgment, and tendered a proposed answer. This motion was brought on for a hearing on April 13th, and the court ordered that the motion be granted, and that the answer tendered stand as served *on the date of service of the motion papers,* on condition that the defendant pay certain costs and disbursements within 15 days from date of the order. The defendant sought to remove this case before the expiration of the 15 days from date of the order. The court held, however, that its time to plead had expired on April 2d, *on account of the provision in the order which provided that the answer was to stand served as of that date.* In the case under consideration the defendant was given, unconditionally, the right "to plead or otherwise move" within 20 days from August 6, 1913.

Judge Ray, in his opinion in the Quilhot Case (C. C.) 158 Fed. at page 193, says:

"I am not to be understood as holding, for I do not hold or intimate, that, had the defendant obtained an order opening his default, and giving a certain number of days in which to serve his answer or interpose his defense, he would not have been entitled to remove the cause at any time after the default was opened, and before the expiration of the time within which he was required or permitted by the order to answer. Such an order, being lawful, and made in compliance with and by the express authority of the statutes of the state, would fix the time within which he was required by the laws of the state to answer. The time would be fixed by the court in compliance with statute, and by its authority, and hence by the laws of the state."

The motion to remove this case to the United States court is granted, with $10 costs.

Let an order be entered accordingly.

(82 Misc. Rep. 312)

APPEL et al. v. BUCKBINDER.

(Supreme Court, Equity Term, Monroe County. October 20, 1913.)

1. EVIDENCE (§ 461*)—PAROL EVIDENCE—DEEDS.

Where a father conveyed a portion of a residence tract to a son by deeds containing building restrictions, and after the father's death his heirs, including the son, conveyed all the property to a third person without restriction, and he reconveyed to the son and the other heirs, parol evidence was inadmissible to show that such conveyance was for the purpose of straightening lot lines, and not to destroy the restriction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129–2133; Dec. Dig. § 461.*]

2. DEEDS (§ 171*)—BUILDING RESTRICTIONS—VALIDITY.

A deed providing that the grantee agrees not to erect on the premises any building or buildings except for residential purposes, or to reconvey the property to any person for the erection of a block for commercial business, was valid as between the parties, and binding against subsequent grantees with notice.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 537–542; Dec. Dig. § 171.*]

3. VENDOR AND PURCHASER (§ 231*)—CONSTRUCTIVE NOTICE—EXAMINATION OF RECORDS.

Where a building restriction in a deed in defendant's chain of title, duly recorded, would have been discovered by a proper search of the public records, she was chargeable with notice thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. § 231.*]

4. DEEDS (§ 173*)—BUILDING RESTRICTIONS—BENEFIT.

Where a father conveyed a portion of a residence tract to his son, inserting in the deed a clause that the grantee agreed not to erect any building or buildings on the premises except for residence purposes, such restriction was for the benefit of the father's remaining portion of the tract, and was therefore enforceable by the subsequent owners thereof.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 543; Dec. Dig. § 173.*]

5. DEEDS (§ 175*)—BUILDING RESTRICTIONS—SUBSEQUENT CONVEYANCE.

A father owning a tract of residence property sold two of the lots to his son, and later platted the entire tract, including the lots so sold. On

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his death his heirs, including the son, joined in a quitclaim deed conveying the entire tract to D. This deed contained no restriction, and on the same day D. reconveyed the lots previously owned by the son, and conveyed the balance of the property to the father's other heirs. According to the map made by the father, the lot lines were not at right angles with the street, and after his death the heirs replatted the tract and caused a new map to be filed by which the lot lines were straightened. *Held*, that the purpose of making the deeds to D. appeared, from the construction of the deeds themselves, to be to change the description in order to straighten the lines, and that they did not merge and terminate the restrictions contained in the father's original deed to the son.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 545, 548; Dec. Dig. § 175.*]

Suit by Mae R. Appel and another against Mary Buckbinder, for permanent injunction restraining defendant from erecting a business block in violation of a restrictive clause in a deed of her predecessor in title. Writ granted.

Reed & Shutt, of Rochester, for plaintiffs.

Henry R. Glynn, of Rochester, for defendant.

CLARKE, J. Many years prior to 1889, John Dempsey purchased about an acre of land at the corner of Monroe avenue and Shepard street in the city of Rochester, and held title to said property until February, 1889, when he sold a portion of said tract to his son Timothy B. Dempsey the parcel thus sold fronting on Monroe avenue, and being called lot 1 of the Dempsey tract, and being on the corner of Monroe avenue and Shepard street. That deed contained the following clause:

"The party of the second part hereby agrees not to erect on said described premises any building or buildings except for residential purposes or to reconvey property to any person for the purpose of erecting block for commercial business."

In July, 1889, John Dempsey conveyed to his son Timothy B. Dempsey another lot fronting on Monroe avenue, adjoining the parcel above referred to on the east, being lot 2 of the Dempsey tract, and that deed contained the following clause:

"The party of the second part agrees not to erect on said described premises any building except for residential purposes (barns allowed) or to reconvey property for any other purposes."

John Dempsey still retained the balance of his tract of land adjacent to the lots above referred to, which other land fronted on Shepard street, and in 1893 he caused a map of his entire property to be made, including lots 1 and 2 previously sold to his son Timothy, the entire property, according to that map, being divided into nine lots, including those previously sold to his son Timothy. Mr. Dempsey owned no other property in that portion of the city of Rochester, and it is plain that it was his idea to have it used for residential purposes.

John Dempsey died intestate on the 3d day of March, 1895, and left him surviving five children, four sons, and one daughter, all of whom were of full age.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In February, 1897, the heirs of John Dempsey joined in a quitclaim deed, conveying the entire parcel of land formerly owned by their father, to Eugene J. Dwyer, and that deed included lots 1 and 2 previously sold to Timothy B. Dempsey, and he and his wife joined in that deed. On the same day Mr. Dwyer conveyed, by quitclaim deed, to Timothy B. Dempsey lots 1 and 2, which had been previously conveyed to him by his father, and lots 3, 6, and 8, with other property, and also on the same day said Dwyer, by various deeds, conveyed the balance of the property, which had thus been conveyed to him by the heirs of John Dempsey, to various other of his heirs, but in none of the deeds, either to Mr. Dwyer or from him to the heirs, was there any clause restricting the use or enjoyment of any part of the property.

[1] According to the map made by John Dempsey, above referred to, by which he laid out this land into city lots, it appeared that the lot lines were not at right angles with Shepard street, and after his death his heirs replotted said tract, and caused a map to be made and filed by which the lot lines were straightened, making them run at right angles with Shepard street. In order to do this and to divide the John Dempsey lands among his heirs, the deeds to Mr. Dwyer and from him to the heirs were made and executed, but I am clearly of the opinion, from the facts and circumstances surrounding the case and the parties at that time, that it was not their intention to do away with the restrictive clauses in the Timothy B. Dempsey deeds above referred to, for they had clearly been placed there by the owner of the entire tract for the benefit of the lands retained by him after he sold lots 1 and 2 to his son Timothy, and that the sole purpose of making the deeds to Dwyer, and he reconveying the same day to the heirs, was to straighten the lines of the lots fronting on Shepard street, and to divide the property. Plaintiff on the trial sought to show by oral testimony that that was the intention of the parties, but that evidence was excluded, and it seems to me properly so. Uihlein v. Matthews, 172 N. Y. 154, 64 N. E. 792.

It was not necessary to have oral testimony admitted to show the intention of the parties, for the two maps and the descriptions in the various deeds are quite sufficient to show that the lot lines were not at right angles with Shepard street according to the first map, and that it was desirable to have them so in a residential portion of a populous city goes without saying, and I cannot believe that the heirs of John Dempsey, owning all of his lands, excepting lots 1 and 2, which he had previously sold, would have knowingly waived the restrictions he placed in the deeds conveying these lots for the benefit of the lots remaining, and which descended to his other heirs, and that idea is strengthened by the unquestioned fact that it was the intention of all the parties to have all the lots used for residential purposes only; they being in a portion of the city at a considerable distance from any commercial buildings.

[2] The restrictions in the deeds by which John Dempsey conveyed lots 1 and 2 to his son Timothy were for the benefit of the lots adjoining and still retained by John Dempsey. They were in a residential portion of the city of Rochester, and it was his purpose to divide the

tract into lots to be sold for the erection of residences. These restrictive clauses in the deeds were perfectly valid as between the parties, and would be binding as against the defendant if still in existence and she had notice of them. Cambridge Val. Bank v. Delano, 48 N. Y. 326; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816.

[3] Defendant may not have had actual personal notice of these restrictions, but a proper search of the public records would have revealed them, and she must be deemed chargeable with notice of their existence. Whistler v. Cole, 81 Misc. Rep. 519, 143 N. Y. Supp. 478.

[4] The restrictions placed by John Dempsey in the deeds conveying lots 1 and 2 to his son Timothy were for the benefit of the remaining lots in the Dempsey tract, and were proper and legal. These plaintiffs subsequently, by various mense conveyances, became the owners of lots 5 and 6 of that tract, and they can enforce these restrictions the same as their predecessors in title could have done. Korn v. Campbell, 192 N. Y. 490, 85 N. E. 687, 37 L. R. A. (N. S.) 1, 127 Am. St. Rep. 925; 13 Cyc. 886.

[5] The learned counsel for defendant urges that, because all these lands were conveyed by deed to Eugene J. Dwyer by the heirs of John Dempsey with no mention of the restrictions in the deeds of lots 1 and 2, said restrictions merged in the higher title, and became thereby extinguished. I do not think so under the facts as established in this case, for I do not believe that was the intention of the parties when they executed the deed to Mr. Dwyer, and merger is primarily a question of intention of the parties, and will not be assumed. New York Public Library v. Tilden, 39 Misc. Rep. 169, 79 N. Y. Supp. 161; 20 Am. & Eng. Enc. of Law, (2d Ed.) 590.

This is a court of equity, and it must not permit John Dempsey's wishes with regard to his property and its use to be entirely thwarted simply because, for some reason when his heirs by various conveyances sought to partition his estate and straighten lot lines, lots 1 and 2, previously sold by him, were included, and the restrictions placed in the deeds to lots 1 and 2 for the benefit of his other lands were omitted. It could not have been the intention of all the parties to the Dwyer deed to thus extinguish restrictions which had been placed in prior deeds by their father for his and their benefit, and the intention of the parties must control. 16 Cyc. 665, 666; Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506.

When the deed of these various lots was made by the John Dempsey heirs to Eugene J. Dwyer, they conveyed to him different interests, and he in turn, that very day, reconveyed different interests to the different heirs. Why lots 1 and 2 were included in the deed to Dwyer does not appear, but they were included in the description, but when the father of the Dempsey heirs had placed the restrictive clauses in the deeds of lots 1 and 2, he undoubtedly had in mind the erection on all of the lots of residences only, and he provided the restrictions in the deeds for the benefit of the remaining lots to the end that the entire territory, both the lots that he conveyed and those he still retained, should be used exclusively for residential purposes, and I cannot be-

lieve that when his other heirs joined with Timothy in the deed to Mr. Dwyer, they knowingly released the very restrictions which their father had placed in the prior deeds to Timothy for the benefit of the lands which they received from him by descent, and which inured to their benefit; and, if it was not their intention to extinguish those restrictions, then a court of equity should see to it that the intentions of the original owner of all this property should be respected and enforced. While in law it might well be urged that the restrictions were extinguished by the deed to Dwyer, if that was not the intention of the parties, equity should step in and prevent a wrong being done.

On the whole evidence it must be held that the restrictive clauses in the deeds by which Timothy B. Dempsey took title from his father to lots 1 and 2 were never extinguished by the subsequent deed to Mr. Dwyer, for that was not the intention of the parties, and those restrictive clauses being part of the public records, and being shown in the abstracts of title examined by counsel for defendant before she purchased her property, she must be deemed chargeable with notice of their existence.

It is established that defendant is engaged in erecting a business block on lot 1, which would be in violation of the terms of the deed of one of her predecessors in title, and that the erection of such a building would seriously damage the plaintiffs who are owners of lots which are part of the remaining Dempsey tract, and in whose favor the restrictive clauses in question were inserted in the Timothy B. Dempsey deeds. These plaintiffs undoubtedly purchased their lots and erected dwellings thereon with the idea that all lots of the John Dempsey tract were to be used as he intended, for residential purposes, and defendant, being engaged in the erection of a business block in violation of the restrictions above mentioned, which have not been extinguished, and of which she is chargeable with notice, should be restrained from continuing said work to the end that justice be done to those who purchased lands in the John Dempsey tract, for whose benefit the restrictions above referred to were created.

Judgment is therefore directed in favor of the plaintiffs, and against the defendant for the relief demanded in the complaint, with costs.

Findings may be submitted.

(82 Misc. Rep. 394)

FOX v. FOX.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

APPEAL AND ERROR (§ 565*)—PROCEEDINGS FOR TRANSFER OF CAUSE—TIME TO TAKE PROCEEDINGS—RELIEF IN CASE OF FAILURE TO PROCEED IN TIME.

Where defendant was delayed in making his case on appeal by the failure of the stenographer to furnish a copy of the minutes of the trial, and also by negotiations for a settlement, a motion to declare the appeal abandoned for failure to make and serve the case in time should not be sustained, though defendant failed to ask for an extension of time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2507–2510; Dec. Dig. § 565.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from City Court of New York, Special Term.

Action by Sigmund Fox against Henry E. Fox. From four orders entered against him, the defendant appeals. Reversed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Blandy, Mooney & Shipman, of New York City (Charles Blandy and Laurence A. Sullivan, both of New York City, of counsel), for appellant.

Max Shlivek, of New York City, for respondent.

SEABURY, J. This is an appeal from four orders of the Special Term of the City Court. The first order declares the defendant's appeal to this court from a judgment rendered against him abandoned. The second order denies defendant's motion to open his default in failing to make and file his case as required by law. The third order denies the defendant's motion to vacate the execution issued upon the judgment. The fourth order denies defendant's motion to vacate the order for his examination in aid of execution.

If the first order was improperly made, it follows that the other orders should be reversed. This action was brought to recover a balance claimed to be due under a building contract. Upon the first trial the plaintiff recovered a judgment, which was reversed by this court. 77 Misc. Rep. 100, 135 N. Y. Supp. 1073. Upon the second trial the plaintiff again recovered a judgment. The time of the appellant to make and serve a case on appeal expired, and the plaintiff moved to declare the appeal abandoned. It appears that the appellant was delayed in making a case by reason of the failure of the stenographer to furnish a copy of the minutes of the trial, and that the preparation of the case on appeal was further delayed by negotiations between the attorneys for a settlement which were not consummated. Under these circumstances, we think that the defendant should have been relieved from his default. The learned court below denied the motion to open the default on the ground that the defendant had failed to have his time to serve and file his case extended, not on the ground that the defendant had not excused his failure so to do. The fact that the defendant was in default, of itself, furnished no ground for refusing to relieve him from his default. We think that the interests of justice require that the order appealed from should be reversed, that the defendant should have an opportunity to present his appeal to this court. Under the circumstances, no costs will be allowed to either party.

The order declaring the appeal abandoned is therefore reversed.

It follows, from the reversal of this order, that the order denying defendant's motion to open his default should be reversed, and that motion granted, allowing the defendant an extension of 10 days' time.

The order denying the motion to vacate the execution should be reversed, and the motion to vacate the execution is granted.

The order denying defendant's motion to vacate the order for his examination in aid of execution is reversed, and the motion to vacate said order is granted.

In lieu of granting costs as a condition for opening the defendant's default, the respondent will be allowed his disbursements upon these appeals. All concur.

(82 Misc. Rep. 304)

CITY OF BUFFALO v. BUFFALO GAS CO.

(Supreme Court, Special Term, Erie County. October 21, 1913.)

1. CERTIORARI (§ 40*)—RIGHT TO WRIT—APPLICATION—TIME.

Code Civ. Proc. § 2125, provides that certiorari to review a determination must be granted and served within four months after the determination becomes final and binding on the relator. Section 2122 declares that the writ cannot be issued where the body or officer making the determination is expressly authorized by statute to rehear the matter on the relator's application, unless the determination to be reviewed was made on a rehearing, or the time for relator to procure a rehearing has elapsed. *Held* that, though Public Service Commissions Law (Consol. Laws 1910, c. 48) § 22, provides for a rehearing, it does not abrogate the limitation of four months established by section 2125 for obtaining a writ of certiorari, so that, where more than four months elapsed after the service of an order of the Public Service Commission fixing a gas rate to be charged the city of Buffalo without the issuance of a writ of certiorari to review the same, the city's right to the writ was barred, regardless of the time within which an application for rehearing was made and denied.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 58; Dec. Dig. § 40.*]

2. GAS (§ 14*)—RATES—DETERMINATION—PUBLIC SERVICE COMMISSION—REHEARING.

An application to the Public Service Commission for rehearing of an order fixing gas rates to be charged a city must be made within a reasonable time after the filing of the order.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10, 11; Dec. Dig. § 14.*]

3. GAS (§ 14*)—RATES—HEARING—PUBLIC SERVICE COMMISSION—TIME—DISCRETION.

Whether the Public Service Commission shall grant a rehearing of an application to fix gas rates as authorized by Public Service Law, § 22, is a matter within the discretion of the Commission.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10, 11; Dec. Dig. § 14.*]

Suit by the City of Buffalo against the Buffalo Gas Company. On motion to set aside certain orders of injunction restraining defendant from charging the city more than 70 cents a thousand for gas consumed, etc. Motion granted on condition.

Louis L. Babcock, of Buffalo, for the motion.

Clark H. Hammond, opposed.

WOODWARD, J. On or about the 10th day of September, 1908, the plaintiff brought an action against the defendant for the purpose of compelling the latter to supply illuminating gas for the public uses of the plaintiff at a reasonable price and to restrain the defendant from discontinuing the supply of gas during the pendency of the action. A temporary injunction was granted on the said 10th day of September. Subsequently the defendant moved to set aside such temporary

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

order of injunction. This motion resulted in an order denying the relief demanded on condition that the city of Buffalo pay to the defendant a sum equivalent to 75 cents per thousand feet for all gas consumed by the plaintiff up to the time of bringing the action, without prejudice to either party to establish a different price upon the trial of the action. Subsequently, on appeal to the Appellate Division (128 App. Div. 918, 113 N. Y. Supp. 1128), this order was modified by reducing the amount to be paid to 70 cents per thousand cubic feet, and, as thus modified, affirmed, and the city of Buffalo paid up the amount so fixed and since that time has been paying for gas at the rate thus established, contracting with the Welsbach Street Lighting Company of America to furnish gas for street lighting at a given price from the defendant's mains as though the city of Buffalo were itself the owner of such gas and without any participation in the matter by the defendant company.

Since the above action was commenced, the defendant, as appears by the moving affidavit, has made repeated efforts to induce the plaintiff to join in an effort to determine the proper price to be paid for the gas used by the city of Buffalo, but without avail, and that after an amendment of the Public Service Commissions Law, giving the defendant the right to file a complaint against the city of Buffalo, the defendant instituted a proceeding against the plaintiff for the purpose of arriving at a proper price for its product, and this proceeding was tried before the Public Service Commission, resulting in an order, bearing date of February 5, 1913, by which it was found that the just and reasonable maximum price to be charged by the Buffalo Gas Company for gas to be furnished to the city of Buffalo is the sum of 90 cents per thousand cubic feet. This order appears to have been served upon the city of Buffalo on the 5th day of April, 1913. The defendant since that time has been billing its gas to the said city of Buffalo at the rate of 90 cents per thousand cubic feet, but the said city of Buffalo neglects and refuses to make payments upon this basis, and the action in the meantime remains untried.

On the 15th day of September, 1913, more than five months after the service of the order of the Public Service Commission upon the city of Buffalo, the plaintiff in this action filed a petition with the Public Service Commission asking for a rehearing and demanding a copy of the opinion of said Commission in determining the proceeding, which, of course, constituted no part of the determination, unless specially made a part thereof, and on the 24th day of September, 1913, the said Commission made an order denying a rehearing and a few days later furnished a copy of its opinion on the original determination to the corporation counsel of the city of Buffalo. It is now urged on the part of the city of Buffalo that it is its present intention to review the order of the Public Service Commission by a writ of certiorari, and this appears to be the principal ground upon which it opposes the present motion to vacate the injunction orders granted in 1908, and under the provisions of which it is contracting to supply gas to the Welsbach Street Lighting Company and refusing to pay

to the defendant the price which has been established by the Public Service Commission. It becomes important, therefore, to consider whether there is still an opportunity to review the order of the Public Service Commission.

[1] Section 2125 of the Code of Civil Procedure provides that, subject to the provisions of section 2126 (which has no relation to the matter now before us), "a writ of certiorari to review a determination must be granted and served within four calendar months after the determination to be reviewed becomes final and binding upon the relator, or the person whom he represents, either in law or in fact." Obviously the "determination to be reviewed" is the determination made in the order of February 5, 1913, for the order denying a rehearing rests entirely in the discretion of the Commissioners, and more than five calendar months elapsed between the time of serving this original order making the "determination to be reviewed" and the application for a rehearing. It is suggested, however, that under the provisions of section 2122 of the Code of Civil Procedure a writ of certiorari cannot be issued "where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the relator's application, unless the determination to be reviewed was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed," and that section 22 of the Public Service Commissions Law provides for such rehearing, and the city of Buffalo could not secure the writ until after it had exhausted its remedy by way of a rehearing. But does this operate to abrogate the limitation of four months established by section 2125 of the Code of Civil Procedure? It is true, as pointed out by the respondent, that the Public Service Commissions Law does not prescribe any limitation upon the time within which a rehearing may be applied for in express language, but this very absence of a particular limitation operates to limit the time, for it is particularly within the spirit of a rehearing that it should follow immediately upon the determination, while the matter is fresh in mind, unless a longer time is provided by statute. "Aside from the statute," says the court in Pratt v. Keils, 28 Ala. 390, "the court cannot grant a rehearing unless the application is made before the end of the term, and the effect of the enactment is to extend the period within which the petition may be filed." The statute itself appears to recognize this limitation, for it is provided that "after an order has been made by a Commission any party interested therein may apply for a rehearing," etc.

[2] It makes no mention of the order being served; it is "after an order has been made" that the right is given to make an application for a rehearing; and, while it is probably true that the rigid rule of courts would not be applied, it is certainly incumbent upon a party interested to move within a reasonable time if it is intended to ask for a rehearing, and the provisions of section 2122 of the Code of Civil Procedure were not intended to increase the time within which a writ of certiorari might issue. It cannot issue at all where the statute provides for a rehearing, "unless the determination to be reviewed

was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed." The order was made on the 5th day of February. There was a period of two months after the order was made before the same was served upon the plaintiff, and during this time (twice the length of time permitted for an appeal to the Appellate Division [section 1351, Code of Civil Procedure]) the plaintiff had full authority to make an application for a rehearing. Then the order was served and became binding upon the plaintiff. That order was served on the 5th day of April, and the four months fixed by the Code of Civil Procedure in which a writ of certiorari might issue expired on the 5th day of August, but it was not until the 15th day of September that the plaintiff made an application for a rehearing, and this was denied on the 24th day of September, and we are now asked to hold, for the purposes of this motion, that the plaintiff is still entitled to a writ of certiorari to review the order of February 5th. We are of the opinion that the right does not survive the four months' period from the time this order became effective.

[3] Assuming the petition for a rehearing to have been duly made, the statute does not require the Commission to give a rehearing. It makes it discretionary with the Commission. It is given the power to "grant and hold such rehearing if in its judgment sufficient reason therefor be made to appear." The denial of the application is a determination on the part of the Commission that "sufficient reason therefor" has not been made to appear, and it must be presumed that this determination would have been made at any time after the original order was made in February, so that an application for a writ of certiorari made at this time would not be for the purpose of reviewing a determination made upon a rehearing, and the legitimate time in which an application for a rehearing could be made had elapsed long before the order of February 5th became effective. The fair scope of subdivision 3 of section 2122 of the Code of Civil Procedure, read in connection with section 2125 of the Code of Civil Procedure and section 22 of the Public Service Commissions Law, is that the writ might issue to permit of a review of the original order of February 5th any time within four calendar months of the time that the order became effective by service upon the proper parties, where the plaintiff had neglected to make an application for a rehearing until it was too late to get a review of such order by the Commission having jurisdiction. That is the statute (section 2122, Code Civil Pro.) intended to deny to a party any right of review by certiorari of an original order where there was a provision of the statute providing for a rehearing, except in a case where the time had expired in which the relator could procure such rehearing. If, for instance, the particular statute provided that an application for a rehearing should be made within ten days of the time the order was made, and the aggrieved party should permit this ten days to expire, the writ might issue to review the original order rather than an order which might have been made upon an authorized rehearing but without any intention of increasing the time limited by section 2125 of the Code of Civil Procedure. In the

instant case there was absolutely no move made for a rehearing until after the four months had expired. Indeed, it was more than six months from the making of the order to the filing of the petition for a rehearing; and, when we take into consideration the nature of a rehearing, it must be concluded that the Legislature never intended that a party's rights should be enlarged by a mere neglect to act under the provisions of a statute designed to grant a privilege.

Taking this view of the question, there does not appear to be any very good reason why the defendant should be compelled to continue furnishing gas to the plaintiff at an arbitrarily determined price, where a competent tribunal has fixed the rates at an advance of 20 cents per thousand feet and the plaintiff has taken no steps to review that determination. However, it would be in the nature of a public calamity to have the gas service discontinued during the time that it may be necessary to adjust to the present situation, and we have reached the conclusion that the motion should be granted to take effect in 30 days from a service of notice upon the plaintiff of the entry of the order, unless the plaintiff shall in the meantime consent to a trial of the action before a referee or to an adjustment of the controversy between the parties.

Motion granted, with $10 costs; order to be settled by the court as above indicated.

(82 Misc. Rep. 72)

WEST VIRGINIA PULP & PAPER CO. OF DELAWARE v. PECK et al.

(Supreme Court, Special Term, Saratoga County. August, 1913.)

1. NAVIGABLE WATERS (§ 22*)—RIGHTS OF LANDOWNER—MAINTENANCE OF DAM.

Where a company owning land on the Hudson river was granted the right by statute (Laws 1882, c. 406; Laws 1900, c. 683) to erect a dam of a certain height, it acquired no rights as against the state by increasing the height of a dam of the full authorized height by the use of flashboards.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 100–103, 105, 106, 108–120, 132, 260; Dec. Dig. § 22.*]

2. ESTOPPEL (§ 29*)—GRANTEE—TITLE OF GRANTOR.

Where a company owning property on the Hudson river claimed under a grant from the state under Laws 1900, c. 683, giving the right to erect a dam of a certain height, it was estopped from questioning the grantor's title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 69–73; Dec. Dig. § 29.*]

3. NAVIGABLE WATERS (§ 22*) — GRANT — CONSTRUCTION — "ON THEIR OWN LANDS."

The expression "on their own lands," as used in Laws 1882, c. 406, authorizing a company to construct a dam across the Hudson river on their own lands, refers to the anchorage upon the shore, not to the bed of the stream, and fixes the location on the stream.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 100–103, 105, 106, 108–120, 132, 260; Dec. Dig. § 22.*]

4. NAVIGABLE WATERS (§ 8*)—PROPERTY GRANTS—RESTRICTIONS.

With every property grant from the state there is reserved the inalienable power to exercise its sovereign authority whenever occasion

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

therefor may arise, and hence Laws 1900, c. 683, granting to a company the right to erect a dam on the Hudson river, did not surrender the state's power to improve the river for navigation without rendering itself liable in damages.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 21; Dec. Dig. § 8.*]

5. NAVIGABLE WATERS (§ 36*)—NAVIGABILITY—BED OF STREAM—TITLE.
The Hudson river above tide water is a navigable stream, the title to the bed of which is in the state.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–200; Dec. Dig. § 36.*]

6. NAVIGABLE WATERS (§ 2*)—IMPROVEMENTS—POWER OF STATE.
While the state's power to improve navigable tidal and boundary streams is subordinate to that of the federal government, its power to improve other navigable waters of the state is equal to that of the federal government in tidal and boundary streams.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 2, 63; Dec. Dig. § 2.*]

7. INJUNCTION (§ 163*)—TEMPORARY INJUNCTION—GROUNDS.
Where, on a motion to continue a temporary injunction granted ex parte pending the action and restraining defendants from tearing down flashboards on a dam, it appears upon the law and the facts that there is no merit in plaintiff's case, the motion will be denied, though removal of the flashboards pending the final determination of the action will cause plaintiff large pecuniary loss.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357–371; Dec. Dig. § 163.*]

Action by the West Virginia Pulp & Paper Company of Delaware against Duncan W. Peck and others. Motion to continue injunction denied.

Lewis E. Carr, of Albany, for plaintiff.

Joseph A. Kellogg and Edward J. Mone, Deputy Attys. Gen., for defendants.

VAN KIRK, J. This is a motion to continue an injunction, pending the action, granted ex parte with an order to show cause. The defendants took from the dam of the plaintiff flashboards two feet or more high. The injunction restrains defendants from taking down or interfering with the flashboards on the dam.

In 1882, by chapter 406 of the laws, it was provided that:

"The Hudson River Water Power & Paper Company are hereby authorized to construct a dam across the Hudson river at Mechanicville, on their own lands, in such manner as not to injuriously affect the water privilege at Stillwater village as it now exists, or any water privilege now existing and in use on said river between Stillwater village and lands of the Hudson River Water Power & Paper Company without an agreement with the owner or owners of such rights; and to connect the waters of said river with the Champlain canal, by the construction of locks, upon such plans as may be approved of by the state engineer and the superintendent of public works. Before constructing said lock or locks, a map of location shall be filed with the state engineer and surveyor, who, together with the superintendent of public works, shall determine and prescribe such regulations as they may deem to be for the interest of navigation and for the safety and protection of the interest of the state, and the said superintendent of public works shall at all times have control of the same."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This law is not in the form of an absolute grant of any property right but is a permission or authority to construct the dam. There is no limit placed upon the height of the dam by the act. Under this act a dam was constructed. In 1909, by chapter 683 of the Laws, it was provided:

"The erection of the dam heretofore built by the Hudson River Water Power & Paper Company, the name of which has been since changed to the Duncan Company, across the Hudson river at Mechanicville, * * * is hereby legalized and said company is hereby authorized to forever maintain said dam and flood back up said river so far as it now owns the adjacent uplands or may have rights of flowage thereon, for the purpose of maintaining the pond formed by such dam; and any interest of the state in the lands under the waters of said river, covered by said dam and the buildings and works of said company connected therewith, is hereby granted to said Duncan Company."

The act of 1882 not only does not purport to be a grant of property, but it was not passed by the necessary vote, by which the Legislature is authorized to convey state property. The act of 1900 is evidently intended to be a grant of state property. It was passed by both houses of the Legislature by a two-thirds vote, as required by the Constitution. Article 3, § 20. It applies to the dam as it then existed. In 1904 the plaintiff raised the crest of the dam three feet. No question, however, is raised by the state on this account, and therefore the dam at its present height may be considered, for the purposes of this motion, the dam authorized by the act of 1900. This act conveys the title of the state in the bed of the stream under the dam and works of the plaintiff. The following conclusions result:

[1] (1) The height of the dam authorized is the height of the present dam without flashboards. Nothing in the grant authorizes the plaintiff to increase the height of the dam and no rights have been acquired by the plaintiff as against the state by reason of the fact that it has been accustomed to use flashboards. Fulton Light, Heat & Power Co. v. State of New York, 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. (N. S.) 307.

[2] (2) Plaintiff, claiming under the grant from the state in 1900, is estopped from questioning the title of its grantor. 16 Cyc. 685, 686; Fitch v. Baldwin, 17 Johns. 161.

[3] (3) The expression in the act of 1882, "on their own lands," refers not to the bed of the stream but to the anchorage upon the shore and fixes the location on the stream.

[4] (4) The grant of 1900 did not, and was not intended to, convey or abdicate any part of the power of the state to improve public navigation in the river. People v. New York & S. I. F. Co., 68 N. Y. 71; Sage v. Mayor, 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592.

While it would seem that the plaintiff is estopped from disputing the title of the state to the bed of the Hudson, the plaintiff nevertheless does urge its title thereto.

[5] I have not found any case in which the bed of the Hudson river north of its junction with the Mohawk has been determined in an

action between parties who directly disputed the title of the state in the bed of the stream, but it has been held uniformly that the Hudson river above tide water is a public, navigable stream, the bed of which belongs to the state and not to the riparian owners. These declarations by the court have been frequent. Palmer v. Mulligan, 3 Caines, 307, 2 Am. Dec. 270; Canal Appraisers v. People, 17 Wend. 571; People v. Tibbetts, 19 N. Y. 523; People v. Canal Appraisers, 33 N. Y. 461, 465, 475; Smith v. City of Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Fulton Light, Heat & Power Co. v. State, 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. (N. S.) 307; People v. Page, 39 App. Div. 110, 56 N. Y. Supp. 834, 58 N. Y. Supp. 239; Slingerland v. International Contracting Co., 43 App. Div. 215, 60 N. Y. Supp. 12. Rights in the Hudson where the tide runs are considered in Sage v. Mayor, 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592, and Matter of Mayor, 182 N. Y. 361, 75 N. E. 156, 108 Am. St. Rep. 809. The canal acts uphold the same view. It is conceded that no bridge has been constructed across the Hudson river and no dam in the Hudson river without a grant from the state; and, since the existence of the canal, the waters of the Hudson river have been uniformly diverted from the natural stream and used, without question and without compensation to any riparian owner, for public navigation in the canal. Thus for more than 80 years property rights have been taken, held, and conveyed on the understanding that the bed of the Hudson river to high-water mark belongs to the state and not to the riparian owners.

It is urged that the declarations in these cases were not necessary to the decision of the cases, but it must be recognized that they have been accepted as the law of the state and have been positively declared to be the law. Smith v. City of Rochester, 92 N. Y. 483, 44 Am. Rep. 393. The trial court does not feel at liberty to disregard it, even if it be held that the plaintiff is not estopped from disputing its grantor's title. It must be held, therefore, that the Hudson is a public, navigable stream, the title to the bed of which is in the state of New York. At the premises in question, the canal and the lock through the dam are in the stream, and the construction of the Barge canal is an improvement of the public stream for navigation. Lehigh Valley R. R. Co. v. Canal Board, 146 App. Div. 160, 130 N. Y. Supp. 978.

The state may convey its property by act of the Legislature, but its sovereign rights it cannot alienate. Smith v. City of Rochester, 92 N. Y. 484, 44 Am. Rep. 393. With every property grant by the state there is reserved the inalienable power to exercise its sovereign authority, whenever the occasion therefor may arise. Lehigh Valley R. R. Co. v. Canal Board, 146 App. Div. 159, 130 N. Y. Supp. 978, and cases cited, approved 204 N. Y. 473, 474, 97 N. E. 964, Ann. Cas. 1913C, 1228. In the said acts of 1882 and 1900 the state did not alienate any part of its power to improve the Hudson river for navigation. This power is absolute as against private rights and property, even though the title to the bed thereof is in the individual possessing said private rights and property; and such private rights and

property may be destroyed or lessened in value by such improvement without compensation; this not being a "taking" of private property for public use. United States v. Chandler-D. W. P. Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063; Lehigh Valley R. R. Co. v. Canal Board, supra.

[6] While the sovereign power of the state to improve for navigation public tidal and boundary streams is subordinate to the power of the federal government, as to all other public waters within its limits, the state has the same power to benefit and promote navigation held by the federal government in tidal and boundary streams. When the state has determined to improve public waters for navigation and adopted its plan, its decision is final and not subject to review by the courts. United States v. Chandler, etc., supra.

The conclusion, therefore, seems to be necessary that in this case the state government has full power and authority to use the bed of the Hudson river and all constructions therein for purposes of public navigation, without being liable to a claim for damages from any private interest; and therefore, in making such use, in accordance with its declared intention and plan, the state government and its officers cannot be interfered with by parties owning property whose value is lessened by such use or preparation therefor. The plaintiff not being entitled to compensation, it is not necessary that the property be formally appropriated by the state before removing the flashboards; and, since the plaintiff had not the right to maintain these flashboards, it would seem that the superintendent of public works should not be restrained from removing them. N. Y. Const. art. 5, § 3.

[7] It is strongly urged by the plaintiff that the court should continue this injunction pending the action. The state has granted to the plaintiff the right to construct this dam, and the right to maintain it at its present height is not disputed. Also the plaintiff, without objection by the state, has used flashboards upon its dam constantly (except from 1904 to 1911, inclusive) in low-water periods. While flashboards are on the dam during a period of low water, little, if any, water flows over the flashboards, the capacity of the plaintiff's wheels taking the entire flow of the river; and, with the flashboards upon the dam 2½ feet high, the surface of the water is not raised higher than it stands during the periods of ordinary water in the stream and when no flashboards are used. The defendant must construct the works for its canal to meet a condition of ordinary high water in the stream, and the use of these flashboards does not therefore submerge the works more than the state must have contemplated. Because of this grant and use, the plaintiff in good faith has constructed expensive works and enlarged its capacity to fit the use granted and permitted by the state. If the state is allowed to remove the flashboards during the present period of low water, the plaintiff must suffer a large pecuniary loss. It is also urged upon the affidavits that the contractors took the contracts understanding fully the conditions, as recited in the contract, after viewing the conditions upon the premises. Therefore, if any expense is occasioned by the use of the flashboards to the contractors, it must be an expense borne by the

contractors and one which they had taken into account in making their contracts. Therefore the court is urged to exercise the discretion given to it upon the application for a temporary injunction and leave the parties in their present position till a trial has finally determined their respective rights. The plea is strong; but, however much the court may feel inclined to answer it favorably, I know of no ground on which in its discretion it may grant an injunction, when, upon the law and the facts, it is satisfied that the plaintiff is not entitled to an injunction.

The motion to continue the injunction is denied.

Motion denied.

CLARE v. ENGEMAN.

(Supreme Court, Appellate Term, First Department. October 22, 1913.)

COURTS (§ 189*)—CITY COURT—DEFAULT—OPENING—CONDITIONS.

In an action in the City Court of New York City for damages for false representations, where it appeared on a motion to open defendant's default that it was due to his belief that he had 20 days in which to answer, and that upon learning of the default he immediately saw his attorney, and 4 days later procured an order to show cause why the default should not be opened, the opening of the default, in view of the nature thereof and the character of the complaint, should not have been made conditional upon the filing of an undertaking to secure payment of any judgment recovered by plaintiff.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. § 189.*]

Appeal from City Court of New York, Special Term.

Action by William Clare against William A. Engeman and another. From an order granting his motion to open his default on condition, the defendant named appeals. Modified.

The action was one for damages claimed to have been sustained by reason of false representations by which plaintiff was induced to enter into a contract. It appeared from defendant's affidavit on the motion to open the default that the summons and complaint were served on August 1st; that he thought he had 20 days in which to answer, until he received a letter from plaintiff's attorney on August 14th informing him that he was in default; and that he at once saw his attorney, who began preparation of his answer. An order to show cause why the motion should not be granted was made August 18th.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Warren S. Burt, of New York City, for appellant.

Henry Kuntz, of New York City (Abraham P. Wilkes, of New York City, of counsel), for respondent.

PER CURIAM. This is an appeal by defendant from an order granting his motion to open his default, and allowing him to plead upon condition that he file an undertaking to secure any judgment that plaintiff may recover. In view of the nature of the default and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

character of the complaint, we think the order should be modified, by striking out the condition that the defendant be required to file an undertaking, and that the motion should have been granted upon payment of $20 costs.

It is so ordered, without costs or disbursements of this appeal to either party.

(82 Misc. Rep. 407)

ROSEN v. SIMONS et al.

(Supreme Court, Appellate Term, First Department. October 24, 1913.)

DISCOVERY (§ 104*)—INSPECTION—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 803, providing that a court of record may compel a party to produce and discover or give to the other party an inspection of any papers or property relating to the merits of the action or of the defense, in a pledgor's action against the pledgee for the value of a pledge claimed to have been stolen by burglars from the pledgee's vault, in which plaintiff claimed that the loss was due to defendants' negligence, it was proper to grant an inspection of the vault at a time convenient to the pledgee by an electrician and a mason, but, no reason appearing why photographs of the vault should be taken, the taking thereof should be denied.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 136; Dec. Dig. § 104.*]

Appeal from City Court of New York, Special Term.

Action by Rebecca Rosen against Martin Simons and another, copartners trading as Martin Simons & Son. From an order permitting an inspection on behalf of plaintiff of defendants' vault by a mason and electrician and allowing a photographer to take photographs thereof subject to certain restrictions and regulations, defendants appeal. Modified and affirmed.

Argued October term, 1913, before SEABURY, P. J., and GUY and BIJUR, JJ.

Moss, Laimbeer, Marcus & Wels, of New York City (Charles L. Hoffman, Samuel Marcus, and Henry A. Friedman, all of New York City, of counsel), for appellants.

Henry L. Franklin, of New York City, for respondent.

BIJUR, J. The action is brought by a pledgor to recover the value of a pledge alleged to have been stolen by burglars from defendants' vault wherein they kept such pledges. Plaintiff claims that the loss was caused through the negligence of defendants.

The case seems to be one in which an inspection as provided in section 803 of the Code is appropriate. See Chojnacki v. Int. R. T. Co., 76 Misc. Rep. 427, 134 N. Y. Supp. 1090; Donoghue v. Callanan, 152 App. Div. 162, 136 N. Y. Supp. 657; Beyer v. Transportation D. Co., 139 App. Div. 724, 124 N. Y. Supp. 463. The ultimate merits of the entire case on debatable questions of law urged by the defendants should not be decided on this motion. There seems, however, absolutely no reason why photographs of the vault should be taken.

The order should therefore be modified by permitting one inspec-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of the interior and exterior of the vault, not to exceed two hours, at some time convenient to defendants, which can no doubt be agreed upon between the respective counsel, by the electrician and mason named in the order, in the presence of plaintiff's counsel. The order may also provide that there shall be no disturbance of the structure of the vault nor of any apparatus connected with it. As so modified the order is affirmed, without costs of this appeal to either party. Settle order on notice. All concur.

(158 App. Div. 496)

In re SWEENEY.

(Supreme Court, Appellate Division, Third Department. October 24, 1913.)

1. ELECTIONS (§ 126*)—PRIMARIES—COUNT OF VOTES—VARIATION IN NAMES.
Where, in a primary election, one vote was cast for "Henry V. B.," three votes for "H. V. B.," and two votes for "Harry V. B.," and the affidavits showed that "Henry V. B." was commonly known within the district as "H. V. B." but did not state that he was known as "Harry V. B.," and it appeared that he had a son who was known as "Harry V. B., the presumption is that the votes for "Harry V. B." were cast for the son, and they cannot be counted for "Henry V. B."
[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

2. ELECTIONS (§ 154*)—PRIMARIES—CONTESTS—DETERMINATION BY COURT.
Where there were only 15 votes cast for the nomination for Justice of the Supreme Court at the primary of a party in a judicial district consisting of 11 counties, the court should not strain a point in order to give the nomination to one who was not a member of the party and whose candidacy was expressly objected to by the official organization of that party.
[Ed. Note.—For other cases, see Elections, Cent. Dig. § 136; Dec. Dig. § 154.*]

Appeal from Special Term, Schenectady County.

Petition of Daniel J. Sweeney, Chairman of the Socialist Committee of the County of Schenectady, against the Commissioners of Election of the County of Montgomery, to review their action in the matter of making returns from the tally sheets and inspectors' returns at a primary election in said county, and to correct the returns made by such commissioner. From an order of the Supreme Court denying the petitioner's application, he appeals. Reversed, and petition granted.

Argued before SMITH, P. J., and LYON, HOWARD, WOODWARD, and CHESTER, JJ.

Fryer & Lewis, of Schenectady (Charles G. Fryer, of Schenectady, of counsel), for appellant.

Andrew J. Nellis, of Albany, for respondents Commissioners of Elections, Montgomery County.

Thomas Carmody, Atty. Gen. (Joseph A. Kellogg, of Glens Falls, and Claude T. Dawes, of New York City, of counsel), for Secretary of State.

Henry Leon Slobodin, of New York City, for the State Socialist Party.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. [1] It appears from the record that the tally sheets as presented to the Justice of the Supreme Court from whose order this appeal is taken showed that Henry V. Borst received one vote, H. V. Borst three votes, and Harry V. Borst two votes, for the office of Justice of the Supreme Court; that William Siebe received three votes, Wm. Siebe received one vote, and W. Siebe one vote; and four votes were cast for other candidates.

The only question for our determination is, assuming that the votes for H. V. Borst and for W. Siebe should be counted for Henry V. Borst and William Siebe, whether the two votes for Harry V. Borst should be counted for Henry V. Borst, thus giving him six votes for the nomination, while Siebe had only five.

The affidavit in support of the respondents here, while carefully stating that Henry V. Borst was commonly known within the district either as "Henry V. Borst" or as "H. V. Borst," fails to state that he was known anywhere in the district as "Harry V. Borst." On the contrary, it appears that he has a son whose name is "Harry V. Borst" and who is known by that name, and the legal presumption is that the ballots cast for Harry V. Borst were intended for the son of Henry V. Borst and not for Henry V. Borst himself. This Harry V. Borst is a law student, within the district, and the papers fail to state his exact age.

[2] The Fourth judicial district consists of 11 counties, and in these counties only 15 votes were cast in the primaries of the Socialist party for the office of Justice of the Supreme Court. These 15 votes were all in two counties, thus leaving 9 counties in which not a single vote was cast. The 15 votes cast make an average of about 1⅓ votes in each of these counties, and in the interest of justice no court ought to strain a point to give the nomination to a candidate not a member of the party nominating, and especially when his candidacy is expressly objected to by the official organization of that party.

With these conclusions, it must follow that the plurality of the votes cast for the office of Justice of the Supreme Court in the official primary of the Socialist party were cast for William Siebe, a member of the Socialist party, and that the Secretary of State has improperly certified that Henry V. Borst was nominated for the position, and that the prayer of the petition should be granted, and said certificate of nomination should be canceled.

FOX v. LINDEMAN et al.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

NEW TRIAL (§ 42*)—GROUNDS—DISQUALIFICATION OF JUROR.

That after his examination a juror recalled that he had met some years before a partner of plaintiff's attorneys was not sufficient ground for setting aside the verdict, where there was nothing to show that he knowingly answered falsely, or that his mind was influenced thereby.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 74–79; Dec. Dig. § 42.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from City Court of New York, Trial Term.

Action by Henry Fox against Samuel Lindeman and others. From an order setting aside the verdict and vacating the judgment thereon, plaintiff appeals. Reversed, and verdict reinstated.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Goldfogle, Cohn & Lind, of New York City, for appellant.

H. I. & L. Cohen, of New York City, for respondents.

PER CURIAM. In our opinion the ground upon which the verdict of the jury was set aside was insufficient to warrant such action. There is nothing in the record to suggest that the fourth juror knowingly made a false statement in response to the question propounded to all the jurors, nor is there anything to show that the fact that the juror subsequently recalled that several years before he had met one of the partners of the plaintiff's attorneys in any way influenced his mind in arriving at a verdict. The whole incident was not of sufficient importance to have any weight attached to it.

Order reversed, with $10 costs and disbursements, and the verdict reinstated.

(82 Misc. Rep. 383.)

M. F. O'NEILL, Inc., v. LOCKWHIT CO. et al.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

1. ACTION (§ 55*)—CONSOLIDATION OF ACTIONS.

Several causes of action by the same plaintiff against the same defendants should not be consolidated, where the aggregate amount exceeds the amount for which the court has jurisdiction to enter judgment.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 55.*]

2. COURTS (§ 483*)—CITY COURT—JURISDICTION—TRANSFER OF CAUSES.

Where several actions are brought in the New York City Court, which might be consolidated, as authorized by Code Civ. Proc. § 817, but for the fact that their aggregate amount exceeds the court's jurisdiction, the defendant may have them removed to the Supreme Court, as authorized by section 319a, where they may be lawfully consolidated.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1288–1290, 1306; Dec. Dig. § 483.*]

Appeal from City Court of New York, Special Term.

Seven actions brought by M. F. O'Neill, Incorporated, against the Lockwhit Company and another, in the City Court of the City of New York, were consolidated by order of court, and the plaintiff appeals. Reversed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Hugo S. Mack, of New York City (William Kaufman, of New York City, of counsel), for appellant.

Paul M. Abrahams, of New York City (George Trosk, of New York City, of counsel), for respondents.

SEABURY, J. [1, 2] Under the authority of Gillin v. Canary, 19 Misc. Rep. 594, 44 N. Y. Supp. 313, the practice of consolidating sev-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

eral actions, the aggregate of which is in excess of the amount for which the City Court is authorized to enter judgment, is not to be adopted. The amount demanded in the actions consolidated in the order appealed from is $6,043. It follows that the order should be reversed. The defendant may then move to have the several actions now pending in the City Court removed to the Supreme Court, where they may be lawfully consolidated and tried as one action. Code Civ. Proc. §§ 319a, 817.

Order reversed, with disbursements to appellant, and motion denied. All concur.

(82 Misc. Rep. 396)

DIAMOND v. KAUFMANN et al.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

DISMISSAL AND NONSUIT (§ 60*)—WANT OF PROSECUTION.

Where issue was joined in May, 1911, and thereafter no steps were taken to prosecute the action, until defendant moved to dismiss on July 18, 1913, it should be dismissed, though an affidavit was presented of an attorney "associated with" plaintiff's attorney that he believed that notice of trial had been served and note of issue filed until he was served with the motion papers.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. § 60.*]

Appeal from City Court of New York, Special Term.

Action by Daniel Diamond against William Kaufmann, impleaded, etc. From an order denying his motion to dismiss the action for want of prosecution, defendant appeals. Reversed, and motion granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Bernard H. Arnold, of New York City, for appellant.

Timothy A. Leary, of New York City, for respondent.

SEABURY, J. The defendant appeals from an order denying his motion to dismiss the action for want of prosecution. The action was commenced in May, 1911, and issue was joined in that month. On February 9, 1912, a new attorney was substituted for the former attorney of the plaintiff. From the date of joining issue until July 18, 1913, when the defendant made the motion to dismiss, no step to prosecute the action was taken by the plaintiff, and younger issues had in the meantime been tried.

In opposition to the motion an affidavit was presented of an attorney "associated with" the plaintiff's attorney, to the effect that he "believed that the notice of trial had been served and note of issue filed, and the first intimation that defendant had that these matters of procedure had not been attended to was the receipt of the motion papers." The court characterized the plaintiff's excuse as a "lame one," but denied the motion simply upon condition "that the cause be immediately placed on the calendar." The defendant made out a clear case entitling him to have the action dismissed. Anderson v. Hedden & Sons Co., 116 App. Div. 231, 101 N. Y. Supp. 585; Pociunas v.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

American Sugar Refining Co., 74 Misc. Rep. 407, 132 N. Y. Supp. 395; Holtzoff v. Dodge, etc., 134 App. Div. 353, 119 N. Y. Supp. 47.

Order reversed, with $10 costs and disbursements, and motion granted, with $10 costs. All concur.

(82 Misc. Rep. 405)

LICKERMAN v. MOTCHAN.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

COURTS (§ 169*)—STATE COURTS—NEW YORK CITY COURT—JURISDICTION.

The New York City Court has jurisdiction of an action wherein the complaint demands judgment for a greater sum than $2,000, with interest and costs, even though a judgment in excess of that amount cannot be entered.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413–425, 428–436, 443, 456, 458, 465; Dec. Dig. § 169.*]

Appeal from City Court of New York, Special Term.

Action by Frank Lickerman, an infant, by Sarah Kirschenbein, his guardian ad litem, against Louis Motchan. From an interlocutory judgment overruling a demurrer to the complaint, defendant appeals. Affirmed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Edward J. Walsh, of New York City, for appellant.

Henry Kuntz, of New York City (Abraham P. Wilkes, of New York City, of counsel), for respondent.

SEABURY, J. The complaint states a cause of action; and demands judgment for $5,000. The defendant demurred—

"on the ground that the jurisdiction of the court is limited to actions where the sum claimed does not exceed $2,000, and that it appears upon the face of the amended complaint herein that the sum demanded in damages is the sum of $5,000."

The court below properly overruled the demurrer. It has been uniformly held that the City Court has jurisdiction of an action wherein the complaint demands judgment for a greater sum than $2,000, with interest and costs, although a judgment for a sum in excess of that amount cannot be entered. Ralli v. Pearsall, 69 App. Div. 254, 74 N. Y. Supp. 620. The case of Lewkowicz v. Queen Aëroplane Co., 154 App. Div. 142, 138 N. Y. Supp. 983, Id. 207 N. Y. 290, 100 N. E. 796, has in no way changed this rule.

Interlocutory judgment affirmed, with costs, with leave to defendant to answer within six days after service of a copy of the order entered herewith, with notice of entry in the City Court, upon payment of costs in this court and the court below. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(82 Misc. Rep. 16.)

In re D'ARSCHOT'S WILL.

(Surrogate's Court, New York County. July, 1913.)

1. WILLS (§ 47*)—"TESTAMENTARY CAPACITY."
Where testatrix was able to understand the relationship of her relatives to her, and to recollect what claims any of them had upon her affection and bounty, and appreciated the value of her property, and the scope and bearing of her will, the fact that she was advanced in years, infirm, and suffering from various ailments did not divest her of testamentary capacity.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 94; Dec. Dig. § 47.*
For other definitions, see Words and Phrases, vol. 8, pp. 6929–6931.]

2. WILLS (§ 166*)—PROBATE—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.
Evidence on a contested probate of a will *held* insufficient to show that the will was procured by undue influence.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

3. WILLS (§ 155*)—UNDUE INFLUENCE.
That the beneficiaries of a will exercise every means of persuasion within their power in the procurement of the will does not constitute undue influence, in the absence of fraud or conspiracy, or a substitution of their volition for that of testatrix.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375–381; Dec. Dig. § 155.*]

Proceedings upon the contested probate of the will of Countess Gaston D'Arschot, formerly Wilhelmine Detmold. Decree according to opinion.

Robert Thorne, of New York City, for proponents.
Kellogg & Rose, of New York City, for Lentilhon.
Daly, Hoyt & Mason, of New York City, for Boynton.
Alexander T. Mason, of New York City, for Wheeler and Macomb.
Murray, Ingersoll, Hoge & Humphrey, of New York City, for Gilford.

COHALAN, S. The testatrix was an American woman, the widow of Count Gaston D'Arschot of Belgium. Her husband died in 1893. They had no children. For several years she lived abroad with her husband, and after his death returned to America in 1894, to take up her residence at No. 27 West Tenth street, in this city. She lived with her aunt until the aunt's death in 1908, when her nephew, Joseph De Tours Lentilhon, and his family took up their residence with her. The testatrix left surviving her as next of kin eight nephews and nieces, children of her deceased sister. The estate is estimated at about $400,000. Under the will Count Guillaume D'Arschot, a nephew of decedent's husband, and at present the secretary to the cabinet of the king of Belgium, is bequeathed nearly one-third of the estate, and the residue is divided equally between Joseph De Tours Lentilhon and Minna Lentilhon Crook, a blood nephew and niece of the testatrix. The other nephews and nieces of the testatrix are mentioned in the will, but are bequeathed only a few personal remembrances. The pa-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

per is propounded for probate by Joseph De Tours Lentilhon, one of the executors named therein. Probate is contested by four of the nieces and one of the nephews upon the usual grounds of testamentary incapacity and undue influence.

[1] All the statutory requirements were complied with in the formal execution of the paper offered for probate, and the contestants raise no question on that ground. It is urged that the testatrix did not have what is known as "testamentary capacity" at the time she made the will. It is not necessary to go into any lengthy discussion here as to what is "testamentary capacity." It has been defined repeatedly by the courts, but little has been added to the definition made into law by the Court of Appeals in Delafield v. Parish, 25 N. Y. 9. The testatrix was a woman advanced in years, infirm and suffering from various ailments, but she knew who her relatives were, and named them in her will. The testimony leaves no doubt that she was able to understand their relationship to her and to recollect what claims any of them may have had upon her affection and bounty. She evidently knew and appreciated the value of her property and the scope and bearing of the provisions of her will. The objections on the ground of testamentary incapacity are therefore overruled.

[2] The objection on the ground of undue influence is the only one worthy of any serious consideration in this case. It is charged that Count Guillaume D'Arschot, a nephew of the deceased husband of the testatrix, procured the making and execution of the will by fraud and undue influence practiced upon the testatrix. It is alleged that the count conspired with Joseph De Tours Lentilhon, another of the three beneficiaries, in fraudulently inducing the testatrix to change her previously expressed testamentary intentions.

There are some facts that clearly appear. While the testatrix lived in Belgium, during the lifetime of her husband, she had become attached to her husband's nephew, young Count Guillaume D'Arschot. She assisted him in many ways, paid for part of his education, and became interested in his diplomatic career. In 1894, after her husband's death, the countess made a will in his favor, and in his own words made him her "universal legatee." The testatrix then returned to this country and took up her residence on West Tenth street. She did not resume her American citizenship, but preferred to continue as a subject of Belgium and to draw a pension of some $600 per year from the Belgian government. The count visited her in this country two or three times, and their relations seem to have been cordial and even affectionate until some time in 1906. During this period many letters passed between them, and the question of a suitable marriage alliance for Count D'Arschot seems to have been the subject uppermost in the mind of the countess. The countess seems to have been afraid that the count would marry one of the "common people," or only the daughter of a business man, and the count was having difficulty in finding a woman sufficiently aristocratic to please his aunt, and at the same time sufficiently rich to meet his own needs. The count appears to have become somewhat discouraged over his matrimonial prospects, for in July, 1906, he wrote to his aunt:

"I have looked and people have looked for me and never have I had a serious opportunity. If I ever marry, it will be a matter of money and nothing else."

Again in August of the same year he wrote:

"In the U. S. there is nothing to be done then? Let time bring a golden baboon, who is nice. I believe it more and more notwithstanding your advice, the only thing to be considered and to put on this question is the 'R. I. P.' of the tombstones."

The contestants contend that the motive of the count in his subsequent relations with the countess regarding the execution of the will in question should be judged from such statements as the foregoing, and, in view of the almost grotesquely affectionate character of the letters that the count subsequently wrote again and again to the countess, an old lady, it can be said that he was evidently actuated chiefly by mercenary motives.

The marriage of the count with a Miss Nubar, of Egypt, plays a very important part in the story of the relations between Count D'Arschot and the testatrix. The letters written by the count and the testatrix at the time show that the count's marriage was against the wishes and advice of the countess, and that she was very much pained and grieved thereby, notwithstanding the fact that "the fortune, solid, well taken care of, very honest, is valued at between forty and fifty millions (francs);" and that there was "a million and a half of dowry, eight to ten millions more later on; granddaughter of Nubar Pasha, the celebrated statesman." In one of the letters written by the countess to the count she intimated that if he went on with the proposed marriage he would lose the legacy that she had already given him in her will. Nevertheless the count married Miss Nubar and there followed a break in the cordial and affectionate relations that had theretofore existed between him and the countess.

To offset the effect of his marriage upon the countess the count then began a campaign of letter writing, in which he begged, beseeched, and implored her to reinstate him in her affections. There are in evidence almost 200 letters of the count, written to the countess from 1906 to 1911, and they comprise a remarkable and unique chapter in the history of will contests. In some of these letters he reproached her for her apparent neglect and failure to write to him, and in one letter said that he had written her 17 letters within a certain time while she had only written him 3. Some of the count's letters are more like the fervid appeals of an infatuated lover than the letters of a young man to his uncle's widow, who had taken an interest in his future.

The contestants alleged that in 1907 or 1908, after the count's marriage, the countess made a will that bequeathed to the count only those moneys which came to the countess through the D'Arschot family, and revoked the one made in 1894, in which the count was the chief beneficiary. Testimony was offered to prove the making of this will. If such a will had been made by the countess, that fact would be material as showing a change in testamentary intention. However, the evidence offered on this point was very meager, and in my opinion insufficient to establish the fact of its execution.

Counsel for the contestants have submitted an able and exhaustive brief on the facts and on the law of this case. They have examined and analyzed the evidence from every point of view that is favorable to them. But they overlook the fact that the testatrix was one of that class of American expatriates to whom a title of nobility is the great criterion of honor, virtue, and high social position. A title and illustrious family connections were the things she thought most desirable. Throughout her life, after her marriage with the count's uncle, she seems to have permitted herself to be easily swayed and influenced by such considerations. If she was the kind of woman that worshipped a title and permitted herself to be influenced by one who possessed the same title that she acquired by her own marriage, and was pleased to receive the grossest and most extravagant flattery and adulation from the possessor of that title, how can it be claimed that such influence was undue influence in the legal sense of that term? Granted that the count's motives were mercenary, that his own letters prove him to be a fortune hunter, and that he exhausted all his ingenuity in playing upon the affections of a title-worshipping American woman, the fact cannot be overlooked that the testatrix did show great interest in the count throughout his early life, wrote affectionate letters to him, sent money to him at various times, and did various other things, from 1894 to 1907, which showed a great regard for him. The count may have influenced the testatrix in many of these acts, but, if so, it was not the kind of influence which substituted his will in place of hers and compelled her to do what he desired contrary to her independent judgment. I cannot conceive of undue influence in the legal sense extending over a period of 20 years. Beside it does not appear that the testatrix had any particular affection for any of the contestants, or that any of them had any claim upon her except their kinship.

The circumstances attending the execution of the will, which in themselves may appear suspicious, should be considered in this aspect. The Belgian consul, Pierre Mali, interested himself in the matter at the request of the count. Within a day or two of the arrival of the count at the home of the countess, a new physician was engaged for her at the suggestion of the count. When the count asked Mr. Mali to recommend a lawyer to draw a will for the countess, Mr. Mali suggested the name of his nephew; Johnston De Forest. Mr. De Forest took his instructions from the count and Mr. Mali, and never saw the testatrix until he went to her home prepared to have the will executed. One of the witnesses to the will was Mr. Mali, and Mr. De Forest was appointed one of the executors. Mr. De Forest read the will to the testatrix, and she assented to the provisions, supplied some names, and made a few small corrections. The count sailed for home a day or two after the execution of the will, and the countess died about two weeks later. These facts appear rather suspicious and without explanation would seem to indicate fraud. But they are all satisfactorily explained, and are easily understood in the light of the whole history of the relations between the count and the testatrix.

Although the tenor of the count's letters show him to have been a typical European fortune hunter, desirous of bartering his title of no-

bility for money, and not caring where the money came from, as shown by the following extract from one of his letters to the testatrix:

"I would have preferred to have married a Belgian. But in the nobility there are no fortunes, and as to the common people I agree with you; a foreigner is better. Be she therefore Mexican, American or Egyptian, I hardly see the difference, apart from the fact that the American enjoys, one does not know why, special consideration and whenever one mentions an American girl everything is considered all right and that there are millions of dollars"

—nevertheless, I am of opinion that the influence that the count exerted upon the testatrix did not legally amount to fraud, coercion, or duress. It was merely a yielding to the adulation and flattery that she had been pleased to receive from the time the count was able to take advantage of her fondness for the society and attentions of one of the "nobility."

In the count's letters relating to his marriage he very frankly stated to the testatrix that his only object in matrimony was to obtain money. His statements and admissions as to his own fortune-hunting characteristics, far from *unduly* influencing her contrary to her independent judgment, seem rather to have touched a responsive chord in her nature, to which she gave expression by the words in her will: "To my nephew, Count D'Arschot (Guillaume) Ministre resident, chef du Cabinet du Roi à Brussels, Belgium." The testatrix did not make Count D'Arschot one of the chief objects of her bounty because of any fraud or undue influence practiced upon her by him, but because years of habit and a lifelong departure from those sterling principles of democracy that are supposed to be so characteristically American had caused her "to dearly love a lord."

The manifest insincerity of the letters that the count wrote to the countess would have filled an ordinary American woman with disgust, but they seem to have been received by her with pleasure because they were written by her nephew, the count, a member of an "illustrious" family. If this were the will of an average American woman who did not have an exaggerated veneration for titles and trappings of nobility, I think the influence exerted here might perhaps be considered undue influence; but the testatrix was a woman satiated with foreign ideas, who looked upon plain Americans with contempt as being of the "common people," and who was only too pleased to have the opportunity to name the count as one of her beneficiaries.

[3] As a matter of law the count was entitled to use every means of persuasion within his power that did not amount to fraud or conspiracy. Matter of Snelling, 136 N. Y. 515, 32 N. E. 1006. In Smith v. Keller, 205 N. Y. 44, 98 N. E. 215, the Court of Appeals says:

"A will cannot be avoided because of the influence of another, unless it appears that the influence exerted was so potent at the time the will was made as to take away and overcome the power of the testatrix at that time to act freely and upon her own volition. The influence of another to avoid a will must amount to coercion and duress."

The paper propounded will be admitted to probate as the last will and testament of the decedent. Submit decision and decree and tax costs on notice.

Decreed accordingly.

(82 Misc. Rep. 496)

WESTERN NEW YORK WATER CO. v. LAUGHLIN, Mayor, et al.

(Supreme Court, Special Term, Niagara County. November 1, 1913.)

1. INJUNCTION (§ 137*)—PRELIMINARY INJUNCTION—GROUNDS FOR DENIAL—RIGHTS IN DOUBT.

Where the affidavits are conflicting as to whether there are sufficient funds on hand to pay for the extension of water mains and other indebtedness contracted in connection with a municipal water plant, an injunction pendente lite, which would practically determine the action, will not be granted to restrain the letting of contracts or the incurring of the indebtedness; especially since under General Municipal Law (Consol. Laws 1909, c. 24) § 51, the officers are personally liable if they spend money in excess of the funds on hand, and the funds may be reached in the hands of any contractors who have been parties to the illegal transaction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307–309; Dec. Dig. § 137.*]

2. INJUNCTION (§ 134*)—PRELIMINARY INJUNCTION—GROUNDS FOR DENIAL—RIGHTS IN DOUBT.

Injunctions pendente lite, which in effect determine the litigation and give the same relief it is expected to obtain by the judgment, should be granted with great caution and only when necessity requires.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 303; Dec. Dig. § 134.*]

Action by the Western New York Water Company against William Laughlin, individually and as Mayor, and others. Motion for temporary injunction denied.

Kenefick, Cooke, Mitchell & Bass, of Buffalo (Edward H. Letchworth, of Buffalo, of counsel), for the motion.

Firnum G. Anderson, of Niagara Falls (Augustus Thibaudeau and Morris Cohn, Jr., both of Niagara Falls, of counsel), opposed.

WOODWARD, J. The plaintiff a domestic corporation engaged in supplying water to the inhabitants of the city of Niagara Falls, brings this action to restrain the mayor, common council, and board of water commissioners from letting certain contracts, or incurring indebtedness, in connection with the municipal water plant under the circumstances alleged to exist in the city of Niagara Falls. The action is brought under the provisions of section 51 of the General Municipal Law and of section 1925 of the Code of Civil Procedure, and the scope of the action may be fairly gathered from the prayer for relief, which is as follows:

"Wherefore plaintiff demands judgment herein perpetually enjoining the defendants * * * from paying out any money from said water fund upon contracts or for work purported to be authorized or executed when no funds appropriated to said fund by the board of estimate and apportionment are available for paying for the same and no other funds are lawfully available for paying for the same and no other funds were lawfully available as hereinbefore alleged, and perpetually restraining and enjoining said defendants * * * from entering into any further contracts, express or implied, and from incurring any further indebtedness while there is a deficit in said water fund, and adjudging and decreeing that the defendants herein who have pur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ported to authorize and incur said indebtedness in violation of law are personally responsible therefor to said city of Niagara Falls, and enforcing the restitution and recovery of all sums heretofore paid out by the defendants or under their authorization from the water fund of the city of Niagara Falls in violation of the provisions of law, providing for the collection and repayment thereof by these defendants, and by their bondsmen, if any, so as to indemnify and save harmless said city of Niagara Falls, and for a temporary injunction restraining and enjoining said defendants * * * during the pendency of this action from any and all acts against which a permanent injunction is sought herein as aforesaid, and for such other, further, and different relief as to the court may seem just and proper in the premises."

[1] The principal contention of the complaint is that the defendants, as members of the board of water commissioners and other public officers of the city of Niagara Falls, have been making contracts for extensions of mains, etc., at a time when there were no funds lawfully available for these purposes, and the affidavits presented on behalf of the plaintiff seem to support this contention, while those submitted on behalf of the defendants are at least equally clear that funds were and are available for the purposes which have been undertaken, and which are contemplated. There is a clear conflict in the evidence, or rather in the affidavits, and those offered in behalf of the defendants are from sources which are clearly in a much better position to know the facts than the plaintiff's affiants, and we are of the opinion that the latter has not so far overcome the presumptions in favor of official integrity as to justify this court in granting an injunction to remain in force during the pendency of this action. The temporary injunction asked for grants the very relief demanded in the complaint, and no suggestion is made that any material rights of the plaintiff, or of the taxpayers generally, will be irrevocably lost during the time that will be required for the trial of this action. The law has imposed certain duties upon the board of water commissioners of the city of Niagara Falls, and the law presumes that in performing these duties the public officials will act honestly and within the authority given by the statute, and, unless it is made to appear clearly that these officials have acted illegally, this court is not justified in interfering with the performance of the objects for which the board was created, and this is peculiarly true where the statute expressly provides, not only for holding the public officials personally responsible for any losses growing out of illegal conduct, but for reaching the funds in the hands of those who may have been parties to such illegal transactions as contractors or otherwise. Section 51, General Municipal Law.

There is no suggestion in the moving papers that the defendants are not personally responsible, nor that there is any reason to suppose funds improperly paid out could not be recovered from the contractors involved under the provisions of the statute, and, with such a condition existing, it does not seem to be necessary to determine upon affidavits the crucial question of fact involved in the litigation, and to grant in advance the relief which may or may not be warranted by the proofs upon the trial of the cause. The plaintiff's right to an injunction, in any event, is seriously disputed, and that is the issue which is involved in the action, and necessarily must be determined after a trial.

[2] Injunctions pendente lite, which in effect determine the litigation, and give the same relief which it is expected to obtain by the judgment, should be granted with great caution, and only when necessity requires. Maloney v. Katzenstein, 135 App. Div. 224, 226, 120 N. Y. Supp. 418, and authorities there cited. No such necessity is here disclosed, and the motion should be denied.

Motion denied, with costs.

(158 App. Div. 525)

In re STODDARD et al.

(Supreme Court, Appellate Division, First Department. October 27, 1913.)

ELECTIONS (§ 151*)—CERTIFICATE OF NOMINATION—OBJECTIONS—FILING—TIME—STATUTES.

Election Law (Consol. Laws 1909, c. 17) § 125, provides that any question with reference to the construction or legality of any certificate of nomination shall be determined on the application of any citizen by the Supreme Court or any justice thereof within the judicial district, but the final order must be made on or before the last day fixed for filing certificates of nomination to fill vacancies with such officer as provided in section 136. *Held*, that the provision of section 125 as to the time of filing objections to a certificate of nomination is directory only; and hence, where an application to set aside a certificate based on an alleged illegal nominating petition was filed on the first secular day after the registration in the particular political district was complete, when for the first time it could be determined whether the petition was signed by the requisite number of qualified voters, it was in time.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 133; Dec. Dig. § 151.*]

Appeal from Special Term, New York County.

In the matter of objections to the independent nomination of Francis R. Stoddard, Jr., for member of assembly, Twenty-Fifth Assembly District, and of Henry H. Curran for alderman, Twenty-Sixth Aldermanic District, of the City of New York. From an order declaring the nominations void, the nominees appeal. Affirmed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Robert McC. Marsh, of New York City, for appellants.

J. Hampden Dougherty, of New York City, for appellant Anti-Tammany Jeffersonian Alliance.

Samuel J. Rosensohn and A. Welles Stump, both of New York City, for respondent petitioner.

INGRAHAM, P. J. The order appealed from recited as facts that there was filed with the board of elections, city of New York, an independent nominating petition, purporting to nominate Francis R. Stoddard, Jr., for member of assembly from the Twenty-Fifth Assembly District under name of the Anti-Tammany Jeffersonian Alliance; that objections to the said petition were duly filed on the 18th day of October, 1913; that the number of signatures required to nominate candidate for member of assembly in the Twenty-Fifth Assembly District was 403; that the number of signatures filed was 461;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the number of illegal signatures was 70; that the number of legal signatures was 391; and that therefore this nominating petition was illegal and void; and the order sustained the objections and enjoined the board of elections from printing the name of Francis R. Stoddard, Jr., as candidate for member of assembly in the Twenty-Fifth Assembly District.

The appellant does not attack the findings of the court that the number of nominators was not sufficient as required by the statute but takes the objection that the application was not presented within 15 days prior to election day, and therefore the court was without jurisdiction to entertain the application. Section 125 of the Election Law (Consol. Laws 1909, c. 17) provides that any question with reference to the construction, sufficiency, validity, or legality of any such certificate shall be determined upon the application of any citizen by the Supreme Court, or any justice thereof, within the judicial district, who shall make such order in the premises as justice may require, "but the final order must be made on or before the last day fixed for filing certificates of nomination to fill vacancies with such officer as provided in section one hundred and thirty-six of this article." In Matter of Hennessey, 54 App. Div. 180, 66 N. Y. Supp. 463, we held that the order determining the validity of the certificate must be made on or before 15 days prior to the election day, and that was reversed by the Court of Appeals, 164 N. Y. 393, 58 N. E. 446. After reviewing the law, the Court of Appeals said:

"It is thus apparent that the Legislature contemplated a review of the action of the election officers and a correction of the errors which they may have committed in the discharge of their duties under the statute and that this was regarded as one of the prominent and essential features of the law."

See, also, Matter of Herman, 108 App. Div. 335, 96 N. Y. Supp. 144. It appears from the papers before us that the 18th of October was the last day of registration, and, until it was ascertained who were the registered voters, it was impossible to determine whether the certificate contained enough signatures of registered voters to make a valid certificate. The objections to the petition were filed after the registration was completed and on the same day. If the objection of the appellant, that that was the last day on which application to the court could be made, be valid, the object of the statute would be frustrated, and there could be no review by the Supreme Court of the validity of this certificate. This provision of the Election Law that the order must be made within 15 days of the election prevented the court from making an order after that time if this provision were mandatory; but, however, if it were merely directory, it would seem that an application to the court made immediately after the last day of registration would be in time. The application to the court was made on the 20th of October; the first day on which an application could be made as the intervening day (the 19th) was Sunday. That was returnable the 22d of October, and the court made the order, finding as a fact that the certificate was illegal. It seems to me that if this provision of the Election Law is directory simply and not mandatory, and if this ap-

plication was made as soon as validity of the certificate could be ascertained, the time was sufficient and the court below had jurisdiction.

It follows, therefore, that the order appealed from should be affirmed. All concur.

(82 Misc. Rep. 365)

KELDERHOUSE v. McGARRY.

(Supreme Court, Special Term, Erie County. October 28, 1913.)

1. ATTACHMENT (§ 228*)—SETTING ASIDE—GROUNDS—INSUFFICIENCY OF AVERMENTS.

Under Code Civ. Proc. § 635, authorizing an attachment in an action for breach of contract, and section 636, requiring the affidavit to show that plaintiff is entitled to a stated sum over and above all counterclaims, in an action for breach of an agreement to execute a chattel mortgage as additional security for a payment due on a real estate mortgage, where neither the moving affidavit nor the complaint show a right to recover any definite amount, since plaintiff may not suffer any injury, and it is not stated that the amount claimed is over and above all counterclaims, the attachment should be set aside.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 783–784; Dec. Dig. § 228.*]

2. ATTACHMENT (§ 2*)—NATURE OF REMEDY—STATUTORY PROVISIONS—STRICT CONSTRUCTION.

Owing to the harshness of the remedy by attachment, it should be construed, in accordance with the general rule applicable to statutes in derogation of the common law, strictly in favor of those against whom it is invoked.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 5–7; Dec. Dig. § 2.*]

3. ATTACHMENT (§ 92*)—AFFIDAVITS TO PROCURE—AVERMENTS IN GENERAL.

The information furnished by the moving papers for an attachment must be such that a person of reasonable prudence would be willing to accept and act upon it.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 238, 239; Dec. Dig. § 92.*]

4. ATTACHMENT (§ 113*)—AFFIDAVITS TO PROCURE—KNOWLEDGE OR INFORMATION.

Under Code Civ. Proc. § 636, authorizing an attachment when it is shown by affidavit that the defendant is about to dispose of property with intent to defraud creditors, affidavits merely stating facts which might give rise to a suspicion of such purpose, without stating the source of information, or showing personal knowledge, are insufficient; since definite statements will not suffice where it is apparent that the affiant had no actual knowledge or information of the facts.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 307–311; Dec. Dig. § 113.*]

5. ATTACHMENT (§ 47*)—GROUNDS—PRESUMPTIONS—AFFIDAVITS.

Where the facts averred in an affidavit for an attachment on the ground of defendant's intent to dispose of property to defraud creditors might be true and yet there be no fraudulent intent, fraud will not be presumed as fraud is never presumed but must be proved.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 120, 861–876; Dec. Dig. § 47.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. ATTACHMENT (§ 100*)—AFFIDAVITS TO PROCURE—AVERMENTS AS TO MEANS OF KNOWLEDGE.

Averments, in an affidavit for an attachment in an action for breach of an agreement to give a chattel mortgage as additional security to a real estate mortgage, as to the value of the mortgaged real and personal property and as to the amount of property owned by the defendant, are insufficient, in the absence of any averment of circumstances from which the inference may be fairly drawn that the affiant has actual personal knowledge of the facts.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 255–257; Dec. Dig. § 100.*]

Action by Herbert Kelderhouse against John B. McGarry. On defendant's motion to set aside a warrant of attachment. Granted.

Edward N. Mills, of Buffalo (William C. Carroll, of Buffalo, of counsel), for the motion.

Alexander Taylor, of Buffalo, opposed.

WOODWARD, J. The complaint alleges that on or about the 5th day of August, 1912, the plaintiff sold to the defendant certain premises situate in the village of Athol Springs, Erie county, together with certain personal property, consisting of groceries and general merchandise, with certain store fixtures, for the agreed sum of $7,500; that the sum of $100 was paid on account of the purchase price, and that a mortgage upon said real estate was made and delivered for the sum of $7,400; that a chattel mortgage, covering the store fixtures and certain horses and wagons, was at the same time made and delivered as further security upon the said purchase; that by the terms of said mortgage the sum of $400 became due on the 5th day of February, 1913; that the defendant defaulted in this payment, and the plaintiff foreclosed the chattel mortgage, but before the sale was reached defendant made the payment of $400, the chattel mortgage was satisfied, and the parties entered into an agreement by the terms of which the defendant agreed that, in the event of a further default in the payments under the real estate mortgage, he would execute and deliver a chattel mortgage upon the personal property covered by the original chattel mortgage; that the sum of $400 became due under the real estate mortgage on the 5th day of August, 1913, which sum remains unpaid; that the defendant has failed, neglected, and refused to make and deliver the chattel mortgage provided for in the above-mentioned agreement; and that the said personal property is of the fair value of $500, in which amount the plaintiff claims to have been damaged, and demands judgment therefor.

[1] There would seem to be some question about the right of the plaintiff to the relief demanded in this action. The defendant is in default in failing to make and deliver the chattel mortgage, no doubt; but is the plaintiff in a position to recover a money judgment? The defendant owes $400 and accrued interest upon the bond and mortgage, and the chattel mortgage, so far as the facts may be inferentially gathered from the complaint, is in the nature of collateral security for the payment of this installment, and the plaintiff's damages must de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pend upon the action of the defendant in relation to the payment of his indebtedness. He no doubt has the right to foreclose his real estate mortgage upon the default in the payment of an installment, and, in any event, the defendant would have a right to make the payment of the amount due and to relieve the personal property of the lien of the chattel mortgage, and this would seem to be a case where a court of equity might properly be called upon to adjust the equities, but it is hardly a case for an action at law to recover damages. Section 635 of the Code of Civil Procedure provides for issuing a warrant of attachment "where the action is to recover a sum of money only as damages," in an action for "breach of contract, express or implied, other than a contract to marry," and section 636 of the same Code requires that, if the action "is to recover damages for a breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him." Neither the moving affidavit nor the complaint which is attached thereto shows a right in the plaintiff to recover any definite amount of money, nor is there any attempt to comply with the requirement that it shall show that the amount is over and above all counterclaims known to him, so that, if the objections urged by defendant were unavailing, there would still be justification for setting aside the warrant.

[2, 3] Owing to the harshness of the remedy by attachment, it should be construed, in accordance with the general rule applicable to statutes in derogation of the common law, strictly in favor of those against whom it is invoked (Courtney v. Eighth Ward Bank, 154 N. Y. 688, 49 N. E. 54), and, thus construed, there would seem to be no reasonable ground for continuing the warrant, for the affidavits do not meet the requirement that the information furnished by the moving papers must be such that a person of reasonable prudence would be willing to accept and act upon it. Brandly v. American Butter Co., 130 App. Div. 410, 114 N. Y. Supp. 896.

[4] The affidavits do not show that the defendant has removed, or is about to remove, property from the state, with intent to defraud his creditors; or that he has assigned or disposed of, or secreted, or is about to assign, dispose of, or secrete property with the like intent. Section 636, Code of Civil Procedure. The most that can be said is that the persons making the depositions assert some matters, without giving their source of information or showing that they are in fact possessed of the facts from personal knowledge, which might give rise to a suspicion that the defendant intended to dispose of some portion of his property with fraudulent intent; but the rule is well settled that, where it is apparent that the affiant had no actual knowledge or information of the facts, definite statements as to such facts are insufficient. Taintor v. Beseler Co., 33 Misc. Rep. 720, 68 N. Y. Supp. 980; Taylor v. Same, 62 App. Div. 617, 71 N. Y. Supp. 1149.

[5] All of the facts so stated might be true, and yet the intent of the defendant might be lacking; he may regard it as prudent and consistent with the rights of his creditors to sell his personal property at an apparent sacrifice; it may be better for all concerned than to con-

tinue the expense of an unprofitable business, and the law does not presume fraud; it must be proved.

[6] The defendant has bought property and made a substantial payment upon it; the property is not shown to be insufficient to pay the plaintiff's debt, except by the affidavit of the plaintiff, and his mere assertion as to the values, and as to the amount of property owned by the defendant, is not proved. Personal knowledge in an affidavit is not sufficient unless circumstances are stated from which the inference may be fairly drawn that the affiant actually has such personal knowledge. Hoorman v. Climax Cycle Co., 9 App. Div. 579, 41 N. Y. Supp. 710. When any man, not connected with the business of another, and having no special means of knowing, undertakes to say that a man is not worth more than his indebtedness, or that he is insolvent, and generally to pass upon his ability to meet his obligations, he is going outside of the rules of evidence, and his bare statements are not convincing.

The motion should be granted.

(158 App. Div. 505)

LEIH-UND-SPARKASSA AADORF v. PFIZER.

(Supreme Court, Appellate Division, First Department. October 24, 1913.)

1. CORPORATIONS (§ 432*)—BILLS AND NOTES (§ 525*)—AUTHORITY—VALIDITY—SUFFICIENCY OF EVIDENCE.

In an action upon a note executed by a corporation, indorsed by two of its directors and given to the president in payment for the assignment of certain patents to the corporation, evidence *held* sufficient to show that there was a valuable consideration for the note, that the president had authority to negotiate it, and that the plaintiff acquired the note from him in due course for value.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726–1735, 1737, 1743, 1762; Dec. Dig. § 432;* Bills and Notes, Cent. Dig. §§ 1832–1839; Dec. Dig. § 525.*]

2. CORPORATIONS (§ 465*)—CONTRACTS WITH OFFICERS—PROMISSORY NOTE.

Where a note was given by a corporation in payment for patents assigned to it by its president, the mere fact that the payee was the president does not affect the validity of the note, especially in the hands of an indorsee who did not know that he was the president of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1822–1826; Dec. Dig. § 465.*]

3. BILLS AND NOTES (§ 354*)—BONA FIDE PURCHASERS—AMOUNT OF PAYMENT.

The fact that an indorsee of a note took it at one-half of its face value, or that the transfer took place in a foreign country, does not indicate that the transaction was not in good faith.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 904, 905; Dec. Dig. § 354.*]

4. BILLS AND NOTES (§ 360*)—BONA FIDE PURCHASERS—CONSIDERATION—RENEWAL NOTE—RELEASE OF INDORSEE.

Where the holder of a note, which had been given by a corporation to its president after being indorsed by two of its directors, accepted a renewal of the note in the same form but indorsed by only one of the di-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rectors, thereby releasing the other, who was a responsible indorser, the holder was a holder for value of the renewal note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 793; Dec. Dig. § 360.*]

Appeal from Trial Term, New York County.

Action by Leih-und-Sparkassa Aadorf against Charles Pfizer, Jr. Judgment for the defendant, and plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles E. Thorn, of New York City, for appellant.

George C. Lay, of New York City, for respondent.

McLAUGHLIN, J. Action upon a promissory note for $15,706, made by the International Exploitation Company, payable to the order of its president, indorsed by the defendant, and discounted or purchased by the plaintiff. Payment was resisted upon the ground that the note was fraudulently diverted by the payee, was an ultra vires act of the maker, and that the plaintiff took it in bad faith, with full knowledge of its invalidity. The question of the invalidity of the note and the plaintiff's bad faith were submitted to the jury, which found in favor of the defendant. From the judgment entered upon the verdict and an order denying a motion for a new trial, plaintiff appeals.

[1] Prior to September 6, 1905, one Paul Ruf-Martin owned or controlled certain letters patent which he was desirous of exploiting in the United States. To that end he and certain other persons on that day formed a corporation under the laws of the state of New Jersey, known as the International Exploitation Company, with an authorized capital of $300,000. Ruf-Martin was elected president, Pfizer, the defendant, vice president, one Schwanhausser, treasurer and secretary; and they, together with one Imandt, constituted the entire board of directors. On the day following the formation of the corporation it entered into a written agreement with Ruf-Martin by which he transferred to it the letters patents referred to in consideration of $100,000, $50,000 of which was paid in cash and the balance agreed to be paid by the delivery to him of certificates representing $50,000 of the capital stock of the corporation, provided the patents, in the discretion of the board of directors, proved to be "good and marketable." This agreement, while purporting to have been executed on the 7th of September, 1905, was not acknowledged until the 12th of that month. A certificate for 500 shares of the capital stock of the corporation was made out in the name of Ruf-Martin, and, while he signed a receipt for it, it appears it was never actually delivered to him but that the same or a part thereof was taken and used by the defendant. When the agreement referred to was executed, or shortly thereafter, it was modified so that Ruf-Martin, instead of receiving the $50,000 in stock, received two notes of the corporation, one for $20,000, negotiable in form and indorsed in blank by the defendant and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Schwanhausser, and the other for $30,000 being nonnegotiable and unindorsed.

The testimony on the part of the plaintiff tended to establish that Ruf-Martin, being in need of cash, requested the two notes instead of the 500 shares of stock, with the understanding, however, that he could receive the stock upon the return of the notes. The defendant denied there was any agreement by which the contract was modified and contended that the notes were given to Ruf-Martin for the sole purpose of securing him against maladministration of the affairs of the corporation during his absence abroad and under an agreement on his part not to negotiate them. Defendant's claim in this respect is not sustained either by the form of the note sued on, the resolution of the corporation passed by the board of directors at the time the same was executed and delivered, or the other evidence bearing upon that transaction. All of the circumstances tend to corroborate plaintiff's claim that the consideration for the $20,000 note was the transfer of the patents in lieu of that amount of stock which was to be delivered to him if the note were not returned.

That it was expected Ruf-Martin would negotiate the note is clearly evidenced by the resolution passed at the time the note was delivered, which, among other things, specifically provided that in case the corporation did not pay the same at maturity, or at the time to which payment might be deferred, and by reason of that fact the indorsers had to pay, then and in that event they should be reimbursed out of the funds of the company, and the amount paid by them should be a first lien thereon. It was further evidenced by resolution of the board of directors passed on the 26th of March, 1906, wherein it was stated that the corporation issued the note "with the express understanding that the said Ruf-Martin was to take it up and pay it at maturity."

Shortly after Ruf-Martin received the note he procured it to be discounted by the plaintiff, a savings bank located in Switzerland, and received therefor approximately $10,000. The state of the record is such that it is difficult to determine whether he sold the note to the bank or it loaned the money to him, taking the note as security. Substantially the only evidence as to the circumstances under which the note was negotiated by Ruf-Martin is the deposition of the manager of the plaintiff, who testified that he accepted the note and advanced the money thereon and that he was not aware, at the time he did so, of any defect in it; that he did not remember when he first learned that Ruf-Martin was president of the corporation which made the note. There is absolutely no evidence to show bad faith on the part of the plaintiff, nor is any claimed except that Ruf-Martin, at the time the note was made, was president of the corporation; that only $10,000 was advanced upon it; and that such advance was made in a foreign country.

[2] But Ruf-Martin did not execute the note. The fact that he was president of the corporation did not prevent it from discharging its obligation to him by paying for the patents in cash, stock, or a promissory note. If a corporation owes its president, it is bound to pay him just as much as it is any other person.

[3] The fact that the plaintiff took the note for $10,000 is of no more importance than that the transaction took place in a foreign country. If Ruf-Martin had a right to negotiate the note, then the plaintiff had a right to take it upon the best terms obtainable, and that is no concern of the defendant. No matter what may be said upon the subject, the evidence clearly establishes that there was sufficient consideration for the note; that Ruf-Martin had a right to negotiate it; and that plaintiff acquired it in due course, for value.

[4] When the note matured it was presented for payment, payment refused, and an action thereupon brought in the Supreme Court of this state against defendant, but at his request the same was discontinued and a renewal note given, payable three months from date, executed and indorsed as was the original. Besides giving the renewal note, the defendant paid the plaintiff's attorney in the action $827, for which a receipt was taken which recited that the second note was given in consideration of the discontinuance of the action brought in the Supreme Court. When the note fell due, it was renewed, Schwanhausser refused to indorse a renewal note, and thereupon defendant paid $5,000, and the plaintiff accepted, without Schwanhausser's indorsement, the note in suit, no part of which has been paid. When the plaintiff accepted this note, without the indorsement of Schwanhausser, a responsible indorser on the preceding notes, and thereby released him, this, so far as the defendant was concerned, constituted the plaintiff a holder of the note for value. Phœnix Ins. Co. v. Church, 81 N. Y. 218, 37 Am. Rep. 494. The note, in form, is an absolute promise for a valuable consideration to pay a given sum of money at a specified time. There is nothing upon its face to indicate that Ruf-Martin had any connection with the corporation or with the note other than that he was the payee therein named. There is not the slightest evidence to indicate that the plaintiff, when it took the note, knew or had any reason to believe that Ruf-Martin was the president of the maker, and, had it possessed that knowledge, the situation would not have been different. There was sufficient consideration passing to the corporation. The note was executed and delivered for the purpose of being negotiated, which is clearly established by the resolution directing its execution and providing that if it were not paid by the corporation at maturity, and by reason of that fact the indorsers had to pay it, then they should have a first lien upon the assets of the company to that extent. The defendant voted for the resolution; and, when the first note matured and an action was brought upon it, he procured its discontinuance by indorsing a renewal note; and, when the note in suit fell due, he induced the defendant to release a good indorser by paying $5,000 and inducing plaintiff to accept a renewal note for the balance.

Under such circumstances, I think the plaintiff's motion for the direction of a verdict should have been granted and the exception to its denial was well taken. Under section 1317 of the Code of Civil Procedure this court has the power to do what should have been done by the trial court.

The judgment and order appealed from, therefore, is reversed, with costs, and judgment directed in favor of the plaintiff against the defendant for the amount of the note sued on, with interest. All concur.

(158 App. Div. 503)

HERBST v. KEYSTONE DRILLER CO.

(Supreme Court, Appellate Division, First Department. October 24, 1913.)

DEPOSITIONS (§ 46*)—INTERROGATORIES—ATTACHING CORRESPONDENCE.

Code Civ. Proc. § 909, provides that a commission with the certificate, returns, depositions, and exhibits thereto annexed must remain on file in the office of the clerk and are always open to the inspection of the parties, either of whom is entitled to a copy of them or any part thereof. In an action for libel, a commission issued to examine the Brazilian representative of defendant's agent. One of the interrogatories required the witness to state the information he possessed, prior to the writing of a certain letter to his firm, on which he based certain statements, and also called on him to include in his answer a statement of the facts which he knew of his own knowledge, and to produce the letters or other communications from other persons by which he obtained such facts as were not known to him of his own knowledge and on which he based such statements, and to cause a copy to be made of the parts of such communications on which he relied when making them, etc. On objection, this interrogatory was modified so as to require the witness to attach the entire correspondence between defendant's agent and the witness' company between certain dates, which correspondence consisted of numerous personal letters covering many matters which did not relate to the issues, including communications of business policy and other confidential matter. *Held*, that such modification was improper, and that the interrogatory should only require the witness to attach copies of such parts of the communications as referred in any way to the subject-matter of the controversy, on condition that defendant produce at the trial the complete communications referred to, or copies thereof, and submit the same to the trial judge for comparison with the extracts attached to the answer to the interrogatory, and in default thereof that the answer be stricken.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 68–71; Dec. Dig. § 46.*]

Appeal from Special Term, New York County.

Action by Robert Herbst against the Keystone Driller Company. From an order entered on the settlement of interrogatories to be attached to a commission to examine witnesses, defendant appeals. Modified.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Cornelius P. Kitchell and Harry D. Nims, both of New York City, for appellant.

Hoadley, Lauterbach & Johnson, of New York City (Alfred H. Townley, of New York City, of counsel), for respondent.

PER CURIAM. This is an action for libel. A commission was issued to examine witnesses in Brazil. The thirty-fourth interrogatory addressed to the witness Oscar R. Taves required the witness to state

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the information in his possession prior to the writing of a certain letter by his firm on which he based certain statements set out and continued:

"Include in your answer a statement of such facts as you knew of your own knowledge, and produce the letters or other communications from other persons by which you obtained such facts as were not known to you of your own knowledge, and upon which you based these statements. Cause a copy to be made of the parts of such communications upon which you placed reliance in making the statements in the letter above referred to, signing such copies yourself, and causing the commissioner to certify to the correctness of such copies."

The order appealed from directed that said interrogatory be disallowed as proposed and the said interrogatory amended so as to require the witness to produce the complete communications referred to therein instead of causing parts thereof to be attached. This would require the entire correspondence between H. S. Henry & Son, the defendant's agent, and Oscar Taves & Co., Henry's Brazilian representative, between the period of January, 1911, and May, 1911, to be attached to the commission. These letters are numerous, personal, and extensive, and cover a great many matters which do not relate in any way to the issues in this action. They include many communications in regard to business policy, the credit and integrity of persons dealing with the defendant company and its agents, and like matters which are confidential and ought not to be divulged unless required by the exigencies of the case.

Section 909 of the Code of Civil Procedure provides that:

"A commission, * * * with the certificate, returns, depositions, and exhibits thereto annexed, must remain on file in the office of the clerk. * * * They are always open to the inspection of the parties, either of whom is entitled to a copy of them, or of any part thereof, on the payment of the fees allowed by law."

If the order were permitted to stand, the result would be that many important confidential business transactions utterly unrelated to the case at bar would be exposed and such revelation might be a serious business detriment. On the other hand, it would not be entirely fair to permit the witness to extract only such parts of the communications as he might determine upon.

In order to safeguard the interests of both sides, the order appealed from should be modified by providing as follows:

"Ordered, that direct interrogatory No. 34, proposed to be administered to the witness Oscar Taves, be amended so as to require the witness to attach copies of such parts of the communications received from H. S. Henry & Son, as refer in any way to the Keystone Driller Company, or to the sale of drilling machines to the Brazilian government; and upon condition that the Keystone Driller Company produce at the trial of this action the complete communications referred to, or copies thereof, and submit the same to the trial judge for comparison with the extracts attached to the answer to interrogatory No. 34, pursuant to this order and in default thereof the written answer to said thirty-fourth interrogatory be stricken out."

And, as so modified, affirmed, with $10 costs to the appellant.

(82 Misc. Rep. 404)

KRICKL v. OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

INSURANCE (§ 632*)—BURGLARY INSURANCE—ACTION—ALLEGATIONS OF COMPLAINT.

The complaint in an action on a larceny insurance policy was fatally defective for not alleging that the property stolen was that covered by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1319; Dec. Dig. § 632.*]

Appeal from City Court of New York, Special Term.

Action by Charles A. Krickl against the Ocean Accident & Guarantee Corporation, Limited. From an order of the City Court denying defendant's motion for judgment on the pleadings, it appeals. Order reversed, and motion granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Joseph L. Prager, of New York City (Sidney S. Levine, of New York City, of counsel), for appellant.

George Young Bauchle, of New York City, for respondent.

SEABURY, J. This is an appeal from an order denying defendant's motion for judgment on the pleadings. The action was brought to recover upon a policy insuring plaintiff against loss by burglary, larceny, or theft of certain articles mentioned in said policy, a copy of which is annexed to the complaint. The complaint alleges that while said contract of insurance was in force and effect "certain property belonging to plaintiff's wife" was stolen. The court below denied the motion, on the ground that the plaintiff was entitled under the policy to bring the action in his own name, even though the property belonged to his wife. The terms of the policy justified this ruling. The vice of the complaint lies in its failure to allege that the property stolen was the property covered by the policy of insurance. Such an allegation was essential to the statement of a cause of action. Rodi v. President, etc., 19 N. Y. Super. Ct. 23; Krank v. Continental Insurance Co., 50 Misc. Rep. 144, 100 N. Y. Supp. 399.

Order reversed, with $10 costs and disbursements, and motion granted, with $10 costs, with leave to plaintiff to serve an amended complaint within six days after service of a copy of the order entered herewith, with notice of entry in the City Court, upon payment of costs in this court and the court below. All concur.

(82 Misc. Rep. 400)

JAMES v. MARQUETTE.

(Supreme Court, Appellate Term, First Department. October 24, 1913.)

ATTORNEY AND CLIENT (§ 192*)—ENFORCEMENT OF LIEN—PROCEEDINGS.

The amount of the attorney's fee and the question as to how much has been paid by the client thereon cannot be determined summarily on a mo-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion by the attorney to enforce his lien for fees, but should be ascertained on reference.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 425-427; Dec. Dig. § 192.*]

Appeal from City Court of New York, Special Term.

Action by Thomas James against Joseph R. Marquette, Jr. From an order of the City Court of New York denying a motion to open a default judgment, defendant appeals. Reversed, and motion granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Abraham Kutz, of New York City, for appellant.

Warren McConihe, of New York City, for respondent.

BIJUR, J. As there is no claim that the default was suffered other than by the mere accident of defendant's attorney having been a few minutes late when the original motion came on to be heard, the order denying the present motion to open the default is not based on any ground in connection with the occurrence of the default, but on the theory that defendant's moving papers show no merit. With this view we are compelled to disagree. This motion was made by an attorney to enforce his lien by being permitted to issue execution to the amount of such lien, a stated sum, against the defendant, against whom judgment had been recovered in the action. The plaintiff has voluntarily paid the amount of the judgment to the plaintiff's present attorney.

In the present state of the record, it appears that the attorney is entitled to enforce his lien; but both the amount of his fee and the question as to how much has been paid thereon cannot be determined summarily against the defendant, but should be ascertained upon a reference. Bailey v. Murphy, 136 N. Y. 50, 32 N. E. 627; Matter of Speranza, 186 N. Y. 280, 78 N. E. 1070. It should also be referred to a referee to ascertain whether, at the time when the moving party obtained an injunction against the plaintiff and his present attorney from disposing of any part of the proceeds of the judgment paid to them by defendant, either of them had any of these funds in hand. If they did, the moving party having consented to withdraw the motion in so far as it is directed against the plaintiff and his present attorney, the question will have to be decided whether he has not waived his lien against the defendant to that extent by such action See Oishei v. Penn. R. R. Co., 101 App. Div. 473, 474, 91 N. Y. Supp 1034.

Order reversed, with $10 costs and disbursements to appellant, default of defendant opened, on payment of $10 costs, and an order of reference of the issues herein above set forth directed to be entered in the court below. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(82 Misc. Rep. 402)

FICKETT v. MARQUETTE.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

Appeal from City Court of New York, Special Term.

Action by Zemro M. Fickett against Joseph R. Marquette, Jr. From an order denying defendant's motion to open a default, defendant appeals. Reversed, and default opened.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Abraham Kutz, of New York City, for appellant.

Warren McConihe, of New York City, for respondent.

BIJUR, J. This appeal involves precisely the same considerations as order No. 25 (James v. Same, 143 N. Y. Supp. 750), except that the plaintiff is still alive, and is alleged by McConihe, the applicant, to reside in New Jersey and to be insolvent. The determination is therefore the same.

Order reversed, with $10 costs and disbursements, default of defendant opened, on payment of $10 costs, and an order of reference of the issues referred to in the opinion in James v. This Defendant directed to be entered in the court below. All concur.

HEINE et al. v. WELLER.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

DISCOVERY (§ 32*)—STATUTORY PROVISIONS—VACATING ORDER—GROUNDS.

The fact that a defendant denies the allegations of a complaint does not of itself deprive a plaintiff of the right to examine him before the trial, or furnish grounds for vacating an order for his examination.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 40; Dec. Dig. § 32.*]

Appeal from City Court of New York, Special Term.

Action by Arthur Heine and another against Henry J. Weller. From an order of the City Court, vacating an order for the defendant's examination before trial, plaintiffs appeal. Order reversed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Fixman, Lewis & Seligsberg, of New York City (Walter N. Seligsberg and Clarence M. Lewis, both of New York City, of counsel), for appellants.

Louis Werner, of New York City (S. A. Lowenstein, of New York City, of counsel), for respondent.

SEABURY, J. This is an appeal by plaintiffs from an order granting defendant's motion to vacate an order obtained upon the application of plaintiffs to examine the defendant before trial. The learned court below granted the motion, and vacated the order for defendant's examination because of the denial of the defendant in his answer and in the affidavit submitted upon the motion of all of the material allegations of the complaint. The fact that a defendant denies the allegations of the complaint does not of itself deprive the plaintiff of a right to examine him before trial, or furnish any legal ground for vacating

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an order for his examination. Istok v. Senderling, 118 App. Div. 162, 103 N. Y. Supp. 13; Straus v. Peck, 126 N. Y. Supp. 628.

Order reversed, with $10 costs and disbursements, and motion to vacate order for defendant's examination denied, with $10 costs. All concur.

MAGUIRE v. O. U. BEAN & CO., Inc.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

EXECUTION (§ 364*)—SUPPLEMENTARY PROCEEDINGS—ORDER FOR DELIVERY OF PROPERTY.

Where one holds property under the terms of an overdue chattel mortgage from a judgment debtor, it cannot be said that the title thereto was not the subject of substantial dispute, and a restraining order could not be granted, under Code Civ. Proc. § 2447, allowing a supplemental order to require those holding property, the rightful possession of which by the judgment debtor is not substantially disputed, to deliver such property to the sheriff, to compel the delivery of such property.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1100, 1101; Dec. Dig. § 364.*]

Appeal from City Court of New York, Special Term.

Action by Samuel A. Maguire against O. U. Bean & Co., Incorporated. From an order of the City Court adjudging Charles Geely and Frederick Yung in contempt for disobedience to an order entered in supplementary proceedings, said Geely and Yung appeal. Order reversed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Nathan Burkan, of New York City, for appellants.

Leon Laski, of New York City, for respondent.

PER CURIAM. This is an appeal from an order adjudging the appellants in contempt. The alleged contempt consisted in the act of the appellants in parting with property in their possession. It is claimed that this property belonged to the judgment debtor and that the appellants were restrained from parting with the same under the terms of an order in supplementary proceedings against the judgment debtor. The restraining order applied only to property belonging to the judgment debtor as to the title to which there was no substantial dispute. Code Civ. Proc. § 2447; First National Bank v. Gow, 139 App. Div. 576, 124 N. Y. Supp. 450–452. In this case it clearly appears that the appellants held the property under the terms of an overdue chattel mortgage from the judgment debtor. Under these circumstances, it cannot correctly be said that the title to the property in question was not the subject of substantial dispute.

It follows that the order must be reversed, with $10 costs and disbursements, and the motion to punish for contempt denied, with $10 costs. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WHAMOND v. NORTH SIDE BOARD OF TRADE IN CITY OF NEW YORK.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

CONTRACTS (§ 337*) — ACTIONS FOR BREACH — COMPLAINT — ALLEGATION OF BREACH.

A complaint for breach of a contract, a copy of which was annexed thereto, for the publication of a booklet, which alleges that defendant abandoned and refused to perform the contract, does not state a cause of action, where the complaint and the contract do not show that the defendant was obligated to do any act which it has neglected or refused to perform.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1682–1690; Dec. Dig. § 337.*]

Appeal from City Court of New York, Special Term.

Action by Reginald Whamond against the North Side Board of Trade in the City of New York. From an order denying defendant's motion for judgment on the pleadings, defendant appeals. Order reversed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Cornelius J. Earley, of New York City, for appellant.

Emile Pincus, of New York City, for respondent.

GUY, J. This action is brought on an alleged contract, a copy of which is annexed to and made part of the complaint, for the publication of an illustrated and descriptive booklet of the Bronx. The complaint alleges that defendant is a membership corporation; that one Davis was chairman of its literature and publication committee; that plaintiff submitted its proposal to publish a booklet to the chairman of defendant's publication committee; that the committee recommended the acceptance of the proposal; that defendant then authorized the committee to accept the proposal; that the committee, through its chairman, for and on behalf of defendant, duly accepted the proposal, which it had authority to accept on defendant's behalf, and subsequently the defendant abandoned and refused to perform said contract. The answer admits the incorporation of defendant, that Davis was chairman of said committee, and that the committee recommended an acceptance of plaintiff's proposal, and denies all other allegations of the complaint.

These facts, as alleged in the complaint, when read in connection with the contract, which is a part of the complaint, do not, however, set up a cause of action. Nowhere does it appear that by said contract defendant was obligated to do any act or perform any duty which it has neglected or refused to do or perform. There being no duty to perform, a mere allegation of refusal to perform does not constitute a cause of action.

The order must therefore be reversed, with $10 costs and disbursements, and the motion granted, with $10 costs, with leave to plaintiff to serve an amended complaint within six days upon payment of costs in this court and in the court below. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(158 App. Div. 913)

CASTELLI v. BURNS et al.

(Supreme Court, Appellate Division, First Department. October 24, 1913.)

1. MORTGAGES (§ 11*)—FORECLOSURE—DIVESTITURE OF MORTGAGOR'S TITLE.
The acceptance of a mortgage executed by the mortgagor after entry of a decree of foreclosure of another mortgage on the property, but before sale, would be effective in favor of the second mortgagee, since it is the sale on foreclosure and delivery of the referee's deed which divests a mortgagor's title.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 10–12, 16; Dec. Dig. § 11.*]

2. DEEDS (§ 82*)—DELIVERY—RECORDING.
It is not essential to the vesting of title that the deed be recorded, delivery and acceptance by the grantee being sufficient; and the grantee can thereafter legally execute a mortgage on the property without first recording the deed.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 217; Dec. Dig. § 82.*]

Appeal from Special Term, New York County.

Action by Domenico Castelli against Alexander S. Burns and others. From an order directing the county clerk to enter and docket a judgment for plaintiff against defendant named, such defendant appeals. Reversed and motion denied.

The prior order of the court, referred to in the opinion, directed Burns to execute to plaintiff a mortgage and bond.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

George E. Blackwell, of New York City, for appellant.

Louis O. Van Doren, of New York City, for respondent.

PER CURIAM. When this court, in April last (156 App. Div. 200, 140 N. Y. Supp. 1057), so far modified the judgment then under consideration as to reverse that portion of it which dismissed the complaint against the defendant Semenza, it was quite obvious, and therefore understood by the court, that said defendant would probably proceed diligently with the prosecution of his action to foreclose the mortgage held by him. The facts are fully stated in the opinion on that appeal.

[1] The purpose of requiring the defendant Burns to give a bond and mortgage for $4,000 and a mortgage for $2,500 was simply to put plaintiff in a position to protect his interest on the foreclosure sale, or, failing in that, to have an indisputable claim to any surplus that might result from the sale. To effect this object the acceptance of the mortgages after entry of the decree of foreclosure, but before sale, would have been effective; for it is only the sale and delivery of the referee's deed which divests a mortgagor of his title.

[2] It was not essential to vesting title to the property in Burns that the deed to him should have been recorded. It was sufficient that the deed had been delivered to and accepted by him. Burns, therefore,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at the time he made the tender to plaintiff, was "able" to carry out the provisions of the order of this court, within the meaning of that word as used by the court in its order modifying the judgment heretofore appealed from.

The order appealed from is therefore reversed, with $10 costs and disbursements, and the motion denied, with $10 costs.

LASKY v. COVERDALE et al.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

1. CONTRACTS (§ 229*)—CONSTRUCTION—COMPENSATION FOR SERVICES.
   Where a contract provided that "the profits are to be divided as follows, * * * and L. to receive $25 weekly," L.'s salary was to be paid only out of the profits, and no recovery can be had on the contract, without a showing that there were profits.

   [Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1045–1057, 1059–1066, 1070, 1077; Dec. Dig. § 229.*]

2. APPEAL AND ERROR (§ 671*)—QUESTIONS PRESENTED FOR REVIEW—LAW OF THE CASE.
   Where the record does not disclose a previous decision of the case, which appellant contends establishes the law of the case, the effect of such decision cannot be considered.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. § 671.*]

Appeal from City Court of New York, Special Term.

Action by Jesse L. Lasky against Minerva Coverdale and another. From an order of the City Court, denying defendants' motion for judgment on the pleadings, defendants appeal. Order reversed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

O'Brien, Malevinsky & Driscoll, of New York City (Arthur F. Driscoll, of New York City, of counsel), for appellants.

Leon Laski, of New York City, for respondent.

BIJUR, J. [1] The question involved on this appeal is the sufficiency of the complaint, which alleges that plaintiff has duly performed a contract with defendants, that he has become entitled to $25 a week, and that no part of the same has been paid. The contract is made part of the complaint. It provides that:

"All profits are to be divided as follows: Miss Coverdale is to receive one-half of salary received, * * * after commissions have been paid. Mr. White is to receive one-half of salary, and Mr. Lasky is to receive $25 weekly, for services rendered."

It seems to me to be clear, both from the purposes of the agreement as a whole and from the context, as well as from the precise terms just quoted, that the plaintiff was to be paid only out of profits. Apart from the question, therefore, whether an action at law could be main-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tained under this contract, the absence of an allegation that there were profits prevents any recovery.

[2] Appellants urge that a previous decision in this litigation has established the law of the case. As the record discloses no such proceeding, we are unable to consider the point.

Order reversed, with $10 costs and disbursements, with leave to plaintiff to serve an amended complaint within six days, upon payment of costs in this court and in the court below. All concur.

(82 Misc. Rep. 384)

WILLIAM BERNARD, Inc., v. COWEN.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

COSTS (§ 274*)—MODE OF COLLECTION—COSTS OF MOTIONS.

Costs upon a motion not disposing of the merits of a cause, even though awarded by the Appellate Division, are interlocutory, and not enforceable against real property or by supplementary proceedings, under Code Civ. Proc. § 779, authorizing execution for such costs against personal property only.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1043; Dec. Dig. § 274.*]

Appeal from City Court of New York, Special Term.

Action by William Bernard, Incorporated, against Bernard Cowen. From an order of the City Court, denying motion to vacate an order for defendant's examination in supplementary proceedings for the collection of an award of costs made by the Appellate Term (80 Misc. Rep. 394, 141 N. Y. Supp. 252), in granting an interlocutory motion, the defendant appeals. Order reversed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Emanuel Tepper, of New York City, for appellant.

Robert L. Turk, of New York City, for respondent.

GUY, J. Costs upon a motion, not disposing of the merits of a cause, even though awarded by an order of the Appellate Division, are deemed interlocutory, and are not enforceable against real property or by supplementary proceedings. Code Civ. Proc. § 779; Pettis v. Schwartz, 139 App. Div. 904, 123 N. Y. Supp. 1137; In re Stoddard, 128 App. Div. 759, 113 N. Y. Supp. 157; Seabury, City Court Practice, pp. 1096, 1097.

Order reversed, with $10 costs and disbursements, and motion granted, with $10 costs. All concur.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(158 App. Div. 523)

In re WILKINS.

(Supreme Court, Appellate Division, First Department. October 27, 1913.)

1. ELECTIONS (§ 36*)—CALLING ELECTION—CONGRESSIONAL ELECTION.
Under the Election Law (Laws 1909, c. 23 [Consol. Laws 1909, c. 17] as amended by Laws 1911, c. 891) § 292, providing that any vacancy occurring before October 15th in any office authorized to be filled at a general election shall be filled at the next general election, a vacancy occurring September 1st in the office of Representative in Congress is to be filled at the general election in November following, though no writ of election to fill the vacancy has been issued by the Governor in compliance with Const. U. S. art. 1, § 2, subd. 4.
[Ed. Note.—For other cases, see Elections, Cent. Dig. § 25; Dec. Dig. § 36.*]

2. ELECTIONS (§ 154*)—GOVERNMENT AND OFFICERS—CONGRESS—DETERMINATION AS TO ELECTION OF MEMBERS.
Whether the election of a Congressman to fill a vacancy is to be recognized as valid or invalid because no writ of election to fill the vacancy was issued by the Governor in compliance with Const. U. S. art. 1, § 2, subd. 4, is a matter for Congress and not the court to determine.
[Ed. Note.—For other cases, see Elections, Cent. Dig. § 136; Dec. Dig. § 154.*]

Appeal from Special Term, New York County.

Application by William J. Wilkins to review the action of William B. Lambert and another, as Chairman and Secretary of the Democratic Congressional Committee for the Thirteenth District, and the Board of Elections of the City of New York, in designating George A. Loft as a candidate for Congress. From an order denying his motion to reverse the order of the Board of Elections, the petitioner appeals. Affirmed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

George Edwin Joseph, of New York City, for appellant.

A. S. Gilbert, of New York City, for respondents Robson and Rothman.

John G. Saxe, of New York City, for respondent William B. Calvert.

INGRAHAM, P. J. [1] Timothy D. Sullivan was duly elected Representative in Congress for the Thirteenth congressional district for the term beginning March 4, 1913, and ending March 4, 1915, at the general election in November, 1912. On September 1, 1913, by his death a vacancy was created in said office, and the representatives of the various parties in New York nominated candidates for Representative in Congress to fill the vacancy; but the petitioner, who is a citizen and duly qualified voter within the Thirteenth congressional district of the state of New York, objected to the Bureau of Elections placing the name of this candidate upon the official ballot upon the ground that the Governor of the state of New York had not issued a certificate of election to fill said vacancy, as provided for by article 1, § 2, subd. 4, of the Constitution of the United States.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The question arises under section 292 of the Election Law (chapter 22 of the Laws of 1909 [Consol. Laws 1909, c. 17] as amended by chapter 891 of the Laws of 1911), which provides that:

"A vacancy occurring before October fifteenth of any year in any office authorized to be filled at a general election, shall be filled at the general election held next thereafter, unless otherwise provided by the Constitution, or unless previously filled at a special election."

It was also provided that:

"A special election shall not be held to fill a vacancy in the office of a Representative in Congress unless such vacancy occurs on or before the first day of July of the last year of the term of office, or unless it occurs thereafter and a special session of Congress is called to meet before the next general election, or be called after October fourteenth of such year."

The first clause of this section would seem to provide for the filling of a vacancy occurring before October 15th of any year at the general election to be held in the following November. This provision of the Election Law seems to me to justify the Bureau of Elections in filing the proper nominations for member of Congress, although the Governor has issued no certificate of election to fill such vacancy.

[2] Whether or not Congress will recognize the election of the Congressman so elected is a matter for Congress and not for this court to determine. See Matter of Independent Nominations, 186 N. Y. 279, 79 N. E. 708. It is also provided that the Secretary of State shall issue what is called a "supplementary call" for an election to fill the vacancy caused by the death of a Representative in Congress for this district; but whether such a call is a writ of election issued by the executive authority of the state it is not necessary for us to determine. There is a vacancy, under section 292 of the Election Law, that occurred before the 15th day of September, and therefore is to be filled at the General Election in November following.

We think that under the law of the state of New York the nomination was regular, and it follows that the order appealed from must be affirmed. All concur.

(82 Misc. Rep. 385)

PHILLIPS v. HUDSON FILM CO. et al.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

1. RECEIVERS (§ 194*)—ALLOWANCE OF ATTORNEY'S FEES.
Where the attorney of the receiver of an insolvent corporation participated in the entry of fraudulent confessions of judgment, counsel fees cannot be awarded.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 385, 386; Dec. Dig. § 194.*]

2. RECEIVERS (§ 55*)—DISBURSEMENTS—RIGHT TO MAKE DISBURSEMENTS.
Where the Supreme Court found that the appointment of a receiver by the City Court was fraudulent as to the appellant's claim, and decreed that the receiver should hold the moneys in his possession as trustee for appellant, the receiver is not, so long as the judgment remains unre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

versed, entitled to disbursements or compensation without appellant's consent.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 94, 400; Dec. Dig. § 55.*]

3. RECEIVERS (§ 191*)—ACCOUNTING—RIGHT TO ACCOUNTING.
Where the judgment of the Supreme Court was appealed from, there should be no accounting until the final determination of that action.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 382; Dec. Dig. § 191.*]

Appeal from City Court of New York, Special Term.

Action by Mark Phillips against the Hudson Film Company, in which William J. Kindgen was appointed receiver. From an order passing the accounts of William J. Kindgen as receiver, Milton J. Gordon appeals. Order reversed, and disbursements and application denied.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Milton J. Gordon, of New York City, for appellant.

Henry S. Mansfield, of New York City, for respondent.

GUY, J. Respondent Kindgen is the receiver of the property of the Hudson Film Company. He was appointed under a City Court judgment recovered by the plaintiff, Phillips, against that corporation by confession. In May, 1913, in an action in the Supreme Court by the appellant, Gordon, as plaintiff, against Phillips, the receiver, Kindgen, and others, it was adjudged, among other things, that the City Court judgment was confessed with intent to hinder, delay, and defraud the appellant, and that the receiver's counsel in the court below acted as one of the attorneys in entering the fraudulent confession of judgment, as well as other like confessions of judgment, though there was no finding that the receiver was a party to or was privy to any fraud. Because of the fraudulent acts of those instrumental in procuring his appointment, it was adjudged:

"That the moneys in possession of the defendant William J. Kindgen, as receiver of the defendant Hudson Film Company, is and was held in trust for the said Milton J. Gordon, the plaintiff herein, to the extent of the judgment in favor of said plaintiff" for $3,641.50.

In disregard of this Supreme Court judgment, the receiver has procured the entry of an order on August 21, 1913, passing his accounts and decreeing the payment of $360 of the moneys which the Supreme Court judgment awarded to the appellant, to himself for commissions, $470.30 thereof to the counsel who entered the fraudulent confessions of judgment, and $125 thereof to his counsel on this appeal for counsel fees. The Supreme Court judgment has been appealed from, but it still remains unreversed and in full force and effect.

[1] The counsel fee awarded to the receiver's attorney, who participated in the entry of what the unreversed judgment of the Supreme Court holds to be fraudulent confessions of judgment, cannot be sus-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tained in defiance of such judgment. Clapp v. Clapp, 49 Hun, 195, 200, 1 N. Y. Supp. 919.

[2] So long as the Supreme Court judgment holding the appointment of the receiver fraudulent as against the appellant's claim stands, the appellant is entitled to insist that as to him it should be deemed never to have been made, and the City Court cannot lawfully wrest from appellant what the Supreme Court adjudged and still adjudges to be the appellant's property, which is now in the receiver's hands, and direct the receiver's commissions and counsel fees to be paid out of it, without the appellant's consent. Moe v. McNally Co., 138 App. Div. 480, 483, 123 N. Y. Supp. 71; Pittsfield Nat. Bank v. Bayne, 140 N. Y. 321, 329, 330, 35 N. E. 630; Weston v. Watts, 45 Hun, 219–222.

[3] As the final determination of the Supreme Court action may materially affect the receiver's rights, there should be no accounting herein until the final determination of that action.

Order reversed, with $10 costs and disbursements, and application denied, with $10 costs, without prejudice to a renewal thereof in whole or in part upon the final determination of the Supreme Court action. All concur.

(82 Misc. Rep. 398.)

PHILLIPS v. HUDSON FILM CO. et al.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

1. CONTEMPT (§ 58*)—PROCEEDINGS—MATTERS RESPONDENT IS BOUND TO ANSWER.

Where the order to show cause why the respondent should not be punished for contempt for violating a stipulation made in the City Court did not charge the violation of any verbal directions of the City Court justice, respondent need not make any answer to the violation of such directions.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 169–175; Dec. Dig. § 58.*]

2. CONTEMPT (§ 21*)—POWER OF PUNISHMENT—AUTHORITY OF INFERIOR COURT.

Where the Supreme Court found that the appointment of a receiver by the City Court was fraudulent as to appellant, and directed that the receiver should hold all moneys in his possession as trustee for appellant, the City Court cannot, by giving verbal directions to appellant as to his conduct in the cause in the Supreme Court, control the proceedings in that court, and punish appellant for contempt in disregarding such directions, for, even if a justice's recollection of his directions to an attorney cannot be reviewed or questioned in another tribunal, a court cannot extend its jurisdiction by means of such direction, so as to review the judgment of a higher court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 34, 63–66; Dec. Dig. § 21.*]

Appeal from City Court of New York, Special Term.

Action by Mark Phillips against the Hudson Film Company, in which Milton J. Gordon intervened. From an order of the City Court, punishing the intervener for contempt of court, he appeals. Order reversed.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The City Court appointed a receiver for the defendant Film Company under a judgment obtained by confession, which judgment was held by the Supreme Court to be fraudulent as to the intervener, and the receiver directed to hold the money in his possession in trust for the intervener.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Milton J. Gordon, of New York City, for appellant.

Henry S. Mansfield, of New York City, for respondent.

GUY, J. The alleged contempt of appellant charged in the final order herein is that the appellant disregarded his alleged stipulation in open court not to apply to the Supreme Court for a stay of certain proceedings commenced in the City Court by a City Court receiver, which the Special Term of the Supreme Court held were in disregard of its final judgment in an action there pending, to which the City Court receiver was a party, and that appellant also disregarded the verbal direction of a City Court justice directing appellant not to apply for any Supreme Court stay of the City Court receiver's proceedings. A $50 fine was imposed therefor.

[1] The order to show cause why appellant should not be punished for contempt set forth only the appellant's alleged stipulation in open court and its alleged violation, and said nothing about any City Court justice's verbal direction in amplification thereof. The moving affidavit set forth only the alleged stipulation and its alleged violation. The appellant denies the alleged stipulation, but admits making a different stipulation, which he insists he complied with in all respects. He was not formally charged with, and therefore was not required to affirm or deny, the violation of any verbal direction of the City Court justice. In its order the court found him guilty on both grounds. The proof is insufficient to show that he consciously disregarded any stipulation.

[2] Even if, as contended by respondent, a justice's recollection of his directions to an attorney cannot be reviewed or questioned by any other tribunal, and following the rule that a person who, after any court has decided to restrain the doing of an act, does the act with notice, either actual or constructive, of its unformulated, because unwritten, decision, is guilty of a contempt, where the court acted within its powers (People ex rel. Platt v. Rice, 144 N. Y. 250, 260, 261, 39 N. E. 88), it is clear that the City Court had no power to restrain proceedings in the Supreme Court to enforce the judgment of the latter court in an action to which a City Court receiver was a party. This would, in effect, establish a system of appeals to the City Court from judgments of the higher court, which our system of judicial procedure does not contemplate.

Order reversed, with $10 costs and disbursements, and motion denied, with $10 costs. All concur.

(82 Misc. Rep. 388)

LAING v. HUDGENS et al.

(Supreme Court, Appellate Term, First Department. October 23, 1913.)

1. BILLS AND NOTES (§ 335*)—BONA FIDE HOLDERS—DEFENSES.
In an action on a note, where plaintiff came into possession before maturity and paid value, it is a good defense that the note was given for the purchase price of a business bought by defendant upon installments, under an agreement that, in case of her failure to make any of the payments, either party might rescind the contract, the seller receiving back the business and plaintiff her note and payments, but that, contrary to the agreement, the note was negotiated to plaintiff, who took with knowledge of the agreement; for Negotiable Instruments Law (Consol. Laws 1909, c. 38) § 91, defines a holder in due course as one who has no notice of any defect in the title of the person negotiating it, and section 94 describes the title as defective when the person who negotiated it did so by a breach of faith, and consequently such facts would destroy the presumption created by section 98 that every holder is a holder in due course.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 817; Dec. Dig. § 335.*]

2. EVIDENCE (§ 445*)—WRITTEN INSTRUMENTS—PAROL EVIDENCE TO VARY.
Defendant purchased a business under a written contract providing for payment in installments, and authorizing either party in case of a default to rescind the contract. The contract required defendant to execute four notes, but by subsequent agreement defendant gave only one note for the purchase price, which note was, after rescission, wrongfully negotiated by the seller. *Held*, that in an action by the holder of the note, who took with notice, proof of the agreement was not an attempt to vary a written instrument by parol evidence; the contract which governed the issuance of the note being written, and the subsequent oral modification, which was necessarily supported by a consideration, making the written agreement applicable to the single note.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052–2065; Dec. Dig. § 445.*]

3. TRIAL (§ 170*)—DIRECTED VERDICT—DISMISSAL OF DEFENSE.
The dismissal of a defense at the trial, on motion of plaintiff, is permissible.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 390–394; Dec. Dig. § 170.*]

4. COURTS (§ 190*)—CITY COURT—APPEAL—QUESTIONS PRESENTED FOR REVIEW.
An appeal from an order of the City Court denying defendant's motion for a new trial, brings up for review by the Appellate Term, under Code Civ. Proc. §§ 3188, 3189, 3192, providing for appeals to the Supreme Court from orders and judgments of the City Court, all errors committed below.
[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190;* Appeal and Error, Cent. Dig. § 103.]

5. BILLS AND NOTES (§ 467*)—ACTIONS—COMPLAINT.
An allegation in a complaint in an action on a note that the note before its maturity lawfully came into possession of plaintiff for value is not equivalent to an allegation that plaintiff was a holder in due course.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1480–1488, 1490, 1491; Dec. Dig. § 467.*]

6. PLEADING (§ 8*)—COMPLAINT—CONCLUSIONS OF LAW.
An allegation in a complaint that before maturity a note lawfully came into the possession of plaintiff for value is a mere legal conclusion, and need not be denied as one of the material allegations of the complaint.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12–28½, 68; Dec. Dig. § 8.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. BILLS AND NOTES (§ 481*)—ACTIONS—ANSWER—SUFFICIENCY.

In an action upon a note, where the answer set up new matter showing that plaintiff was not a bona fide holder for value, a specific allegation that he was not such a holder is sufficient to destroy the presumption that he was such a holder, created by Negotiable Instruments Law (Consol. Laws 1909, c. 38) § 98.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1530–1532, 1559–1561; Dec. Dig. § 481.*]

8. APPEAL AND ERROR (§ 194*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

In an action upon a note, where the answer set up new matter showing plaintiff not to be a bona fide holder for value, plaintiff cannot for the first time on appeal complain that the allegation in the answer that he was not a bona fide holder for value was a mere conclusion of law, and so was not sufficient to rebut the presumption that he was a holder in due course; for, if the objection had been taken below, the error might have been cured by amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241–1246; Dec. Dig. § 194;* Pleading, Cent. Dig. § 1375.]

Appeal from City Court of New York, Special Term.

Action by James S. Laing against Sula Hudgens and another. From an order denying the motion of the named defendant to set aside a verdict directed in favor of plaintiff, she appeals. Reversed and remanded.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Murphy & Fultz, of New York City (David L. Fultz, of New York City, of counsel), for appellant.

Frank J. Ryan, of New York City, for respondent.

BIJUR, J. Plaintiff sues as the holder of a promissory note made by the appellant December 1, 1911, for $1,000, payable in 12 months. The complaint alleges that the note was originally made to A. M. Kendrick & Co., by whom it was indorsed, "and that thereafter and before its maturity it lawfully came into possession of plaintiff for value." Appellant's answer contains some general denials, but on the trial these were evidently abandoned, and no point is made thereof here.

The entire case turns upon the defendant's separate defense, which is, in substance, that she entered into a contract in writing with Kendrick & Co. to buy their business and to pay $1,000 for the same in four monthly installments, for which notes were to be given, title to the business to pass to her upon final payment. It was a further condition of the contract that, if she should be unable to make any of the payments, either party should have the right to rescind, whereupon the business should be returned to Kendrick & Co., and any payments previously made by her should be returned to her. "Thereafter it was agreed that the note set forth in the complaint should be given in place of the four notes above mentioned, but that the payments were to be at the intervals and in the amounts set forth in the original contract"; that subsequently she became unable to make the payment due March 1, 1912, and notified Kendrick & Co. of her election to rescind

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the contract; that Kendrick & Co. retook possession of the business and kept it. Finally she alleges, "on information and belief, that plaintiff is not a bona fide holder for value of said note sued upon."

On the trial, the learned court asked what the defense was and defendant appellant's counsel confined himself to stating this separate defense. The court remarked that the plaintiff was not a party to the agreement between the defendant and Kendrick & Co., to which defendant appellant's counsel replied: "We contend that the note is not good in the hands of the payee"—and added: "Does your honor hold that the payee could indorse that note to a person who had knowledge of these facts, and that that person could then bring action against the maker of the note and recover upon it?" To this the court replied: "I think he can." The court had previously remarked: "I do not see how this defense can be maintained in a case against a holder for value."

[1] It is quite evident that the learned court below was of opinion that this defense was not available against a holder for value, even though he had notice of defendant's equities. In this ruling the learned court confounded a holder for value with a holder in due course as that term is defined in the Negotiable Instruments Law (Consol. Laws 1909, c. 38). "A holder in due course" of a note, under section 91, is one who has no notice of any "defect in title of the person negotiating it." Section 94 describes the title as defective when the holder obtains the instrument "in breach of faith or under such circumstances as amount to fraud." The defense here asserted alleged such a negotiation, and if proved, would overcome the presumption established by section 98 that plaintiff was a holder in due course, and put him to his proof that he had no knowledge of defendant's equities under the agreement with Kendrick & Co. German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836; Ginsburg v. Shurman, 71 Misc. Rep. 463, 128 N. Y. Supp. 653; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676. The defense is therefore good.

[2] There was also some discussion in the court below, and apparently respondent advanced the claim, to the effect that defendant's reliance on the collateral agreement was an attempt "to vary the terms of a written instrument by parol testimony"—citing Jamestown Business College v. Allen, 172 N. Y. 291, 64 N. E. 952, 92 Am. St. Rep. 740. That case, however, has no application. The defendant appeals to no parol testimony, but, on the contrary, refers to a written contract as modifying the terms of the note; and although, as pleaded, the written contract did not originally refer to a note, but to four installment notes, the allegation is sufficient to show that by subsequent oral agreement (for which, from its very terms, there was mutual consideration) the parties modified the contract by substituting the one note for the originally promised four notes.

[3] The court granted the plaintiff's motion to dismiss the defense and directed the jury to find a verdict for the plaintiff. Defendant appellant now makes the point that the dismissal of a defense at the trial is not permissible. In this, however, he is in error. See Amper-

sand Hotel Co. v. Home Ins. Co., 198 N. Y. 495, 91 N. E. 1099, 28 L. R. A. (N. S.) 218, 19 Ann. Cas. 839.

[4] The respondent contends that, inasmuch as the defendant appellant has not appealed from the judgment, but only from the order denying his motion for a new trial, he cannot avail on this appeal of any alleged errors of law committed below. In support, he cites, among others, the case of Alden v. Knights of Maccabees, 178 N. Y. 535, 71 N. E. 104. That case, however, held merely that an appeal from the judgment alone does not bring up for review questions of fact. The converse is by no means true. On the contrary, it has been held repeatedly that an appeal solely from an order denying a new trial brings up for review in the Appellate Division (and evidently in this court as well—see Code, §§ 3188, 3189, 3192) all errors committed below. Alden Case, supra, 178 N. Y. 541, 542, 71 N. E. 104; Raible v. Hygienic Ice Co., 134 App. Div. 705, 119 N. Y. Supp. 138; Voisin v. Commercial Ins. Co., 123 N. Y. 120, 25 N. E. 325, 9 L. R. A. 612.

[5, 6] Respondent's other contentions are not very clear, but apparently he urges that the separate defense does not contain a denial of material allegations of the complaint, and is therefore incomplete under the rule laid down in Douglass v. Phœnix Co., 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448. Evidently the "material" allegation to which he refers is that the note "lawfully came into the possession of plaintiff for value." That, however, is not equivalent to the plea that plaintiff is a holder in due course. Moreover, it is, in any aspect, defective as stating merely a legal conclusion. Browning, King & Co. v. Terwilliger, 144 App. Div. 516, 129 N. Y. Supp. 431; Fulton v. Varney, 117 App. Div. 575, 102 N. Y. Supp. 608.

[7] If, however, plaintiff should rely on the presumption accorded in the Negotiable Instruments Law, that he is a holder in due course, then defendant is entitled to have considered the allegation of the answer that the plaintiff is not a bona fide holder for value.

[8] The plaintiff respondent's claim that this pleading states merely a legal conclusion might have force, had it been raised below, but it is not available here; for, had it been raised below, defendant, under the pleadings, would have been entitled to permission to amend so as to plead that plaintiff, at the time he negotiated the note, had knowledge of the facts of the defense as set forth. See McCarton v. City of N. Y., 149 App. Div. 516, 133 N. Y. Supp. 939; Ramsay v. Miller, 202 N. Y. 72, 95 N. E. 35; Boynton Furnace Co. v. Trohn, 141 App. Div. 773, 126 N. Y. Supp. 695.

Order reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(82 Misc. Rep. 370)

GAGE v. DETTLING.

(Supreme Court, Special Term, Erie County. October 31, 1913.)

INSURANCE (§ 750*)—MUTUAL BENEFIT INSURANCE—FORFEITURE FOR NONPAYMENT—REINSTATEMENT.

The by-laws of a lodge provided that no member who was in debt for more than 13 weeks' dues when taken sick should be entitled to sick benefits nor his family death benefits, and that a member who was three months in arrears for dues should not become a beneficiary until six weeks after such arrearages have been paid in full, and then only on furnishing satisfactory proof to the lodge that he was in good health at the time the payments were made. The dues were payable quarterly, and plaintiff's husband did not make the payment due September 30th until November 25th, on which date it was received by the lodge. The member's last sickness began on November 28th, and he died on January 4th following. *Held*, that under the by-laws the widow was entitled to death benefits; since a delay in paying the dues of less than three months did not forfeit the rights of the member to continue the insurance, but only required him to carry his own insurance for the time he was delinquent and for any sickness contracted during that time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1895, 1896, 1903; Dec. Dig. § 750.*]

Appeal from City Court of Buffalo.

Action by Helen B. Gage against Paul Dettling. From a judgment of the City Court of Buffalo in favor of the plaintiff, the defendant appeals. Affirmed.

Calvin S. Crosser, of Buffalo, for appellant.

James A. Magoffin, of Buffalo, for respondent.

WOODWARD, J. Franklin B. Gage was duly elected and admitted as a member of Buffalo Lodge No. 315, Knights of Pythias, in the year 1895, and from that time up to about the time of his death on the 4th day of January, 1913, he continued in such membership. Under the by-laws of the lodge, if he was in good standing at the time of his last illness, his widow was entitled to $100 for funeral expenses and $5 per week for a certain length of time prior to his death. The complaint alleges the necessary facts to constitute a cause of action, and the question seriously litigated was whether the plaintiff's intestate had complied with the conditions of the by-laws in paying his dues and assessments; it being urged that he was not in good standing, because of a default in the payment of his dues. It was conceded upon the trial that the dues of Franklin B. Gage, which became due and payable on the 30th day of September, 1912, were not paid until the 25th day of November in that year, and there was some evidence in the case which tended to show that he died from a cancerous condition of the liver, and that this disease must have been in progress at the time this payment was made, so that it is urged that he was not in good standing at the time. The last quarter's payments were not made, although the plaintiff in this action tendered payment on the 25th day of January, 1913, following the death of her husband.

The controversy turns upon the proper construction to be given to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

certain provisions of the defendant's by-laws, and we are of the opinion that the judgment is in harmony with the law and that it ought not to be disturbed. It is the theory of the defendant that the plaintiff's intestate had forfeited his rights under the by-laws of the lodge because he had failed to pay the dues which became due and payable on the last day of September, such payment not being made until the 25th day of November; and, if this is the correct construction of the language of the by-laws, there can be no question that the judgment is wrong. But we are of the opinion that a fair reading of the provisions which are relied upon by the plaintiff show that the deceased was in good standing at all times, and that she is entitled to recover in this action.

Section 1 of article 10 of the by-laws of the local lodge provide that every member "shall pay into the lodge the sum of six dollars per year as dues, commencing with the date of his receiving the rank of page, payable quarterly, which means that the sum of one dollar and fifty cents shall become due and payable on the last regular meeting nights in the months of March, June, September and December," and that he "shall also pay such assessments as may at any time be levied upon him. All liabilities for dues and assessments are due and payable at the time specified by the Grand Statutes." Section 4 of article 11 provides that no member "shall be entitled to sick benefits, nor his family to funeral benefits, who is in debt to this lodge for more than thirteen weeks' dues when taken sick; nor can he by paying up be entitled to benefits during that sickness, nor his family to funeral benefits if death occurs from said sickness"; and section 5 of the same article provides that a member "who is three months in arrears for dues shall not become a beneficiary until six weeks after such arrearages have been paid in full, and then only on furnishing satisfactory proof to the lodge that he was in good health when his dues were paid." There is no claim here that any of the assessments made upon the deceased were unpaid; the default is alleged in reference to the dues. These dues of $1.50 became due and payable on the last meeting nights in the months of March, June, September, and December, so that on the 30th day of September, 1912, plaintiff's intestate owed the local lodge $1.50, and it is conceded that this sum was paid to the proper official on the 25th day of November, 1912; and it is not to be doubted that, if the evidence showed that the illness resulting in death commenced prior to the 25th day of November, the defendant would not be liable. But the evidence does not disclose this fact. At least there was evidence from which the conclusion might properly be reached that the deceased was not taken with his last illness until the 28th day of November, and it is not conclusively shown that cause of death was the cancerous condition of the liver, if it be assumed that such a disease would require a greater length of time.

It may be fairly said that the evidence justifies the finding that the fatal illness of the deceased commenced after the 25th day of November, 1912, and we reach the question whether the failure to pay the dues on the 30th of September operated to forfeit the rights of the deceased. It will be noted that the language of section 4 of article

11 is that if a member "is in debt to this lodge for more than thirteen weeks' dues when taken sick" he is not entitled to receive the benefits, while in section 5 it is provided that a "member who is three months in arrears for dues shall not become a beneficiary until six weeks after such arrearages have been paid in full." In other words, the beneficiary, by neglecting to pay promptly, takes it upon himself to carry his own insurance during the time that he is in arrears for a period of three months. If he is taken sick while in debt to the lodge for more than 13 weeks' dues, he is not entitled to benefits during such sickness; nor are his family entitled to funeral benefits, even though he elects to pay the dues during such sickness. If this arrearage continues for a period of three months—that is, if he remains in debt to the lodge for dues three months after the same have become due and payable—then he shall not become a beneficiary for six weeks after such payments have been made. There is a period of three months, after the debt has become due and payable, in which the beneficiary may take his own risk without forfeiting his right to continue the insurance. If he continues to owe the debt beyond a period of three months, he can be reinstated to the rights of a beneficiary only after the expiration of six weeks from the date of payment. In other words, he is obliged as a condition of his delay for three months to carry his own insurance for a further period of six weeks before he comes into his right of insurance again, and then only on condition of establishing the fact that he was in "good health when his dues were paid." This is the reasonable construction; it gives effect to all of the provisions, and is consistent with a prudent policy on the part of the lodge.

This question is fully discussed in Wiggin v. Knights of Pythias (C. C.) 131 Fed. 123, where the court says:

"Here the disputed dues for the term commencing January first, and ending June thirtieth, did not become finally payable until the later date, after which only did they become 'in arrears'; and, as Wiggin died before the six months' indulgence expired, his policy was not forfeited by the very terms of the contract itself."

In the instant case the deceased was in arrears from the 30th day of September to the 25th day of November, on which date the dues were paid. He had forfeited no rights, except the right to be insured during the time that he was in arrears, or during a term of sickness which might occur during such delinquency. The payment of the dues while he was yet in health, and before the expiration of three months from the due date, operated to restore him to his insurance; and, he having become sick on the 28th day of November, he was entitled to the benefits of his contract as much as though he had paid the previous dues upon the 30th day of September. There is nothing in the Grand Statutes of the lodge, as shown in the record, in conflict with this construction; the provisions are substantially the same as the by-laws of the local lodge, in so far as they relate to this controversy.

The judgment appealed from should be affirmed, with costs.

GRIFFIN v. ARMSTED et al.

(Supreme Court, Special Term, Steuben County. March, 1913.)

1. ACTION (§ 45*)—JOINDER OF CAUSES—FORECLOSURE OF CHATTEL MORTGAGES.
An action to foreclose several chattel mortgages is a proper proceeding.
[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 378–383, 385–448; Dec. Dig. § 45.*]

2. CHATTEL MORTGAGES (§ 277*)—FORECLOSURE—COMPLAINT—SHOWING INTEREST.
The complaint of G. to foreclose chattel mortgages, some of them given to L. and others assigned to L., not showing an assignment from L. to plaintiff, or that L. was a fictitious name under which plaintiff was doing business, or how plaintiff got title, is bad.
[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 564–566; Dec. Dig. § 277.*]

Action by John Griffin against Charles H. Armsted and others. Defendant Armsted demurs to the complaint. Demurrer sustained.

John Griffin, of Hornell, in pro. per.
Floyd E. Whiteman, of Hornell, for defendant Armsted.

CLARK, J. This action is brought to foreclose three chattel mortgages, and defendant Charles H. Armsted demurs to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action as to said defendant, and that it appears upon the face of said complaint that plaintiff has no legal capacity to sue, for the reason that if any cause of action exists against said defendant it is in favor of one F. Laird, and not in favor of the plaintiff, and that it does not appear upon the face of the complaint that any cause of action set forth therein has been assigned by the said Laird to this plaintiff. Said defendant also demurs upon the ground that causes of action have been improperly united in the complaint.

[1] I do not think the last ground of demurrer can be sustained. An action to foreclose several chattel mortgages is a perfectly proper proceeding, and all parties interested in the property should be made parties to the action. Herman on Chattel Mortgages, 500, 501.

[2] Three chattel mortgages are sought to be foreclosed in this action. The first two were assigned to F. Laird, and the third mortgage was given to F. Laird, and it nowhere appears who this F. Laird is, or that he is a fictitious person, nor how title in the chattel mortgages happened to be transferred from Laird to this plaintiff.

Plaintiff undertakes to explain this transaction by the statement that the chattel mortgages were assigned to him in the name of F. Laird, but that statement is somewhat inconsistent with the statements in the chattel mortgage renewals attached to the complaint, which purport to be signed F. Laird by J. G., meaning John Griffin, this plaintiff. If the chattel mortgages Exhibits A and B were assigned to plaintiff and the chattel mortgage Exhibit C was made to plaintiff, but in each instance in the name of F. Laird, as stated in the complaint, it is singu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lar that in the renewals that the name of F. Laird should be signed by J. G., meaning John Griffin, this plaintiff. That would import that John Griffin was the agent for one F. Laird, whereas if F. Laird was simply a figurehead, and John Griffin was all the time the party in interest, there was no need of signing the renewals by this plaintiff as agent for a person who did not exist.

If the first two chattel mortgages were actually assigned to plaintiff, and the third was given to him, no reason appears why the name of Laird should have been used in the transaction. If, however, they were actually given to a man named Laird, then something should have been stated in the complaint showing an assignment from Laird to this plaintiff; and, if plaintiff was doing business under a fictitious name, it seems that it should have been pleaded—that the assignments of Exhibits A and B and the mortgage Exhibit C were made to plaintiff doing business under the name of F. Laird.

I think the demurrer should be sustained on the grounds stated in the first and second clauses thereof, but with leave to plaintiff to plead over within 20 days, on payment of costs.

Ordered accordingly.

(82 Misc. Rep. 162.)

MAXWELL v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Special Term, Columbia County. September, 1913.)

MASTER AND SERVANT (§ 281*) — INJURY TO SERVANT — SUFFICIENCY OF EVIDENCE.

Evidence, in an action for the death of plaintiff's decedent, while employed as a track repairer, from being struck by a freight train in the night, *held* insufficient to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987–996; Dec. Dig. § 281.*]

Action by Carrie J. Maxwell, as administratrix, against the New York Central & Hudson River Railroad Company. Motion to set aside verdict of $5,000 for plaintiff. Motion granted.

Visscher, Whalen & Austin, of Albany (William L. Visscher, of Albany, of counsel), for the motion.

John C. Dardess, of Chatham, opposed.

COCHRANE, J. In Traynor v. New York Central & Hudson River R. Co., 155 App. Div. 600, 140 N. Y. Supp. 625, it was held that if the decedent, who was repairing a track at the time of his injury, was put in jeopardy by a train on that track moving out without signal or warning, the defendant might be held liable either upon the theory that the foreman was negligent in requiring the decedent to work in such a dangerous place as that was described to be where the accident happened without furnishing a watchman, or for the negligence of the engineman of the train or of the employé in charge of the movement of the train. The place where that accident occurred, however, was a very different kind of a place from that where the present accident occurred.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the present action it is claimed that the decedent was struck by a milk train known as No. 77, which, although it had been crossing the tracks, was at the time of the accident proceeding in an ordinary manner westerly on the main west-bound track. There were two west-bound tracks, and it was between these two tracks that decedent was found. The evidence shows that the engine of the milk train east of the Woodbridge avenue crossing blew its whistle. It is of little moment that the occasion for the signal may have been the crossing which the train was about to make. It must have been heard by the deceased, and it was a notice to him, as well as to all others who heard it, that a train was approaching in a westerly direction, and, as above stated, at the time it had reached the deceased it was traveling in the usual way on the main west-bound track. There was no other train in the vicinity at that time, and consequently no train movement to create confusion. There was abundant room or space for the decedent to step on either side of the west-bound tracks. There is no evidence as to whether or not the headlight of the engine was burning, but the train must have been a regular freight train running on schedule time, as is indicated by the fact that it bore a number.

It is urged by the plaintiff, and was urged at the trial, that the defendant should have furnished a watchman for the deceased to have warned him of the approaching trains. A warning may be given by a bell or whistle just as effectually as by the word of a watchman. It may be that it is a question for a jury to determine whether or not this signal east of the Woodbridge avenue crossing was a sufficient warning to the deceased, and that the case should go to the jury as to whether or not under all the circumstances the deceased should have been better protected by more complete warnings from the approaching engine or in some other manner. As the motion for a nonsuit was denied at the trial, that question is not now before me, and I express no opinion in reference thereto. There is no evidence as to what method is usually adopted by railroad companies to warn their employés under circumstances here disclosed. There is no evidence as to the distance of the milk train from the deceased when the whistle was blown, except that it appears that the accident was more than 250 feet west of the crossing. It had been previously snowing but there is no evidence that the night was bad or unusual. I am of the opinion that under the meager facts here appearing, and with the one fact standing prominently forth that the engine in question gave warning of its approach and was proceeding regularly at the time of the accident, and that all which the deceased had to do was to step to one side to allow it to pass, the verdict is against the weight of evidence. And in so holding I recognize the rule that the burden of proof to establish contributory negligence in this action rests on the defendant.

In Hogan v. New York C. & H. R. R. Co., 208 N. Y. 445, 102 N. E. 517, an action which in some general features is not unlike this, the court as a matter of law held that the deceased was guilty of contributory negligence notwithstanding that the case was under the statute which placed upon the defendant the burden of establishing that defense. In this case I merely hold that under the facts disclosed at

the trial the verdict is against the weight of evidence. I realize that the plaintiff is at a disadvantage in not having an eyewitness of the accident, but nevertheless there are some facts not disclosed at the trial which are susceptible of proof.

The verdict is set aside and a new trial granted.

Motion granted.

(82 Misc. Rep. 130.)

In re ATWATER.

(Surrogate's Court, New York County. August, 1913.)

WILLS (§ 524*)—CONSTRUCTION.

Under a will bequeathing a certain sum in trust with instructions to pay the income to testator's stepsister for life and bequeathing the principal sum to "her children living at her death" share and share alike, the remainder in interest in the trust fund was distributable only among those remaindermen who survived both the life tenant and testator, where the life tenant died before testator leaving four children, all of whom survived testator except a daughter, who died leaving five children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. § 524.*]

Judicial settlement of account of David F. Atwater, as executor, etc. Decreed according to opinion.

Hawkins, Delafield & Longfellow, of New York City, for executor.

Ernest P. Hoes, of New York City, for Frances S. Spencer, Sophia S. Cammann, and Constance S. Heckscher.

Frederick F. De Rham, of New York City, for Frederick de P. Foster, as executor of Edward Spencer, deceased.

Myers & Goldsmith, of New York City, for Charles B. Stone and Alexander D. Canter.

Stetson, Jennings & Russell, of New York City, for New York Trust Co.

Daniel J. Mooney, of New York City, special guardian.

COHALAN, S. The testator died November 1, 1911, leaving a last will bearing date August 19, 1895, and which was duly admitted to probate on the 20th day of November, 1911. After making several bequests the testator provided in paragraph seventh as follows:

"Seventh. I give to my nephew, George Walton Green, the sum of twenty thousand dollars, in trust, nevertheless, and for the following uses and purposes, that is to say: That he shall loan out or invest the same in such securities as he in his best judgment may think safe, and shall collect and receive the interest and income arising therefrom and shall pay the same semi-annually unto my stepsister, Mrs. A. L. Stone, widow of Rev. Dr. A. L. Stone, of San Francisco, in the state of California, during her natural life, and upon her death I give the said principal sum of twenty thousand dollars *unto her children living at her death*, to be divided equally among them, share and share alike."

And in paragraph twelfth as follows:

"Twelfth. I give to my nephew, George Walton Green, the sum of twenty thousand dollars, in trust, nevertheless, and for the following uses and purposes, that is to say: That he shall loan out or invest the same in such se-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

curities as he in his best judgment may think safe, and shall collect and receive the interest and income arising therefrom and shall pay the same semiannually unto my brother-in-law and sister-in-law, Harvey Spencer and his wife, Sophia Spencer, to be divided equally between them, share and share alike; and upon the death of either of them he shall pay over the whole of said income unto the survivor of them; and upon the death of such survivor I give the said principal sum of twenty thousand dollars to *their children living at their death*, to be divided equally among them, share and share alike."

The executor has filed his account herein and seeks a construction of these two paragraphs of the will so as to determine to whom the legacies of the remainder bequeathed by these two clauses should be paid.

First taking paragraph seventh, it is conceded that Mrs. A. L. Stone, the life tenant, died December 24, 1904, and before the testator, leaving her surviving four children, Frank F. Stone, Katie R. Stone, Charles B. Stone, and Ellen Stone Baker. All of these children survived the testator except Ellen Stone Baker, who died March 3, 1911, leaving five children her surviving. The executor asks this court to determine whether the remainder interest in the fund is distributable among the four children of the life tenant surviving her, including representatives of Ellen Stone Baker, who predeceased testator, or whether Ellen Stone Baker's share lapsed and passed to the residuary, or whether the fund is distributable to the three children of the life tenant who survived both her and the testator.

The same question is presented in paragraph twelfth of the will. Sophia Spencer, one of the life tenants, died January 19, 1896, and before the testator. Harvey Spencer, her husband, and the other life tenant died July 16, 1898, also before the testator. The children of the life tenants surviving them were Harvey Spencer, Jr., who died October 6, 1904, and before the testator; George H. Spencer, who died June 23, 1907, and before the testator; Edward Spencer, who died December 30, 1911, after the testator; and Sophia S. Cammann, Constance S. Heckscher, and Frances S. Spencer, still living.

There seems to be no question but that the gifts of the remainder interests, after the termination of the life tenancies created by paragraphs seventh and twelfth of this will, are gifts to a class within the scope of the definition of a gift to a class as laid down by the Court of Appeals in Matter of Kimberly, 150 N. Y. 90, 44 N. E. 945, and Matter of King, 200 N. Y. 189, 93 N. E. 484, 34 L. R. A. (N. S.) 945, 21 Ann. Cas. 412. Matter of King is not applicable to this case except for the general definition as to what is a gift to a class, for the reason that the facts in that case are not the same. In Matter of King the gift was to nephews and nieces of the deceased husband of testatrix "who were living at the death" of said husband. That will was executed in 1867, and the husband at that time was not living, having died in 1866. At the time of the execution of the will there were nine such nephews and nieces living. When the testatrix died in 1906, there were four nephews and nieces alive, and the court held that the surviving nephews and nieces took only their own shares and that there was a lapse of the shares of the five who predeceased the tes-

tatrix; those five shares passing into the residuary estate, the legacies not being to "a body of persons uncertain in number at the time of the gift, to be ascertained at some future time," but to certain persons "so described as to be fixed at the time of the gift." It was a gift to designated persons, as much so as if enumerated by name, ascertainable at the date of the will. The number of legatees was never uncertain, for the event by which they became fixed had already occurred before the date of the will.

The situation in this case is not the same. There was an uncertainty as to who would constitute the beneficiaries of this remainder interest until the death of the respective life tenants, which did not occur until after the execution of the will. There was no definite number of individuals, but a class which might be either increased or diminished after the date of the will and before the occurrence of the event when the distribution was to take place. These legacies being gifts to a class, the time for determining who are the persons constituting the class is at the death of the testator, and only those who answer that description when the estate is to be turned over can take. Campbell v. Rawdon, 18 N. Y. 412, 415; Matter of Brown, 154 N. Y. 313, 326, 48 N. E. 537; Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697, 116 Am. St. Rep. 536. Therefore only those remaindermen take who survived both the life tenants and the testator.

Decreed accordingly.

(82 Misc. Rep. 135.)

In re STALLO.

(Surrogate's Court, New York County. August, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 32*) — LETTERS OF ADMINISTRATION — REVOCATION.

Code Civ. Proc. § 2685, specifying the grounds for revoking letters of administration, applies only to letters granted to one entitled thereto as a matter of right under section 2660, and not to a coadministrator who has received letters under such section, not as a matter of right, but upon the consent of the person entitled thereto.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 191–212; Dec. Dig. § 32.*]

2. EXECUTORS AND ADMINISTRATORS (§ 35*) — LETTERS OF ADMINISTRATION — REVOCATION—DISQUALIFICATION OF ADMINISTRATOR.

Where a trust company with whom decedent had pledged securities for the payment of a note was appointed administrator of decedent's estate, its subsequent act of selling the pledged securities, which sale the next of kin claimed was in violation of an agreement extending the note and was made when the financial market was depressed, all of which claims the trust company denied, disqualified it to continue as administrator and to require revocation of its letters of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227–262; Dec. Dig. § 35.*]

3. COURTS (§ 202*)—PROBATE COURT—FINDINGS—NECESSITY.

Where the facts upon which a surrogate's decision is based are not controverted, findings of fact and conclusions of law need not be made.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 480–486; Dec. Dig. § 202.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Application of Laura McDonald Stallo to revoke letters of administration issued to the Metropolitan Trust Company upon the estate of Alexander McDonald, deceased. Revocation ordered.

Rockwood & Haldane, of New York City, for petitioner.

Stetson, Jennings & Russell, of New York City, for Guaranty Trust Co., as guardian of Helena McDonald Stallo Murat.

Carter, Ledyard & Milburn, of New York City, for Metropolitan Trust Co.

COHALAN, S. This is an application to revoke letters of administration granted by this court to the Metropolitan Trust Company upon the estate of Alexander McDonald, deceased. The petition for revocation is made by Laura McDonald Stallo, granddaughter of the decedent and one of his next of kin.

Alexander McDonald died intestate on the 18th of March, 1910. At the time of his death he was a resident of this county. His granddaughters, Laura McDonald Stallo and Helena McDonald Stallo, were his only next of kin. Both of them were infants at the time of his death. Their father, Edward K. Stallo, was appointed their general guardian, and on the 29th of April, 1910, letters of administration upon the estate of Alexander McDonald were issued out of this court to the said Edward K. Stallo. Subsequently and on the 18th of October, 1910, letters of administration were issued to the Metropolitan Trust Company of New York as coadministrator with Edward K. Stallo. On December 23, 1910, the letters issued to Stallo were revoked, and the Metropolitan Trust Company has since acted as sole administrator of the estate of Alexander McDonald, deceased.

It is alleged in the petition herein, and not denied in the answer filed by the Metropolitan Trust Company thereto, that prior to the death of the said Alexander McDonald he had considerable business transactions with the Metropolitan Trust Company, and that on December 8, 1909, he executed a certain promissory note to the trust company for $2,700,000, payable on December 8, 1910. Edward K. Stallo joined with him as maker of the note. McDonald and Stallo deposited with the trust company as collateral security for the payment of the note 2,000 shares of stock of the Standard Oil Company and bonds and stock of the New Orleans, Mobile & Chicago Railway Company of a par value of $4,800,000. The note further provided that the Metropolitan Trust Company, as pledgee of the securities, had the right, upon the nonpayment of the note when due, to sell all the securities at public or private sale without advertisement or notice. The note was not paid at maturity. At various times during the month of June and September, 1911, and after the maturity of the note, the Metropolitan Trust Company, as pledgee of the securities given to secure payment of the note, sold the said securities and applied the proceeds to the payment of the note. The amount realized by the sale of the securities in excess of the amount required for the payment of the note was held by the Metropolitan Trust Company as administrator of the estate.

It is also alleged in the petition, and not denied in the answer, that

the Metropolitan Trust Company, as administrator, charged on its books the sum of $33,701 as commissions for making the said sales. Before the filing of the petition, however, this error was corrected, so that at the time of the filing of the petition the assets of the estate in the hands of the trust company as administrator were not diminished by this amount. The petition further alleges that prior to the maturity of the said note the petitioner, with her father and sister, called at the office of the Metropolitan Trust Company and obtained a renewal of the said note for a period of two years. This is denied by the Metropolitan Trust Company. The petition also contains allegations that prior to the making of the said note the Metropolitan Trust Company charged certain amounts against the said loan; but, as these transactions took place prior to the issuance of letters of administration to the said Metropolitan Trust Company, they may be disregarded in the consideration of the questions involved in this application.

If the Metropolitan Trust Company, as payee of the note for $2,700,000 and pledgee of the securities deposited with it to secure payment of the note, agreed to renew the note for two years, as stated in the petition, its sale of the securities before the maturity of the note as so renewed resulted in a loss to the estate of over $1,000,000. Therefore the right of the estate of Alexander McDonald to the difference between the amount realized upon the sale of the securities and the amount for which they could have been sold at the time of the expiration of the renewed note is dependent upon the determination of the issue raised by this allegation in the petition and its denial in the answer.

[1] At the time that letters of administration were issued to the Metropolitan Trust Company in conjunction with Edward K. Stallo, the company was not, independently of the consent of Stallo, entitled to such letters. They were granted by the surrogate in the exercise of the discretion vested in him by section 2660, Code of Civil Procedure, when it appeared by the petition submitted to him that the person entitled to letters consented that the trust company be made coadministrator with him. But as the letters were granted to the trust company in conjunction with Stallo, not because of any independent right which the trust company had to such letters, but because of the consent of the person who was entitled to be appointed administrator, it would appear that, when the letters issued to Stallo have been revoked and the next of kin now object to the continuance of the trust company as administrator, the letters issued to it as coadministrator may be revoked in the discretion of the surrogate without an allegation of the existence of any of the grounds mentioned in section 2685 of the Code for the revocation of letters. If such power is not vested in the surrogate, then the provision in section 2660 as to the issuance of letters to a coadministrator might be used to nullify the effect of the prior provisions of that section. For instance, if a person died intestate, leaving a widow and adult children, the widow, being entitled to letters, could consent to the issuance of letters to a stranger as coadministrator. After such letters had been issued to the coadministrator, the widow could resign, and the administration of the estate would

then be placed in the hands of a stranger, to the exclusion of persons entitled to share in the estate, and who, if the widow had renounced, would be entitled to letters. It is scarcely conceivable that it was the intention of the Legislature that in such a case the letters issued to the coadministrator could not be revoked without showing such misconduct on the part of the coadministrator as would warrant the surrogate in revoking letters issued to a person entitled thereto. I am therefore inclined to think that section 2685, Code of Civil Procedure, has reference only to an administrator who received letters because he was entitled thereto, and that it has no application to a coadministrator who received letters not as a matter of right, but upon the consent of the person entitled to letters of administration. In the latter case, as the issuance of letters is dependent upon the consent of the person entitled to letters, and is in the discretion of the surrogate, it would appear that, when the consent is withdrawn and the letters of the principal or original administrator are revoked, the surrogate may, in his discretion, revoke the letters issued to the coadministrator and grant letters of administration to the person entitled thereto in accordance with the provisions of section 2660 of the Code.

Subdivision 1 of section 2685 of the Code provides that an application may be made for the revocation of letters:

"Where the executor or administrator was, when letters were issued to him, or has since become, incompetent, or disqualified by law to act as such; and the grounds of the objection did not exist, * * * upon the hearing of the application for letters."

It is not contended that the Metropolitan Trust Company is incompetent to act as administrator within the meaning of the word "incompetent" as defined in section 2661 of the Code.

[2] It therefore remains to be determined whether, because of facts that have developed or action which it has taken since the issuance to it of letters of administration, it has become disqualified to act as administrator of the estate.

At the time that letters of administration were issued to the trust company, the note for $2,700,000 was not due and none of the securities pledged for the payment of the note had been sold. It held the securities in its capacity of pledgee, but it claimed no interest in them apart from its lien as such pledgee. Therefore at that time the trust company neither had nor claimed any interest in the estate adverse to the interests of the next of kin. But after letters of administration had been granted to the trust company, and while it was acting as sole administrator of the estate, it sold as pledgee the securities pledged with it for the payment of the note made by the decedent, and paid to itself as administrator the balance realized from the sale in excess of the amount required for the payment of the note. The next of kin now allege that the Metropolitan Trust Company, as pledgee, had agreed to extend the time for the payment of the note from December 8, 1910, to December 8, 1912, and that in violation of this agreement the trust company, as pledgee, sold the securities when the financial market was depressed and when it was impossible to realize the full

value of the securities. The trust company, as pledgee, denies the making of the agreement for a renewal of the note, and contends that under the terms of the agreement executed at the time of the making of the note the trust company had the right to sell the securities when the note was not paid at maturity. These conflicting statements and contentions create an issue of fact between the Metropolitan Trust Company and the next of kin of the decedent which, if it had existed at the time the trust company applied for letters of administration upon the estate of Alexander McDonald, deceased, would have prevented it from obtaining such letters. Now that the facts are brought to the attention of the court, and it is made to appear that the Metropolitan Trust Company as administrator of the estate of Alexander McDonald, deceased, has taken a position antagonistic to the interests of the estate, and denies the making of the agreement which, if its validity were established, would increase the assets of the estate by over $1,000,000, it seems that it is disqualified to continue to act as administrator, and that it is the duty of the court to revoke the letters issued to it. As pledgee of the securities it alleges its right to sell them at the time the sales were made; as administrator of the estate of Alexander McDonald, deceased, it upholds the action of itself as pledgee and denies that the agreement for the extension of the note was ever made. Instead of attempting to maintain the contention of the next of kin, which would result in materially increasing the assets of the estate, it opposes such contention and maintains the legality of its action as pledgee. As administrator of the estate of Alexander McDonald, deceased, it is its duty to attempt to maintain the contention of the next of kin as to the agreement for renewal of the note; but in violation of such duty it opposes the interests of the estate and attempts to support the contention of itself as pledgee. As the law provides for the appointment of an administrator of the estate of an intestate in order that the assets of the estate may be collected, its claims enforced, and distribution made to the parties entitled thereto, and as the administrator acts in such capacity as the representative of the court, it would not only be a violation of law but a travesty on justice to continue a person as administrator of an estate when it is apparent that his interest is opposed to the interests which he has been appointed by the court to protect and conserve.

In Pyle v. Pyle, 137 App. Div. 568, 122 N. Y. Supp. 256, the court said that, if a trustee places himself in a position where his personal interest is or may come into conflict with his interest as trustee, the court never hesitates to remove him. If such conflict of interest justifies the removal of a trustee, it should be sufficient to warrant the removal of an administrator appointed by the court. Justice requires that each party to a proceeding have an equal opportunity of presenting his case to the tribunal selected for its determination, and it is not in accordance with this conception of justice that a person or a corporation should be permitted to represent an estate in a proceeding brought by the estate against such person or corporation in its individual capacity. The next of kin are entitled to have some one represent them whose interests do not conflict with the interests of such next

of kin. Matter of Wallace, 68 App. Div. 649, 74 N. Y. Supp. 33; Matter of West's Estate, 40 Hun, 291. The amount involved in the controversy between the next of kin and the Metropolitan Trust Company is so large that both parties are entitled to have the issues determined by a jury, and it is essential for the promotion of justice and the protection of the rights of the distributees that an administrator should be appointed whose interests are not antagonistic to those of the estate.

It would therefore appear that, because of the facts that have developed since the granting of the letters of administration of the Metropolitan Trust Company, it has become disqualified to act as such administrator.

Either of the reasons given above would seem to me to be sufficient to warrant the revocation of the letters heretofore issued to the Metropolitan Trust Company as administrator of the estate of Alexander McDonald, deceased.

[3] As the facts upon which I base my decision are not controverted, it is not necessary to submit findings of fact and conclusions of law. Settle order on notice revoking letters of administration to the Metropolitan Trust Company as administrator of the estate of Alexander McDonald, deceased, and directing an accounting of its proceedings as such administrator.

Decreed accordingly.

(82 Misc. Rep. 149.)

DUFFY v. MORRISSEY.

(Albany County Court. September, 1913.)

EXECUTION (§ 420½, New, vol. 10 Key-No. Series)—AGAINST WAGES—LIEN.

Where an execution is issued against the wages of a judgment debtor under Code Civ. Proc. § 1391, and the employer complies with its terms for one week and thereafter enters into a new employment contract with the debtor, under which the debtor's wages are less than $12 per week, he cannot be held liable for failure to retain and pay over on the execution any part of such wages.

Appeal from City Court of Albany.

Action by Daniel F. Duffy against John J. Morrissey. From a judgment for defendant, plaintiff appeals. Affirmed.

Henry J. Crawford, of Albany, for appellant.

William S. Dyer, of Albany, for respondent.

ADDINGTON, J. This is an appeal by the plaintiff from a judgment of the City Court of Albany in favor of the defendant.

On the 11th day of January, 1909, the plaintiff in this action recovered a judgment in the City Court of Albany against one John Wood for the sum of $39.98, and thereafter an execution was duly issued upon said judgment against the property of said John Wood which was duly returned to the City Court of Albany wholly unsatisfied.

On the 3d day of July, 1911, upon an affidavit of the attorney for

the plaintiff in this action, an order was made directing that an execution upon said judgment issue against the wages then due and thereafter to grow due to the said John Wood from John J. Morrissey, the defendant in this action; and thereafter and on the same day such execution was duly issued, and a copy of said affidavit, order, and execution was delivered to and left with the defendant in this action, which execution required this defendant to retain from the wages of the judgment debtor, John Wood, the sum of $1.20 per week; it appearing from the affidavit on which the execution was founded that the said John Wood was employed by the defendant in this action and was earning $12 per week.

This defendant, in pursuance of said execution, retained and turned over to the marshal of the City Court of Albany $1.20 out of the first week's wages due the judgment debtor, John Wood, after the service of the execution upon this defendant. No further sum was paid by this defendant out of the wages of said Wood, nor was any further proceeding taken until, on July 11, 1912, a little more than a year after the service of the execution upon the defendant, the plaintiff served upon this defendant a notice demanding the payment of $50 which he claims accumulated under the execution issued and served upon this defendant. The defendant not having complied with the terms of this demand, the plaintiff, on the 16th day of July, 1912, commenced this action, and judgment was rendered for the defendant on the 27th day of December, 1912.

"Where a judgment has been recovered and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages * * * are due and owing to the judgment debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week, the judgment creditor may apply to the court in which said judgment was recovered * * * having jurisdiction of the same without notice to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the court * * * must issue or if a court of record, a judge or justice, must grant an order directing that an execution issue against the wages * * * of said judgment debtor." Code Civ. Proc. § 1391.

It is further provided by said section that:

"On presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages * * * are due and owing, or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages * * * due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided."

Said section further provides:

"It shall be the duty of any person * * * to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied."

Said section further provides:

"If such person * * * to whom said execution shall be presented shall fail, or refuse to pay over to said officer presenting said execution, the percentage of said undebtedness, he shall be liable to an action therefor by the judgment creditor named in such execution."

Said section further provides:

"Either party may apply at any time to the court from which such execution shall issue, or to any judge or justice issuing the same * * * upon such notice to the other party as such court, judge, or justice shall direct for a modification of said execution."

Upon the trial of this action the defendant, Morrissey, testified that when he retained the $1.20 in pursuance of said execution from the wages of the judgment debtor, Wood, the latter refused to continue to work for him if such deduction from his wages was continued, and that thereafter while the judgment debtor continued in the employment of this defendant he did not work the same number of hours, and did not receive thereafter and up to the date of the trial of this action as much as $12 a week.

It is claimed by the appellant that this defendant was bound by the mandate of the court, namely, the execution, to retain from the wages of Wood the sum of $1.20 per week no matter what the amount of the salary of the judgment debtor was, and that he had no right to complain or raise any question about the mandate of the court, but that if the judgment debtor felt aggrieved section 1391 of the Code of Civil Procedure furnished him a remedy, namely, to move to modify the execution.

I do not believe that this contention of the appellant can be upheld. After the service of the execution upon the defendant, he complied with its terms and paid over to the marshal of the City Court of Albany $1.20. He is bound by the law, and it cannot be maintained that, after the affidavit and the order upon which the execution was issued was served upon him, all of which also apprised him of the law, he would be justified in retaining any part of the wages of the judgment debtor, for as a matter of fact he was not paying to the judgment debtor as much as $12 per week. Notwithstanding the mandate of the court, he having knowledge of the facts, and being bound by the law, would be liable to the judgment debtor for any sums of money which he retained when the wages of the judgment debtor were less than $12 per week. When the execution was left with the defendant, it became a lien on the wages of the defendant due and to become due, and it was the duty of the defendant to pay over the sums directed to be paid "while said execution shall remain a lien upon said indebtedness." Code Civ. Proc. § 1391.

The execution ceased to be a lien on said wages after the payment of $1.20, the wages of the defendant not amounting to $12, and hence defendant properly, as was his duty to himself and to the judgment debtor, paid no further sums under the execution.

After the service of the execution upon the defendant, he had the right to enter into new conditions of employment with the judgment

debtor, which he did, and under these circumstances, if he retained any part of the wages which the judgment debtor subsequently received, namely, less than $12 per week, this defendant would be liable for the same to the judgment debtor.

In all these proceedings the defendant complied with the law. When this action was brought against him, he came into court and defended, which it was his duty to do, on the ground that he was paying wages to the judgment debtor of less than $12 per week.

There are many cases in other jurisdictions in which, while they are brought under garnishment statutes different from those of this state, certain principles of law are enunciated applicable to the principles involved in this case. And in these cases it is held that where the garnishee is sued, if he has knowledge of the right of the judgment debtor to exemptions and does not apply them, he is still liable to the judgment debtor if a judgment is obtained against him and paid.

In Winterfield v. Milwaukee & St. P. R. Co., 29 Wis. 589, it was held that the garnishee may interpose the defense in an action by the creditor that the property in question is exempt, and the court says:

"Besides, it is not at all certain, had the railway company neglected to interpose such defense, that Patterson (the judgment debtor) could not have compelled it to pay the debt to him, notwithstanding the garnishee judgment. Knowing that the indebtedness was exempt, it was not only the right of the company, but very probably it was its duty, for self-protection, to interpose the defense. And this the more especially after Patterson (judgment debtor) had formally requested it to do so."

To the same effect is the case of Pierce v. Chicago & N. W. R. Co., 36 Wis. 283, in which the court says:

"But there is a further and perhaps better reason for holding that the defendant is not protected by those garnishee proceedings, which is that those proceedings were ex parte, without any service of process on the plaintiff, and no notice given him of those actions. In such a case we deem it a perfectly reasonable and proper rule to hold that the defendant, in order to protect itself, should have notified the plaintiff of the pendency of these proceedings, and requested him to defend. * * * It must be assumed that the corporation or its officers were familiar with our laws, and knew that the earnings of its creditor were exempt. It should therefore have claimed the benefit of the exemption for him. * * * This, we think, was essential in order to protect itself against a subsequent action by him to recover the debt. * * * But in this case there can be no doubt that the defendant should have exhausted all means to avoid a judgment against it, or have given notice to the plaintiff of the pendency of the garnishee proceedings in order that he might defend against them."

See, also, Bushnell & Clark v. Jos. Allen & Bro., 48 Wis. 460, 4 N. W. 599, citing with approval the Pierce Case, supra.

The Code of Civil Procedure above quoted protects the rights of all the parties in this proceeding. It gives either party the right to modify the execution. It also provides that the judgment creditor may maintain an action against the garnishee or employer of the judgment debtor; and in that action it can be determined, as it was in this case, whether or not the employer was justified in not retaining any part of the wages of the employé.

The decisions in the state of Illinois are in line with the decisions in the state of Wisconsin above quoted.

In the former jurisdiction the court held that under all the circumstances the railroad company and employer should have known that its employé, the judgment debtor, was entitled to certain exemptions.

In the case of Chicago & Alton R. R. Co. v. Ragland, 84 Ill. 375, the court says:

"A judgment was recovered against appellant, which was paid; appellant failing to claim, for the benefit of its employé, the exemption granted by this section. It is insisted appellant had no concern with this matter, and their paymaster had no knowledge of the domestic relations of appellee. It appears, however, that other employés of the railroad company did not know the fact, and it was quite easy for all the officers of the company having active connection with all the employés to know it. It is a very easy matter, attended with no trouble or expense, to make the inquiry of every one, when employed, if he has a family and residing with it, and to enter on the pay roll the word 'family.' We are inclined to think a railroad company should take an interest in the well-being of all its employés, and concede to them and obtain for them all the advantages the law gives them. They are generally poor men, not well informed of their rights, and it would not be in derogation of the higher position occupied by the corporation, to save and protect their interests in all cases, especially when it can be done without trouble and expense to the corporation. Such a disposition, when manifested, cannot fail to render the relations existing between employer and employé more agreeable, and perhaps more profitable, and this in all cases of employer and employé."

To the same effect are the cases of Cooper v. McClun, 16 Ill. 435; Bliss v. Smith, 78 Ill. 359; Hoffman v. Fitzwilliam & Sons, 81 Ill. 521.

For the reasons stated, the judgment of the City Court of Albany in favor of the defendant is affirmed, with costs.

Judgment affirmed, with costs.

VILLAGE OF BRONXVILLE v. LAWRENCE PARK REALTY CO.

(Supreme Court, Special Term, Westchester County. November 3, 1913.)

1. MUNICIPAL CORPORATIONS (§ 654*)—STREETS—ENCROACHMENTS—ACTIONS—EVIDENCE.

In an action by a village to compel the removal of alleged encroachments from a street, evidence *held* to show that the street, when originally laid out as a highway, was located as claimed by the village.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1428; Dec. Dig. § 654.*]

2. DEDICATION (§ 35*)—ACCEPTANCE—ACTS CONSTITUTING.

Where, following a written dedication of a small triangle at the intersection of two highways, the town authorities prepared it for road purposes, reduced the dedicator's real estate assessment by deducting such triangle, worked it in part, and included it in its official survey of the town roads, and the triangle was used by the public, there was an implied acceptance thereof making it a part of the highway.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 68–71, 75, 76; Dec. Dig. § 35.*]

3. DEDICATION (§ 35*)—ACCEPTANCE—ACTS CONSTITUTING.

Where a town worked and used the greater part of a triangle dedicated for highway purposes, it accepted the whole tract, though a small part, which was high and rocky, was not so used.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 68–71, 75, 76; Dec. Dig. § 35.*]

4. ESTOPPEL (§ 62*)—STATEMENTS OF OFFICERS—EXISTENCE OF STREET.

A village was not estopped by the statement of the village attorney respecting the ownership of a portion of a street upon which a privately owned building was erected.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151–153; Dec. Dig. § 62.*]

5. MUNICIPAL CORPORATIONS (§ 655*)—STREETS—ALTERATION OF WIDTH.

The fixing of curb lines by town officials did not narrow the legal width of the highway, where there was no intention to narrow the road, especially as against a purchaser of abutting property who knew the facts.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 655.*]

6. MUNICIPAL CORPORATIONS (§ 657*)—STREETS—ENCROACHMENTS—ACQUIESCENCE.

Village authorities deal with public streets as trustees for the public with no power to appropriate them to private purposes, and their acquiescence in encroachments thereon does not forfeit the rights of the public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.*]

7. MUNICIPAL CORPORATIONS (§ 657*)—STREETS—ABANDONMENT—NONUSER.

The statute, providing that highways which have ceased to be traveled or used as highways for six years shall cease to be highways for any purpose, applies only to highways, or longitudinal portions thereof, that cease to be used for their entire width, and has no application to encroachments or nuisances in the highway.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the Village of Bronxville against the Lawrence Park Realty Company. Judgment for plaintiff.

Allan R. Campbell, of New York City (Charles Scribner, of New York City, of counsel), for plaintiff.

Philip S. Dean, of New York City (Joseph S. Wood, of Mt. Vernon, of counsel), for defendant.

TOMPKINS, J. [1] The plaintiff was incorporated as a village in 1898, and is situated wholly within the town of Eastchester, Westchester county. The defendant is a domestic corporation, owning real estate with buildings thereon, situated on both sides of a village street known as the Sagamore Road. This action is brought to compel the removal of structures erected by the defendant, and alleged to be encroachments upon both sides of said village street, and involves questions as to the location and width of said Sagamore Road.

In 1860, one Edward De Witt made written application for the laying out of the highway in question, and, upon his application, proceedings were regularly taken, under the statute, which resulted, in 1863, in the laying out of said highway, which was described in said proceedings as:

"Beginning at a point where the center line of said public road or highway intersects the northerly line of the road leading from the White Plains Road to the village of Bronxville, called the Penfield Road; thence along the center line of said new public road or highway, an easterly course 123 feet to a stake; thence along the said center line north 38 degrees east 456 feet; thence along the said center line north 27½ degrees east 176 feet; thence along the same line north 16 degrees east 461 feet; thence along same line north 49¾ degrees east 355 feet; thence along same line north 46¾ degrees east 247 feet; thence along the same north 50¼ degrees east 236 feet; thence along the same north 37½ degrees east 236¼ feet; thence along same north 23 degrees east 513 feet; thence along the same north 47 degrees east 613 feet; thence along the same north 32 degrees 20 minutes east 49 feet; thence along the same north 67 degrees east 136 feet; thence along the same north 23 degrees 30 minutes east 112½ feet to Tuckahoe Road; and extending equal distances on both sides of said line above described, and to the width of three rods, as the said public road or highway was laid out, by William Livingston, civil engineer, according to map thereof made bearing date at West Farms, August 4, 1863, and hereto annexed."

The proceedings for the laying out and recording of this road were regular, and the damages for the lands taken were duly assessed.

The first question to be determined is: Where was this three-rod road actually laid out? Point one-half (½), as shown by the Livingston map, is located by agreement at the center of this Sagamore Road immediately north of the defendant's present buildings, and a line drawn from that point for a distance of 123 feet to Point *O*, and west of the Underhill barn, brings us to the Pondfield Road at a point 68¼ feet east of the New York & Harlem Railroad property, so that the center of the highway, as thus laid out, is at a point 68¼ feet east of the monument marking the easterly line of the railroad property at the southwest corner of the Underhill property. This course and direction of the road agrees with the testimony of the witnesses respecting the location of the Underhill fence, to the effect that the

road existed and was traveled by the public close to that fence. To concede the defendant's claim with respect to the meaning of the Livingston map would be to run the road through the Underhill barn and across the triangle upon which that barn stood, and which was afterwards dedicated by Underhill to the public for highway purposes. Besides, the evidence seems to preponderate in favor of the plaintiff's claim that the road, prior to 1871, was immediately west of the said Underhill barn, and the original lead pencil notes and drawing made by Surveyor Hyatt about 1870, from the original Livingston map, and his own knowledge of the premises and experience in surveying the lands in that neighborhood, show that the road laid out as aforesaid ran west of the Underhill barn, and that at point one-half it took a turn toward the southwest. Surveyor Hyatt knew the Underhill barn as it existed in 1871, and the road as it was laid out in 1863, and as it was thereafter maintained and used, and he testified that his notes and maps correctly showed the true location of both. His surveys and notes were made from actual knowledge of the conditions as they existed after the road had been laid out by the town authorities, and while the barn stood in its original position upon the Underhill triangle.

The preponderance of evidence seems to me to support the plaintiff's claim in respect to the location of the three-rod road that was officially laid out in 1863, and that had remained open, and was used more or less by the public from that time until the defendant erected its buildings in 1902 and 1904.

To support its contention, the defendant in part relies and lays emphasis upon the survey and map made by Byrnes & Darling, in 1898, which shows the lines of the street in question to be parallel, practically all the way to the north side of the Pondfield Road, and to be of uniform width from the Pondfield Road in a northerly direction toward Tuckahoe, and does not show the fan-shaped highway at the Pondfield Road that is claimed by the plaintiff to have existed prior to the erection of the defendant's buildings. The force of this contention is lost, however, when we consider the fact that this survey was made and this map prepared for the purpose of showing the lines and profile of the Pondfield Road for contract work that was to be done thereon, for the town of Eastchester, and the Sagamore Road is only incidentally shown upon the map for the purpose of locating the northerly line of the Pondfield Road at that point. In other words, it was not a survey, and does not purport to be a map of the Sagamore Road, but of the Pondfield Road only. And besides, it appears that, only the year before (1897), another map was made for the town of Eastchester by the same firm of engineers, Byrnes & Darling, showing a portion of the plan and profile of the Sagamore Road where it intersects the Pondfield Road, and for a considerable distance north thereof. This map purports to show the boundary lines of the Sagamore Road, and also shows the center thereof, and the part of said road that was to be macadamized, for which purpose the survey and map were made. This map shows the width of the Sagamore Road at the Pondfield Road, at approximately the number of feet claimed for

it by the plaintiff, and it also shows the easterly and westerly lines of the road near the Sagamore Road to curve in the directions and at the angles of the old road, as the plaintiff claims they existed prior to the alleged encroachments by the defendant, and the map prepared by the same engineers in 1913, which purports to show the physical bounds of the Sagamore Road, and Pondfield Road, as they now are, and the physical conditions as they existed in 1897 and 1898, show that in the latter years, and before the defendant's buildings were erected, the Sagamore Road widened as it approached the Pondfield Road, and that at the Pondfield Road it was of the approximate width now claimed for it by the plaintiff.

The map made by Mapes in 1890, showing the property belonging to W. B. Lawrence afterward conveyed to the defendants, also showed that the Sagamore Road widened as it neared the Pondfield Road, and that there were substantial curves on both its westerly and easterly lines leading into the Pondfield Road.

[2] In 1871, Underhill, by a written instrument, dedicated the barn triangle already mentioned to the public use, to be forever thereafter kept open as a public road or highway, and in the instrument of dedication the triangular piece was described as being bounded by the public highway leading to Tuckahoe, the Pondfield Road, and the land of James M. Prescott, which he had previously purchased from Underhill.

This written dedication of the barn and triangle came about in this manner: In 1849, Prescott had purchased from Underhill the land on the east of Sagamore Road, excepting this triangle, and Underhill had given Prescott a right of way over a part of his lands on the west side of the Sagamore Road, and, in consideration of Prescott's surrender of that right of way, Underhill dedicated the barn triangle to the public, and to become a part of the Sagamore Road, as it then existed, so that, with the triangle taken into and made a part of the public highway, the Prescott premises became adjacent to said highway. Soon after this written dedication by Underhill of the barn triangle, to the public, for highway purposes, he removed the barn therefrom, and thereafter the town authorities blasted rock in said triangle, and prepared it for road purposes, and for years thereafter it was in part worked by the town authorities, and used by the public and the town authorities, in consideration of Underhill's dedication of the triangle for highway purposes, reduced his real estate assessment by deducting therefrom a half acre of land representing the said triangle.

In 1898 the official survey of the town roads, and the map made therefrom, and filed in the town clerk's office, showed this triangle to be a part of the public road, and the map of 1897, made by Byrnes & Darling already referred to, shows that the road includes this triangle.

These acts by the town authorities, and this use by the public, constituted, in my judgment, a legal acceptance of the Underhill triangle, so that there was an express dedication by Underhill, and an implied acceptance by the town authorities, and the public, thereby constituting the barn triangle a part of the Sagamore Road, a large part of

which was used for highway purposes down to the time that the defendant erected its hotel building partly thereon; and a large part of that triangle is now the traveled part of the Sagamore Road, while the larger part of the original road, as it was laid out in 1863, is now covered by the Arcade Building.

The triangle was about 101 feet on the Pondfield Road, which added to the three-rod road, as it was laid out in 1863, made the entire width of the Sagamore Road, at the Pondfield Road, approximately 150½ feet, practically all of which was open, worked, and used prior to the erection of the defendant's buildings.

[3] It is true that a part of the barn triangle was not used for highway purposes because it was high and rocky, but the greater part of that plot was worked and used, and that, in my opinion, was sufficient to constitute an acceptance of the whole tract dedicated by Underhill for highway purposes.

Thus we find that the Sagamore Road, at its intersection with the Pondfield Road, was originally 150½ feet in width, made so by the laying out of 49½ feet in 1863, and the express dedication of the barn triangle by Underhill, and the acceptance thereof by the town authorities in 1871, which barn triangle immediately adjoined on the east, the road as laid out in 1863. From the Pondfield Road running north, the Sagamore Road gradually narrowed until it reached the northerly end of the triangle, where it was three rods wide, and so continued to the north.

I have given careful consideration to the claims made by the defendant's counsel in their very exhaustive and able brief: First, that the plaintiff is estopped, by its acts and resolutions, and by those of its predecessor, the town of Eastchester, from claiming that the lines of the Sagamore Road, as they now exist, are not correct lines of said road; and, second, that there has been an abandonment of the road, under the six-year statute.

[4] As to the first claim, there is no proof of any proceeding by the town or village authorities to alter or narrow the Sagamore Road. Neither the town nor the village was a party to the conveyance by the Underhill heirs to William V. Lawrence in 1898, over which the Arcade Building now stands; nor had they any control over Mr. Hyatt, the engineer, who made the survey for the purpose of that conveyance; nor is the village bound by the statement to Mrs. Smith by the village attorney respecting the ownership of the land upon which the Arcade Building was erected.

[5] The fixing of the curb lines by the town officials was not effective to narrow the legal width of the highway. St. Vincent Orphan Asylum v. City of Troy, 76 N. Y. 108, 32 Am. Rep. 286; D. L. & W. R. Co. v. City of Buffalo, 158 N. Y. 266, 53 N. E. 44.

Nor do I think that there was any intention on the part of the town officials to narrow the road, either by the location of the curb lines or the placing of the macadam, and the defendant and its predecessor in title had no right to rely upon such work as fixing the bounds of the highway. Besides, Mr. Lawrence, who purchased the property from Prescott and the Underhill heirs, and who conveyed it to the

defendant, and who is interested in the defendant company, was familiar with all the premises and the highways as they existed from 1889. The acts and conduct of the village authorities, in respect to this road, from the date of its incorporation, do not operate as an estoppel.

[6] Village authorities can only deal with public streets as trustees for the public, and have no power to appropriate them to private purposes, and the acquiescence of village officers in encroachments upon the public street cannot forfeit the right of the public therein.

[7] I think there has been no abandonment of any part of the original highway. The statute which provides that "all highways which have ceased to be traveled or used as highways for six years, shall cease to be highways for any purpose," applies only to streets or parts of streets that cease to be used for their entire width, and is not applicable to a case where a trespasser encroaches or creates a nuisance upon a part of a street only, leaving the rest to be used by the public, and open from end to end. In other words, it is only where longitudinal portions of a highway cease to be used at all that the six-year statute applies.

My conclusions upon the whole case are that the preponderance of evidence supports the plaintiff's claim as to the width, condition, and use of Sagamore Road before the plaintiff's buildings were erected, and that both the Arcade Building and the Gramatan Inn building encroach upon said street the number of feet alleged in the complaint, and that the plaintiff is entitled in law and equity to a judgment directing the removal of said encroachments.

The effect of such a judgment, however, if enforced, will mean the destruction of two very valuable buildings that are ornaments to the village, the destruction of which will disfigure its principal thoroughfare, i. e., Pondfield Road, and at the same time will entail very large cost and damage to the defendant, without corresponding benefit to the village, and it seems to me that the parties to this action should agree that the present street be made of sufficient width to accommodate its present and future traffic by the removal of the Arcade Building only, or so much thereof as may be necessary to accomplish that end, without interfering with the Gramatan Inn building. This should be done in the interest of all parties concerned, even though the widened street may not be on the same lines and in the same location as the original street; and, while the trustees of the defendant may not have authority in law for a compromise of that character, yet it could be accomplished by a proceeding under the statute, to discontinue a part of the original street, that is, the part upon which the Gramatan Inn stands, and shift it toward the west.

My suggestion is that by agreement the street be restored to its original width, as nearly as can be, by the removal of the whole or a part of the Arcade Building only, without disturbing the Gramatan Inn, thereby reducing, as far as possible, the damage to be suffered by the defendant.

Requests to find may be submitted by November 15th.

FAULKNER v. BROWN et al.

(Supreme Court, Special Term, Steuben County. September 27, 1913.)

1. INFANTS (§ 81*)—GUARDIAN AD LITEM—PECUNIARY RESPONSIBILITY.
Under Code Civ. Proc. § 469, requiring a "competent and responsible person" to be appointed to appear for an infant plaintiff, defendants are entitled to have a guardian ad litem appointed who is pecuniarily responsible.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 222–229; Dec. Dig. § 81.*]

2. INFANTS (§ 81*)—ACTION—GUARDIAN AD LITEM.
The rights of an infant plaintiff should not be prejudiced because the guardian ad litem appointed was not a competent and responsible person, as required by Code Civ. Proc. § 469, and an irresponsible guardian ad litem will be given an opportunity to file an undertaking with sureties conditioned for the payment of costs before a motion will be granted revoking his appointment.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 222–229; Dec. Dig. § 81.*]

Action by James H. Faulkner, by Fanny Faulkner, his guardian ad litem, against Harry K. Brown and others. On motion by defendants to revoke the appointment of the guardian ad litem. Motion granted.

Frank J. Nelson, of Hornell, for plaintiff.

Acton M. Hill and Floyd G. Greene, both of Hornell, for defendants.

CLARK, J. Defendants move to revoke the appointment of the guardian ad litem for plaintiff in this action on the ground that said guardian is not a competent and responsible person.

[1] There is no question but that the defendants are entitled to have a guardian ad litem who is pecuniarily responsible. Code Civ. Proc. § 469; Wice v. Insurance Co., 7 Daly, 258; Strong v. Jenkins, 15 N. Y. Supp. 120.

From all the papers in the case it would appear that the guardian ad litem appointed for this plaintiff is not shown to be a responsible person, and defendants are clearly entitled to have a guardian who is responsible, and one who, if plaintiff is defeated, would be responsible for costs.

[2] But the plaintiff should have his day in court, and his rights, if any, should not be prejudiced because the guardian ad litem was not shown to be a person competent and responsible within the meaning of section 469 of the Code of Civil Procedure.

This motion is therefore granted, unless plaintiff shall, within 20 days from this date, make and file an undertaking with sufficient surety to be approved by a justice of the Supreme Court, in the penalty of $250, conditioned for the payment of any costs awarded against the plaintiff in this action, but not exceeding said sum of $250, and in case said undertaking is made, approved, and filed within 20 days from this date, the motion is denied. No costs.

Ordered accordingly.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BARNES v. MARTIN.

(Supreme Court, Equity Term, Monroe County. October 25, 1913.)

1. WATERS AND WATER COURSES (§ 154*)—CONVEYANCE—APPURTENANCES.
Water privileges appurtenant to a gristmill property and necessary to its use pass by a deed of such property and "all and singular, the tenements, hereditaments and appurtenances thereto belonging or in any wise pertaining."

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167–173; Dec. Dig. § 154.*]

2. WATERS AND WATER COURSES (§ 156*)—WATER PRIVILEGES—IRREVOCABLE EASEMENT.
H. owning a dam across a creek, the land at either end, and the millpond, having by deed conveyed to B. the right to construct and maintain a raceway on the east side of the creek through the lands of H., and also certain water privileges so that B. could take water from the pond and run it through such race course to a gristmill to be placed by B. on her land, and by the deed provided that each should make and keep a certain part of the dam in good and constant repair, B. the east part, and H. the west part, and that B. might raise the water in the pond a foot higher than it was, the water privileges so referred to constituted an irrevocable easement.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174–183; Dec. Dig. § 156.*]

3. WATERS AND WATER COURSES (§ 156*)—WATER PRIVILEGE—EASEMENTS.
Where plaintiff, having the absolute right by deed to draw water from a millpond to her mill on the east side of a creek, and to maintain the dam where it then was, on rebuilding it, changed the location of its western end, at request of the owner of the land there, and for its benefit, and maintained it, as rebuilt, for 25 years, without objection, plaintiff's rights in the dam did not rest on a parol license, but the transaction was not only a grant of an easement, but constituted also an easement by prescription to have the dam located where it was rebuilt.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174–183; Dec. Dig. § 156.*]

4. VENDOR AND PURCHASER (§ 231*)—NOTICE—RECORDS.
A purchaser of land at the west of a dam, whose deed after describing the property refers to a map on file in the county clerk's office, indicating the dam, is put on inquiry as to what rights one having a mill on the east side has through their common source of title in the water privilege and to have the west end of the dam abut against his property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. § 231.*]

Action by Charles P. Barnes against Richard P. Martin for an injunction and damages. Judgment for plaintiff.

Smith & Hebbard, of Rochester (P. Chamberlain, of Rochester, of counsel), for plaintiff.

Edward Lynn, of Rochester, for defendant.

CLARK, J. In June, 1825, Enos Blossom and wife deeded to Isaac Barnes a one half interest in a gristmill property, located on the west side of Allen's creek in the town of Brighton, Monroe county, and in 1837 Marshfield Parsons became the owner of the other half of this gristmill property. At that time, a short distance south of the grist-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mill and on the same side of the creek, there was located a sawmill owned by Enos Blossom, and that ultimately became the property of Benjamin Huntington.

Some years after 1825, when Isaac Barnes became the owner of a half interest in the gristmill property, he became the owner of the other half interest, and on the 20th day of June, 1853, he conveyed it all to Hannah Maria Barnes, the mother of this plaintiff. At this time and for many years previously there had been several different mills located on the west side of Allen's creek, near the Penfield road, so called, but there were no mills and there was no raceway on the east side.

The Huntington sawmill above referred to was located on the west side of the creek and south of the Penfield road, and there was a stone dam at that point extending diagonally across the creek, and water from the pond formed by this dam furnished power for the Huntington sawmill and the Barnes gristmill located just north of it, and in times of high water the surrounding lands on the west side of Allen's creek were flooded.

On June 20, 1853, Isaac Barnes conveyed the old gristmill property above mentioned to Hannah Maria Barnes, and she in turn conveyed it the same day to Benjamin Huntington, she, however, reserving the old gristmill and the right to remove it, and it was subsequently taken down and moved to her lot, at a point on the east side of the creek and north of the Penfield road, where it is now located. On the same day Benjamin Huntington conveyed to Hannah Maria Barnes certain lands lying about the old factory, so called, north of the Penfield road and west of the creek, and he also conveyed to her the right to construct and maintain a raceway on the east side of the creek extending in a northerly direction to the limit of his lands that lay on the east side of the creek, and in that deed to Mrs. Barnes he conveyed certain water privileges so that she could take water from the pond formed by this old dam and run it through the raceway to be built by her, through Huntington's land on the east side of the creek, to the gristmill, which she had reserved and which she was about to move to her lands lying on the east side of the creek and just north of the Penfield road.

This deed from Huntington to Mrs. Barnes also provided that each party was to make and keep his part of the dam in good and constant repair forever, and it provided that Mrs. Barnes should have the right to raise the water in the pond one foot higher than it then was, and in that deed it was pointed out which parts of the dam each party was to maintain, Mrs. Barnes to maintain the easterly part and Mr. Huntington the westerly half, and it further provided that Mrs. Barnes, the second party to the deed, was not to put up a sawmill on the west side of the creek.

So by these various deeds it will be seen that Benjamin Huntington became the owner of the lands on the west side of Allen's creek south of the Penfield road, Mrs. Barnes having conveyed to him her interest therein, but reserving the gristmill building which she subsequently

removed to her property on the east side of the creek, as above stated, and after she had thus removed it, and dug her race on Huntington's land located on the east side of the creek, as permitted by his deed to her June 20, 1853, Mrs. Barnes continued to occupy and run said gristmill until 1881, when she sold all of her property in that vicinity to the plaintiff, and he has continued to own it and conduct the mill up to January 14, 1912, and during all of that time the water furnishing the power for the mill was conveyed to it through this raceway above mentioned located on the east side of the creek.

It will be understood that, when Mr. Huntington gave Mrs. Barnes permission to construct this raceway on the east side of the creek, he owned the lands adjacent to the easterly end of the dam, and they extended northerly to the Penfield road, and by Mrs. Barnes' deed of the same date to Mr. Huntington she conveyed to him all her interest in the lands on the west side of the creek, so Mr. Huntington at that time owned the lands on both sides of the creek at the point where this dam was located, the westerly end of it being right near the sawmill, and the dam extending diagonally across the stream touching Huntington's lands on the east, and by his deed to Mrs. Barnes that day executed, he conveyed to her this privilege of constructing a raceway on his lands adjacent to this dam, and located on the east side of the creek and the right to take water from the pond formed by the dam, and convey it to her gristmill about to be removed to her land lying on the east side of the creek and north of the Penfield road.

After these transactions of February 20, 1853, by which deeds were interchanged, all being based upon valuable considerations, Mr. Huntington became the owner of all the land at that point on the west side of the creek, and by various conveyances these lands were transferred from Huntington through William M. Parsons to Lucas Seitz, Jr., and in August, 1911, his heirs conveyed it to the defendant, so that at that time defendant became the owner of the lands lying on the west side of the creek at that point which Benjamin Huntington acquired in June, 1853.

After these transfers in 1853, the dam on several occasions became out of repair, and temporary cofferdams were constructed for the purpose of changing the course of the water, so as to do less damage to surrounding property, and finally on or about the year 1885 or 1886, the old sawmill dam, which was in existence when the interchange of deeds was made, June 20, 1853, had gotten very much out of repair, and it was necessary to reconstruct it. The dam from 1853 down to this time had been kept in repair and maintained through the joint efforts of Mrs. Barnes and those who took under her and by the various people who owned the property on the west side of the creek. At that time the property now owned by defendant was owned by Magdalina Seitz, wife of Lucas Seitz, Sr. He lived with his wife on the premises, was in possession and had charge of them, and when plaintiff went out to work on this dam for the purpose of reconstructing it, Lucas Seitz, Sr., came up there and indicated his objections to plaintiff constructing the dam across the stream at that point, and said

he would like to have the westerly end located further south, so that the effect would be to send the water more directly to the raceway of plaintiff located in the east side of the creek, and prevent so large an overflow in times of high water on the lands located on the west side, then owned by Mrs. Seitz, and now owned by defendant. Plaintiff complied with that request and ran the dam diagonally across the stream; the easterly end being located at substantially the same point where the easterly end of the old sawmill dam was located, but the westerly end where it touched the Seitz lands being located further south. This change was made at the request of the then owner of the property on the west side of the creek, or by her husband who had charge and was in possession of it, and it was done exclusively for the benefit of those lands, and not for the benefit of plaintiff.

It must be understood that several years previously the old Huntington sawmill, located on the west side of the creek, and which had been operated for some years by his successors in title, had been abandoned, so that the owners of the property on the west side, defendant's predecessors in title, were not using any water power, and, when plaintiff found it necessary to reconstruct this dam so that he could operate his gristmill, Mrs. Seitz in no way contributed to the construction of the new dam, and took no part in it, excepting that her husband, for the benefit of those lands and to prevent their being overflowed, requested plaintiff to locate the westerly end further south than the old location, and that was done, and the dam has been continued in that location, and maintained exclusively by plaintiff openly and notoriously, and with the knowledge of the owners of the lands on the west side, and without objection, from that time until January 14, 1912, when defendant cut away portions of the dam to such an extent as to do away with its usefulness and to totally destroy plaintiff's water power privileges.

During all the years from 1853 down to the time defendant destroyed the dam, plaintiff's mill on the east side of the creek had been in operation, most of the time being run exclusively by the water which came through this raceway on the east side of the creek, the water coming from the pond created by the dam in question, and right down to the time defendant destroyed the dam this water power was utilized by plaintiff in the conduct of his milling business.

[1] From this somewhat lengthy recital of the facts established on the trial, it is perfectly plain that plaintiff is the owner of a water privilege at the point in question, and has a right to maintain a dam across Allen's creek, and such rights have never been waived, surrendered, or abandoned. The mere fact that the deed of this gristmill property from Hannah Maria Barnes to the plaintiff, in 1881, does not in so many words speak of the water privileges, is of no particular importance, because the deed says that she transfers to plaintiff "all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise pertaining," and that would carry the water privileges, for they were appurtenances to the gristmill property; they were necessary to its use and would pass with the title as an in-

cident to it. 14 Cyc. pp. 1184, 1185; Hall v. Sterling Iron Co., 148 N. Y. 432, 42 N. E. 1056; Blake v. Clark, 6 Me. 436.

Moreover, long before defendant purchased his property, plaintiff had received from all of the heirs of his mother quitclaim deeds releasing any claims they could possibly have in this gristmill property and its appurtenances.

[2] I am satisfied that the conditions in the deed from Benjamin Huntington to Hannah Maria Barnes constituted an irrevocable easement. Mr. Huntington was the owner of the property, and he had a perfect right to burden it with a perpetual easement if he saw fit, and it was something more than a mere license. The water privileges referred to in the deed from Huntington to Mrs. Barnes constituted an easement, the deed was recorded, and neither he nor his successors in title could revoke it, and it would continue in full force unless it was waived, released, or abandoned by Mrs. Barnes or her successors in title, and that has never been done.

[3] Plaintiff's rights in this race and dam did not rest upon any parol license the result of conversations had with Lucas Seitz, Sr. The old deed from Huntington to Mrs. Barnes gave her and her successors in title an absolute right to construct and maintain the raceway on the east side of the creek, and to maintain and keep in repair a dam to furnish water power for her gristmill, and the precise location of that dam was not pointed out.

The dam and the raceway are necessary for the use of this gristmill. Those rights were conveyed to Mrs. Barnes by Mr. Huntington, and they have never been surrendered or abandoned, as heretofore stated. The mere fact that plaintiff changed the location of the westerly end of the dam at the request of the representative of the then owner of the property did not, and was not intended to, deprive plaintiff of his rights with reference to that dam, and a license cannot be spelled out of the transaction. Plaintiff had an absolute right to place that dam across the creek in the location as it existed at the time the deed of June 20, 1853, was made, and, if subsequently the west end of that dam was moved southerly at the request of the then owner of the adjacent property, plaintiff's rights were not surrendered. The whole transaction was for the benefit of those lands, and it was no benefit to the plaintiff, and the change of the location of the westerly end of the dam having been made for the reasons stated and at large expense to plaintiff, and it having remained in that location openly and notoriously and with the knowledge and acquiescence of the owners of the lands on the west side and without objection for a period of more than 25 years, and under claim of right adverse to the west side owner, it must be held that the facts establish a grant of an easement to have the dam located as plaintiff then constructed it. The whole transaction was based on a sufficient consideration; plaintiff changing the west end of the dam from the point where he had a right to place it, to a point southerly as requested by the representative of the then owner of the property, and it having been thus located for so many years without objection and openly, and with the knowledge and acquiescence of the west

side owners, the transaction was not only a grant of an easement, but it constituted also an easement by prescription to have the dam located as it was when defendant cut it down. Nicholls v. Wentworth, 100 N. Y. 455, 3 N. E. 482; 14 Cyc. pp. 1146–1148; Ward v. Warren, 82 N. Y. 265.

[4] Defendant exceeded his authority when he took the law into his own hands and destroyed plaintiff's valuable property rights. When he purchased his property of the Seitz heirs, the dam was in existence and could be seen by everybody. His deed, after describing the property, referred to a map on file in the Monroe county clerk's office, and this very dam is indicated on that map, so it is perfectly plain that defendant had knowledge of its existence before he purchased his property, and he was put upon his inquiry to ascertain what rights, if any, plaintiff had in this water privilege, and to have the west end of the dam abut against the property defendant was about to purchase.

Defendant's counsel, in his elaborate and very learned brief, urges that, after defendant had contracted for his property, plaintiff had interviews with defendant's immediate grantors, the Seitz family, with reference to a permit to construct a permanent concrete dam on the site as it then existed, urging that he would not have done this if he had not been conscious of the fact that he had no right to maintain the dam as then located. Plaintiff denies these various conversations; but, even if he had them as these witnesses in behalf of defendant testified, it would not be sufficient to establish the proposition that plaintiff knew he had no right to maintain the structure as then located.

It must not be forgotten that this dam was a party structure, owned and to be maintained by plaintiff, and by those owning the lands at its westerly end, and although those owners for a considerable time had done nothing toward its upkeep, and had not used the water for power for any mill purposes on the west side, still they had rights in those water privileges as well as plaintiff, and, when he desired to construct a permanent concrete dam on the site of the one defendant destroyed, it was quite the proper thing for him to consult those owning the property on the west side of the creek, and who had an equal interest with him in the dam and water privileges.

When defendant cut away this dam and destroyed plaintiff's water privileges, the manner in which he went about it would indicate that he acted hastily and more or less in the heat of passion. He seeks to justify this by claiming that plaintiff had placed some planks on the dam which raised the water considerably; but the evidence establishes that, even with this extra planking, it was not raised higher than the original dam, and plaintiff had a right under the deed of June 20, 1853, to raise it one foot.

The fact is, when defendant ascertained that plaintiff had put on these extra planks, without consulting him to ascertain why he did it, defendant on a Sunday obtained an axe and other convenient tools and cut openings in the dam so the water ran through, lowering the pond and effectually destroying plaintiff's water privileges. He had no right to thus arbitrarily destroy plaintiff's property, and it has been

established that he has suffered damages by reason of such destruction in the following amounts:

Loss of rental value of property from January 14, 1912, to trial of action	$1,100 00
Cost of restoring race	50 00
Loss of electric light power	18 00
Cost of restoring dam	600 00
	$1,768 00

Upon all the facts as established in this case, it must be adjudged that on the 14th day of January, 1912, plaintiff was and at the present time is, entitled to maintain a dam across Allen's creek at a point where the dam was located at the time defendant destroyed it, and that it should be of a height equal to the height of the dam provided for in the deed from Benjamin Huntington to Hannah Maria Barnes dated June 20, 1853, and that plaintiff is entitled to damages against defendant occasioned by his cutting down said dam, in the sum of $1,768, together with a permanent injunction restraining defendant, his agents and servants, from interfering with plaintiff, his agents and servants, when he reconstructs said dam, and permanently restraining defendant, his agents and servants, from interfering with said dam after it shall be erected, together with costs to be taxed.

Findings may be submitted and judgment entered in accordance with these views.

(82 Misc. Rep. 500.)

PHILLIPS v. FLAGLER et al.

(Supreme Court, Equity Term, Niagara County. November 1, 1913.)

1. WILLS (§ 222*)—SETTING ASIDE—JURISDICTION OF EQUITY.

Equity has jurisdiction of an action to set aside a will as the result of undue influence, where the land devised has been deeded by the testator to another than the devisee, and such other was in possession under the deed, so that an action of ejectment would not lie.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 542–544; Dec. Dig. § 222.*]

2. ACTION (§ 38*)—MISJOINDER.

A complaint, alleging that defendant F. exercised an undue influence over decedent when he was mentally incompetent to induce him to execute deeds to herself and devise the land to her relatives, who were also made defendants, for her own benefit, alleged a single cause of action in equity to determine and enforce plaintiff's rights to the realty.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 217–220; Dec. Dig. § 38.*]

3. WILLS (§ 38*)—CAPACITY—"DELUSIONS."

An unjustifiable impression held by decedent regarding his son, even though a mistake in judgment, was not necessarily a delusion; mistakes in judgment not being "delusions."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 78–81; Dec. Dig. § 38.*]

4. WILLS (§ 47*)—MENTAL COMPETENCY.

Old age, and mental and physical infirmities resulting therefrom, do not make one incompetent to execute a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 94; Dec. Dig. § 47.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. DEEDS (§ 211*)—VALIDITY—SUFFICIENCY OF EVIDENCE—MENTAL COMPETENCY.
Evidence *held* not to show that a grantor was mentally incompetent when he executed a deed.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. § 211.*]

6. WILLS (§ 55*)—SUFFICIENCY OF EVIDENCE—VALIDITY.
Evidence *held* not to show that the testator was mentally incompetent when he executed a will.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–158, 161; Dec. Dig. § 55.*]

7. WILLS (§ 50*)—MENTALLY COMPETENT—TEST—"TESTAMENTARY CAPACITY."
The test whether testator was competent to execute a will is whether his mind was capable of understanding the nature and disposition of his property and his relations to his relatives and the persons to whom he devised it.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 96–100; Dec. Dig. § 50.*
For other definitions, see Words and Phrases, vol. 8, pp. 6929–6931.]

Action by William E. Phillips against Lydia C. Flagler and others. Complaint dismissed.

S. W. Dempsey, of Lockport, for plaintiff.
David Tice, of Lockport, for defendants Flagler.
F. D. Moyer, of Lockport, for defendant Phillips.

POUND, J. This action is brought to set aside a deed made by Hiram A. Phillips on September 5, 1905, an unprobated will executed by him on July 11, 1908, and a deed made by him on July 15, 1908, on the grounds of mental incompetency and undue influence.

The deed of September 5, 1905, conveys a house and lot on Caledonia street in the city of Lockport to the defendant Lydia C. Flagler. The premises were worth about $1,200. The grantee, at the time the deed was executed, gave back a life lease thereof to the grantor.

The will gives $500 to Frank C. Phillips, $1 to the plaintiff, his son and only heir at law and next of kin, and the remainder of his estate to Emory Flagler, husband of said Lydia C. Flagler, in case he survives testator, otherwise to his heirs. At the time of making the will, Hiram A. Phillips owned the East avenue house and lot, subsequently conveyed; also, some household furniture and several hundred dollars in bank. This will was the last of several executed by Hiram A. Phillips and revoked each by a later will. The circumstances of its execution are testified to by a reputable attorney as being regular and legal in all respects.

The deed of July 15, 1908, conveys the East avenue house and lot, worth about $2,500, to said Lydia C. Flagler and her husband, Emory Flagler, as tenants by the entirety, reserving to the grantor the life use thereof and charging it with the payment of the Frank C. Phillips legacy of $500. The deed was drawn by an attorney other than the one who prepared the will.

Hiram A. Phillips died on September 19, 1911, in the ninety-fifth

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

year of his age. Emory Flagler had died before that date, leaving the defendants Belva Flagler and Roy Flagler, his children and only heirs.

It is urged that the complaint should be dismissed so far as it relates to the will, because a cause of action to set aside the will is improperly joined with causes of action to set aside the deeds, which deeds do not affect the defendants Belva Flagler and Roy Flagler, and also because it does not state facts sufficient to constitute a cause of action to set aside the will for the reason that this court has no original jurisdiction to probate a will nor declare an unprobated will void. Code Civ. Proc. §§ 484, 488, 498; Anderson v. Anderson, 112 N. Y. 104, 19 N. E. 427, 2 L. R. A. 175.

[1] But the defendant Lydia C. Flagler is in possession of the real estate under the deeds, so plaintiff has not the remedy at law by an action of ejectment which he might have if the devisees, the defendants Belva and Roy, were in possession.

The usual objection to an original action in the Supreme Court to set aside a will of real estate on the ground of testator's incompetency is that there is a perfect remedy at law. But the existence of the two deeds above mentioned presents such an impediment to an action at law as to give jurisdiction to a court of equity. Kalish v. Kalish, 166 N. Y. 368, 59 N. E. 917.

[2] The gist of plaintiff's action is that the defendant Lydia C. Flagler exercised an influence and control over deceased when he was mentally incompetent and thereby induced him to execute the deeds and the will for the benefit of herself, her husband, and her children. The complaint states a single cause of action in equity to determine and enforce the rights of the plaintiff to the real property formerly owned by Hiram A. Phillips, which is the subject of the action. Porter v. International Bridge Co., 163 N. Y. 79, 57 N. E. 174.

The question is first as to the mental capacity of Hiram A. Phillips to make the deeds and the will in question, and, second, as to his freedom from undue influence in making them.

[3, 4] Phillips was born on June 18, 1817. He was 88 years of age when he made the first deed and 91 years of age when he executed the will and the second deed. He was in an enfeebled condition of body and mind. The sole provision made by him for his only child was the legacy of $1. He seemed to have some unjustifiable impressions about his son, but mistaken judgments are not delusions, nor are old age and mental and physical infirmity disqualifications. Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302.

[5, 6] It must be conceded that, on the one hand, he attended personally to his simple matters of business, like paying taxes and bills and keeping accounts, down almost to the time of his death at the age of 94, three years after the second deed was executed, and that, on the other hand, he was of failing memory, peculiar, childish about trifles, and suspicious of his neighbors without cause. While he was very old and had lost much of his mental vigor, he was by no means wholly non compos mentis.

Did Hiram A. Phillips know what he was about? Had he a sane reason, though a poor one perhaps, for making no provision for his

son? Did he act freely, under proper influence only, without coercion or duress? A brief history of his relations with his son and with the Flaglers will be helpful in reaching a poper conclusion.

In the year 1895 we find the plaintiff bringing suit against his father in the Supreme Court and, after a contested litigation, obtaining judgment against him that plaintiff was, by virtue of a contract to support his father for life, made in the year 1891, entitled to a 100-acre farm in the town of Royalton, formerly owned by his father. As the learned court found in favor of the plaintiff, it follows that Hiram A. Phillips was in the wrong and to blame for the litigation. But the son regarded the father as mentally competent in 1895, and it must be assumed that Hiram A. Phillips was then able to look after himself and his affairs and that he naturally and normally felt that he was in the right and that his son was in the wrong about the lawsuit. Thus the natural affection of the father for the son was ever afterwards clouded by the memory of this controversy.

In the year 1898, the plaintiff and his father entered into a contract whereby the son agreed to pay the father $65 in cash quarterly in lieu of the support to which he was entitled under the contract. Again the son deals with the father as competent to contract; probably, from his point of view, he deals not unfairly with the old man. But William E. Phillips has beaten his father in a lawsuit over the farm, and has now obligated himself to pay only $260 per annum for his father's support. No hypothesis of mental delusion is required to explain a feeling on the part of the father that the son had gotten the better of him and had been unfilial. After making the contract, the son appeared each quarter with a notary public and took an acknowledged receipt from his father for the payments. The contract provided for this, but it annoyed the father. I think it not unnatural that the father should, out of his disappointment and grief, entertain a bad opinion of the son, regard him as an enemy, and the like, although at times tolerating him, as it were, and not wholly breaking off relations with him. The relations between them after 1898 were, however, confined almost entirely to the payment and receipt of the $65 quarterly. Certainly it was no insane delusion on the part of Hiram A. Phillips that his son had sued him and, as the result of the lawsuit, had obtained title to the Royalton farm for $260 per annum for the life of a man 81 years old. I see no good reason why the son would expect to inherit from the father after that, if the father were competent to disinherit him.

The defendant Lydia C. Flagler is a woman of about 60 years of age, who was taken by Hiram A. Phillips into his home when she was about 6 years old, along with her brother and sister, orphan children named Cole. They all took the name of Phillips, and the brother and sister were brought up by him. Lydia, however, lived with him only about a year and then went to live with another family and in time married Emory Flagler. Her relations were always friendly with the old man. In 1898 she lived on Charles street in Lockport, and Hiram A. Phillips lived not far away on East avenue. From 1898 to the spring of 1911 Hiram A. Phillips boarded with her at her house, paying her the

modest sum of $2 per week for meals, washing, and mending. In the spring of 1911 she moved with her family into the East avenue house, at his request, and continued to care for him until he died in the following September. The Flaglers were closer to him than any one else; they treated him kindly, and had his confidence, and it would seem reasonable for them to expect something at his death in addition to the $2 per week paid by him for board and keep.

[7] Assuming that the mental faculties and will power of Hiram A. Phillips had deteriorated from the year 1891, when the contract with plaintiff about the farm was made, from the year 1895 when they had the lawsuit, from the year 1898, when they made the annuity contract, down to the years 1905 and 1908, the test is: Was his mind still capable of understanding the nature and disposition of his property and his relations with his son and the Flaglers? Delafield v. Parish, 25 N. Y. 9.

He seems at times to have been able to reason himself into a belief that his son had dealt fairly with him about the farm, and that the decision of the court was a just one; but his mind always goes back to the trouble between them. It was not an insane delusion on his part that they had had trouble, nor was the belief that his son had treated him badly evidence of mental incapacity. Even an unjustifiable impression is not a delusion, and the impression that his son had taken advantage of him was not wholly unjustifiable. That he had been disappointed and displeased was due perhaps to the weakness and infirmity of age, rather than to any real misconduct on the part of plaintiff; but it was not due to senile dementia. He may have forgotten many things, great or small, but he never forgot the loss of the farm in the lawsuit. In the free exercise of such intellectual powers as he possessed, he made a perfectly natural disposition of his property. Deeds and wills are not to be set aside by the courts except for the gravest reasons, especially where the result would be to take the property of a dead man from the persons to whom he has thought best to give it and to give it to the legal heir from whom the deceased had been alienated, not without cause, and who had no equitable claim on his father's bounty. Nutting v. Pell, 11 App. Div. 55, 42 N. Y. Supp. 987.

The deeds in my opinion fairly represent the wishes of the deceased. Decision dismissing complaint, with costs.

(158 App. Div. 592)

LEIBOWITZ et al. v. JOSEPH B. THOMSON REAL ESTATE CO. et al.

(Supreme Court, Appellate Division, Second Department. October 31, 1913.)

1. FIXTURES (§ 22*)—CONDITIONAL SALES.

That plumbing appliances placed in a residence are necessary to render the building wholly usable for residential purposes does not exclude them from the rules governing conditional sales of personalty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 57; Dec. Dig. § 22.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. FIXTURES (§ 27*)—AGREEMENT—MORTGAGEE OF LAND AND SELLER OF CHATTELS.

The owner of real property and the seller of personalty may agree that articles to be affixed to the building, but which can be removed without material injury to the freehold, shall until paid for be treated as personalty between them, and such agreement is binding on an existing mortgagee of the premises.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45, 54; Dec. Dig. § 27.*]

3. FIXTURES (§ 33*)—PERSONALTY CONDITIONALLY SOLD—EFFECT OF CHATTEL MORTGAGE.

Where the owner of realty and the seller of personalty, which was affixed to the soil, but could be removed without material injury to the freehold, agreed that until paid for it should be treated as personalty, the taking of a chattel mortgage by the seller will not deprive him of any rights.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 64, 65; Dec. Dig. § 33.*]

Appeal from Special Term, Kings County.

Action by Adolph Leibowitz and another against the Joseph B. Thomson Real Estate Company and others. From an order directing judgment on the pleadings, defendant Louis Fishman appeals. Order reversed as to him.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

Joseph Goldfein, of New York City, for appellant.

Cyrus S. Jullien, of Brooklyn, for respondents.

CARR, J. The defendant Fishman appeals from an order directing judgment, on the pleadings, for foreclosure and sale of certain real property in Brooklyn, in so far as said order affects him. The plaintiffs hold a mortgage on said premises and alleged a default in its conditions. They further alleged that Fishman claimed an interest in the premises which is subordinate to the mortgage. Fishman answered by setting up that he claimed an interest in certain plumbing appliances or fixtures which he sold to the owner of the premises, the Thomson Company, under an agreement that the goods should remain as personal property until fully paid for, and that he took a chattel mortgage on the goods as security for the purchase price and duly filed it as provided by statute, before the goods were installed on the premises in question; that the goods have not been paid for, and that by virtue of said chattel mortgage he is now entitled to the possession thereof. He alleged further that the plaintiffs knew of the conditions and circumstances of the sale and consented thereto. The mortgage sought to be foreclosed antedates in record the appellant's chattel mortgage.

[1] The sole question involved on this appeal is whether the appellant has set up a good defense in his answer, and this question must be determined on the face of the pleadings themselves. There is no allegation in the complaint that the goods in question were so annexed to the realty as not to be removable without serious injury to the structure itself. Their nature, however, is such that to render the building

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fully usable for residential purposes they would need to be replaced with similar appliances. This circumstance does not exclude them from the settled rules applying to conditional sales. Fitzgibbons Boiler Co. v. Manhasset Realty Corporation, 198 N. Y. 517, 92 N. E. 1084, adopting dissenting opinion of Scott, J., below, 125 App. Div. 764, 110 N. Y. Supp. 225.

[2] However, the answer of the appellant distinctly alleges that all of the articles in question "can be disattached from the real property mentioned" (in the complaint) "without any material injury to the said real estate." Therefore, upon the face of the pleadings, this case falls within the rule declared in Tifft v. Horton, 53 N. Y. 377, 13 Am. Rep. 537, Kerby v. Clapp, 15 App. Div. 37, 44 N. Y. Supp. 116, Davis v. Bliss, 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. (N. S.) 458, and many other authorities, in which cases it was held that an agreement between a vendor and the owner of the real property that certain articles, sold to be annexed to a freehold, should still retain their character as personal property until paid for, notwithstanding such annexation, if the goods might be removed without substantial injury to the freehold, should be upheld. This rule has been qualified by statute as to subsequent purchasers and mortgagees in good faith where the contract of conditional sale has not been filed as provided in section 62 of the Personal Property Law (Consol. Laws 1909, c. 41); but that statute does not apply to this case, nor is it so contended. The respondent relies upon the authority of Mechanics' & Traders' Bank v. Bergen Heights Realty Corp., 137 App. Div. 45, 122 N. Y. Supp. 33; McMillan v. Leaman, 101 App. Div. 436, 91 N. Y. Supp. 1055; and Jermyn v. Hunter, 93 App. Div. 175, 87 N. Y. Supp. 546. In all of these cases the agreement of conditional sale was made *not* with the owner of the premises, as is the case here, but with a mere contractor and without the knowledge or consent of the owner.

[3] Nor is the situation changed necessarily by the fact that the appellant accepted a chattel mortgage at the time of the sale and before the installation of the goods, for that was the situation before the court in Tifft v. Horton, ut supra, where it was said that the chattel mortgage was evidence of the agreement that between the vendor and the owner the articles should remain personal property until paid for.

It was error to direct judgment against the appellant, Fishman, on the face of the pleadings, and the order, in so far as appealed from, should be reversed, with $10 costs and disbursements, and the motion denied as to the defendant-appellant, Fishman, with $10 costs. All concur.

(158 App. Div. 539.)

LEHNER v. NUGENT.

(Supreme Court, Appellate Division, Second Department. October 10, 1913.)

1. DEEDS (§ 211*)—EVIDENCE—MENTAL INCOMPETENCY.

Evidence *held* not to support a finding that plaintiff was mentally incompetent when she executed a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. § 211.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. DEEDS (§ 211*)—EVIDENCE—DURESS.
Evidence *held* not to sustain a finding that plaintiff executed a deed to defendant under duress.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. § 211.*]

Appeal from Trial Term, Dutchess County.

Action by Elizabeth Lehner against Julia Nugent. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

Walter Farrington, of Poughkeepsie, for appellant.

Benjamin H. Stern, of New York City, for respondent.

JENKS, P. J. [1] I think that the evidence does not justify the judgment whereby the deed of the plaintiff to the defendant is vacated and set aside and declared null and void. The plaintiff, a woman 73 years old, lived alone without servants. She took in the defendant, who hitherto had earned her living as a seamstress and domestic servant in the small village which was the common home of the parties. They had known one another, but had not been intimate, and they seem to be of the same station in life. About a month after the defendant came to live with the plaintiff, the deed was executed and delivered. Thereby the plaintiff conveyed the premises whereon was her dwelling—valued at about $1,500—to the defendant for the consideration of $1 and upon the conditions that the plaintiff might occupy the premises for life, and that the defendant should care for and nurse the plaintiff during her life. The latter condition was stated to be by way of further consideration. There was nothing out of the ordinary in the transaction. The plaintiff, in addition to the realty, possessed about $3,000 invested in railroad bonds, and seems to have lived in her humble way out of the income thereof and whatever was returned to her from the land. It does not appear, on the other hand, that there was any one more naturally the object of the plaintiff's bounty from ties of blood or marriage or affection. On the other hand, if the defendant is to be believed, and I see no reason to discredit her story, she gave up much of her opportunities for livelihood, and devoted herself to the plaintiff.

[2] There was much testimony taken, which when analyzed is little more than the "rustic cackle of the burg," and which falls far short of sustention of the plea that the plaintiff was ill and unfit mentally and physically, at the time of the execution of the deed, so that she did not understand her act or its sequence; that the defendant made fraudulent representations to her and exercised duress over her. Indeed, the testimony of the plaintiff and that of her attorney who prepared the deed—a gentleman of "excellent reputation," to quote the official expression of the referee—indicates that the plaintiff understood her action, its purport, and its consequences. The learned referee found that the deed was read and explained to her by this attorney, and his subsequent qualification of the finding does not affect

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

those facts. The attorney testifies that he was summoned by a letter from the plaintiff, and instructed by her to draw the deed; that in explanation the plaintiff said to him that the defendant was to live with her and to care for her for the rest of her life, and that she had no other way to compensate her. And it was for this reason that the attorney sua sponte inserted the provisions in the deed which I have described. The plaintiff herself testifies that she never talked with the defendant about the deed, that up to the time of its execution she had no conversation on the subject with the defendant, and that the defendant did not tell her "anything about her having the place." I fail to find any evidence of duress.

My conclusion is hardly contradictory of the referee, although perhaps contrary. For he seems to be mainly moved to his decision by the fact that this attorney did not go further to explain to the plaintiff the full consequences of her act, and how far it went to strip her of her property. I really cannot find that, under the circumstances as detailed by the attorney, he failed in any obligation to his client. The referee finds that the plaintiff was not an invalid, in good health for her years, able to care for herself, and to go about the village without assistance. The attorney was not even a friend of the plaintiff. He had never advised her theretofore, but was called in by her, and was instructed to perform the professional work in question. If the plaintiff appeared to him well in mind and body, it was not his function to attempt to alter her instructions, or to advance arguments to change her purpose, in the face of the reasons which she gave to him, for they appear to me natural and even cogent.

A reading of the record, and between its lines as well, indicates that the defendant did all that she could to obtain and to keep the good graces of the plaintiff, and that she was hostile to those who sought to weaken her hold or to thrust her out. But we can likewise read that much of the testimony relied upon by the plaintiff emanates from those who thought that they could both punish the defendant and perhaps profit themselves. If the defendant had the plaintiff under her thumb, as these witnesses would have us believe, it seems strange that she did not interfere in the matter of the second will, and seek to make herself the principal beneficiary, instead of leaving its terms of disposition in favor of a distant charity and of a mere friend of the plaintiff, who revealed herself as hostile to the defendant.

I advise that the judgment be reversed, and that a new trial be granted, costs to abide the event, on questions of fact as well as of law. All concur.

(158 App. Div. 584)

WALZ v. HUMRICH.

(Supreme Court, Appellate Division, Second Department. October 10, 1913.)

1. APPEAL AND ERROR (§ 460*)—STAY OF EXECUTION.

Code Civ. Proc. § 1330, providing that an appeal taken from a judgment directing execution of an instrument does not stay the execution of a judgment until the instrument is executed, and deposited with the clerk,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

does not apply to stay execution until an appeal has been perfected, and hence would not apply where no undertaking to pay costs and disbursements was given, as required by Code Civ. Proc. § 1326.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217–2226, 2245, 2246; Dec. Dig. § 460.*]

2. CONTEMPT (§ 22*)—PROCEEDINGS—PURPOSE OF REMEDY.

Where appellant did not perfect his appeal from a judgment directing him to execute a mortgage to appellee by giving an undertaking for costs, as required by Code Civ. Proc. § 1326, appellee's only remedy for appellant's failure to comply with the judgment is a motion to punish for contempt for failure to do so.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 67; Dec. Dig. § 22.*]

Appeal from Special Term, Queens County.

Action by Joseph Walz against Magdalena Humrich. From an order denying a motion to punish defendant for contempt in failing to deliver a mortgage to plaintiff as directed by a judgment, plaintiff appeals. Order reversed, and motion granted, unless defendant file security as required.

Argued before JENKS, P. J., and THOMAS, CARR, RICH, and PUTNAM, JJ.

Nicholas Dietz, of Brooklyn, for appellant.

John M. O'Neill, of Brooklyn, for respondent.

CARR, J. The plaintiff obtained a final judgment against the defendant which directed her to execute and deliver to the plaintiff a mortgage on certain real estate in the sum of $2,000, and which likewise awarded against the defendant the taxable costs in the action. The defendant has appealed to this court. She then deposited with the county clerk of Queens county, to await the determination of said appeal, a mortgage in accordance with the directions of the final judgment in this action. The plaintiff thereupon moved to punish her for contempt in failing to deliver said bond and mortgage to him as directed by the final judgment. This motion was denied, and, from the order denying the same, the plaintiff appeals to this court.

[1] The sole question involved is whether or not the defendant, by depositing the mortgage in question with the county clerk of Queens county, thereby stayed the execution of the judgment, pending the determination of the appeal. The defendant does not contend that the money part of said judgment was stayed by the deposit of the mortgage; but she insists that, as execution might issue against her for that portion of the judgment, a proceeding to punish her for contempt in not discharging the money obligation of the judgment is improper. That much may be conceded. However, unless the judgment directing the execution and delivery of the mortgage was stayed pending the appeal, there is no other way in which the plaintiff could enforce the final judgment without resorting to proceedings to punish for contempt. The defendant has obtained no order of court granting a stay of the execution of the judgment, hence her rights in the premises are to be determined exclusively by the provisions of section

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1352 of the Code of Civil Procedure, which relates to appeals to this court. By that section, a judgment may be stayed by an appellant without an order of the court, where the appellant gives the security required to perfect an appeal to the Court of Appeals from a similar judgment. Here the defendant has not given the security which would be required to perfect an appeal to the Court of Appeals.

She contends, however, that under section 1330 of the Code the deposit by her of the mortgage in question with the clerk of this court was sufficient to stay the execution of that part of the judgment which required the execution and delivery of mortgage to the plaintiff. Section 1330 provides as follows:

"If the appeal is taken from a judgment or order, directing the execution of a conveyance, or other instrument, it does not stay the execution of the judgment or order, until the instrument is executed, and deposited with the clerk, with whom the judgment or order is entered, to abide the direction of the appellate court."

This action, however, refers to a case in which an appeal has been perfected. Unless there is a perfected appeal, there can be no stay. An appeal, however, to the Court of Appeals is not perfected until the requirements set forth in section 1326 of the Code are fulfilled, which requires that ordinarily an appellant must give a written undertaking to the effect that he will pay all costs and disbursements which may be awarded against him on the appeal, not exceeding $500. This the defendant has not done, and she is in no position to avail herself of the provisions of section 1330, which refer, as above stated, to a perfected appeal. Waring v. Ayres, 12 Abb. Prac. 112.

[2] The order denying the motion to punish the defendant for contempt in failing to obey the final judgment must be reversed, as otherwise the plaintiff is left remediless under the existing situation. Inasmuch as the appellant seems to have proceeded in good faith through a mistaken interpretation of sections 1352 and 1330 of the Code as aforesaid, he should be given a reasonable opportunity to comply with the requirements of section 1326.

Order reversed, with $10 costs and disbursements, and motion to punish the defendant for contempt is granted, with $10 costs, unless the defendant within 20 days complies with the final judgment or files the security required by section 1326 of the Code of Civil Procedure, and pay the costs and disbursements of this appeal. All concur, except RICH, J., not voting.

(158 App. Div. 604)

PORTER v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. October 10, 1913.)

1. MASTER AND SERVANT (§ 129*)—INJURIES—PROXIMATE CAUSE.

Where a painter was not killed while occupying a scaffold on which he was working, but while shifting it to another position by removing the planks of which it consisted, after the guard rails had been removed, the absence of the guard rails could not have been the proximate cause of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257–263; Dec. Dig. § 129.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 129*)—INJURIES—PROXIMATE CAUSE.
Where a painter fell while he was resting on one of two spars over which his scaffold was slung while moving the boards forming the floor thereof, it could not be said that any narrowness of the scaffold was the proximate cause of the accident.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257–263; Dec. Dig. § 129.*]

3. MASTER AND SERVANT (§ 264*)—INJURIES—ISSUES.
Where the complaint, in an action for a painter's death by falling from a scaffold, alleged neglect in furnishing a scaffold "too narrow to work upon" safely, and in furnishing one without guard rails, any violation of the statute in furnishing a movable scaffold by shifting the planks on the spars as was done, and decedent's assumption of the risk of such danger by continued employment, were not in issue.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861–876; Dec. Dig. § 264.*]

Appeal from Trial Term, Queens County.

Action by Laura A. Porter, as administratrix of James J. Porter, deceased, against the City of New York. From a judgment as amended for plaintiff, and from an order entered, defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and THOMAS, CARR, RICH, and STAPLETON, JJ.

William E. C. Mayer, of Brooklyn (Terence Farley, of New York City, on the brief), for appellant.

Martin T. Manton, of New York City (William H. Griffin, of New York City, on the brief), for respondent.

THOMAS, J. [1] The complaint is that defendant's servant, a painter, was killed by its neglect in furnishing a scaffold "too narrow to work upon" in safety, and without guard rails. But the servant was killed, not in the occupancy of the scaffold, but in shifting it to another position. For such purpose the guard rail in front had been unshipped and the guard rope in the rear of the scaffold loosened. The guard rail had no protective relation to the decedent's act, and its absence was not the proximate cause of the fall. It was his duty with the aid of his co-worker to draw the ladder from position to position, and at the time an obstructing platform required the dismantling of the guard rail. But even if it, complete, had remained in place, it could not have served him while traversing the spar, nor was it intended or expected to do so. From the bridge two spars, tapering from 8 to 4 inches in diameter, some 36 feet in length and from 15 to 18 feet apart, were suspended, and across these two spruce planks, one-half inch thick, 2½ feet wide, and 25 feet long, and separated by an interval of 2½ feet, were lashed, on each of which two men while painting were supported. There is some suggestion that a painter's ladder lay under the plank, which was the probable fact. It was the duty of the two men to move the scaffold as the work progressed. To do this each necessarily placed his feet or body on the spar, steadying or supporting himself by taking hold or resting upon some part of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bridge. Porter stated in the hospital that he stood on the spar for the purpose of pulling the plank along and, slipping, fell. So it is evident that the question of the guard rail did not and could not affect the matter, and that it should not have been considered by the jury.

[2, 3] The only other charge of negligence is that the scaffold was too narrow for decedent to work on safely, and therefore he fell from it. But he did not in any proper sense fall from the scaffold because it was too narrow, but from the spar because he was obliged to rest on it to shift the plank. Hence the real accusation against the defendant is that it furnished a scaffold that had to be moved along by means dangerous to the workmen. And the plaintiff contends that instead of one or two boards across the spars it should have been planked for the entire length of the spars. Then the workmen could have taken one board at a time and, walking across the other boards still lashed, placed it in the advanced position. But no such charge is made or intended in the complaint. It is true that there was evidence relevant to such issue in a sentence first given by the plaintiff's witness and pursued on cross-examination by defendant. But when the plaintiff would have the testimony of the witness Gribbon directly on the subject, the defednant repeatedly objected upon grounds that required the rejection of the evidence if it were to be used for the issue now presented. It is not entirely clear whether the court intended to submit such issue to the jury, but as the particulars in the complaint were specifically mentioned, it is inferred that only such questions were submitted for decision. The decedent had moved the planks a hundred times, his working mate said, during the two years of his use of the scaffold; and, if there was any question whether the defendant failed to observe the statute because it provided a scaffold movable in the way adopted, it should have been submitted after proper pleading and sustaining evidence, together with the question whether plaintiff's knowledge, continued employment and conduct should of themselves defeat recovery. I do not consider whether such allegation would state a cause of action, inasmuch as it was foreign to the intendment of the complaint. Nor does the notice served suggest such failure by defendant. It is now sufficient to decide that neither of the failures charged in the complaint, even if it existed, was the proximate cause of the accident. The complaint charges that plaintiff served a notice pursuant to the statute, the defendant admits that it received a paper purporting to be a notice of intention to sue, and the notice in evidence shown to have been filed does prove notice of such intention. Hence the required notice of intention to sue was proved.

The judgment and order should be reversed, and a new trial granted, costs to abide the event. All concur, except RICH, J., not voting.

(158 App. Div. 912)

In re CRUGER AVE., HOLLAND AVE., AND MAPLE ST. IN CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. October 17, 1913.)

MUNICIPAL CORPORATIONS (§ 508*)—STREET IMPROVEMENTS—ASSESSMENT—APPEAL—TIME.

Greater New York Charter (Laws 1901, c. 466) § 988, as amended by Laws 1906, c. 658, providing that an appeal from an order confirming a report of commissioners of estimate and assessment, not prosecuted within six months, unless time be extended by the court, shall be deemed abandoned, is mandatory, so that the court has no jurisdiction to disregard the same.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1181, 1182; Dec. Dig. § 508.*]

Application of the City of New York to improve Cruger Avenue, Holland Avenue, and Maple Street. Application to dismiss an appeal from an order confirming a report of commissioners of estimate and assessment. Granted.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

William B. R. Faber, of New York City, for the motion.

Charles B. Mason, of New York City, opposed.

PER CURIAM. The order appealed from was entered on March 10, 1913, appeal taken March 14, 1913, and time to file papers extended to April 18, 1913, when what purported to be the case on appeal was served. Under section 988 of the New York Charter, as amended by chapter 658 of the Laws of 1906, an appeal taken in one of these proceedings and not prosecuted within six months, unless time for prosecution of the appeal be extended by the court, shall be declared abandoned. The provision is mandatory, and the court has no power to disregard it. See Matter of Old Pier, 151 App. Div. 659, 136 N. Y. Supp. 532.

Motion granted, with $10 costs.

(158 App. Div. 558)

BLUMENTHAL v. BROOKLYN UNION ELEVATED R. CO. et al.

(Supreme Court, Appellate Division, Second Department. October 31, 1913.)

1. CARRIERS (§ 306*)—PASSENGERS—INJURIES—COMPANIES LIABLE.

Defendant electric railway companies owned separate railroads which were connected so as to make a through route to R., over which they carried passengers, each company receiving a part of the fare. The L. Company owned that part of the connecting road called the "incline," and had immediate control of all of it, but the cars were furnished and run by the employés of the B. Company. *Held*, that the L. Company was responsible for injuries to a passenger from negligently permitted electric disturbances on the car whether they occurred on the part of the connecting track owned in common, the "incline," or on the main tracks of the L. Company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1249–1251; Dec. Dig. § 306.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CARRIERS (§ 316*)—INJURY TO PASSENGER—RÉS IPSA LOQUITUR DOCTRINE. Where the electrical disturbance on an electric railway passenger car resulting in injury to a passenger was abnormal to the usual use of the electrical apparatus, the happening of the accident was sufficient evidence of negligence to require a showing of due care by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285–1294; Dec. Dig. § 316.*]

Appeal from Trial Term, Queens County.

Action by Hyman Blumenthal against the Brooklyn Union Elevated Railroad Company and the Long Island Railroad Company. From a judgment for each defendant, and an order denying a motion for a new trial, plaintiff appeals. Judgment and order as to the Brooklyn Union Elevated Railroad Company affirmed, and judgment as to the Long Island Railroad Company reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

Nathan Ottinger, of New York City, for appellant.

D. A. Marsh, of Brooklyn, for respondent Brooklyn Union Elevated R. Co.

William C. Beecher, of New York City, for respondent Long Island R. Co.

PER CURIAM. Two carriers owned separate railroads which were connected, so as to make a through route between New York and Rockaway, over which they arranged to carry passengers for a fare whereof each company should receive a stated part. The Long Island owned that part of the connecting railway called the "incline," and both companies beneficially owned the remainder of it, but as to all of it and the trains using it the Long Island had immediate control. The plaintiff, a passenger from New York to Rockaway, was injured proximately by fire resulting from electrical disturbance on the car, which occurred, as plaintiff insists, and in this he finds support in the evidence, either upon the common track, the incline, or the main tracks of the Long Island.

[1] In either case the Long Island was a responsible carrier. But the complaint was dismissed as to it when plaintiff rested, and after further evidence the jury found a verdict in favor of the Brooklyn.

[2] The electrical manifestation was abnormal to the appointed use and was sufficient evidence of negligence to demand a showing of proper care on the part of the carrier in regard to whatever was a competent cause of it. The fact that the cars were furnished and manned by the Brooklyn did not entitle the Long Island to dismissal of the complaint, although it could avail itself of the care observed by the associate company; yet for the purposes of the use of the common track and for its own tracks it, as regards the passengers, adopted the train and the crew and shared the responsibility or alone bore it, and as the case stood there was a question for the jury. The evidence including the contracts shows that the Long Island was the more influential factor as to the connection and ultimately responsi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ble as to its own tracks. In the case against the Brooklyn Company the plaintiff undertook to attribute the fire to a short circuit from the lead wire, from which the insulation had been burned, coming in contact with a part of the car, and the court charged the jury, "You will have to be able to point your finger to the negligence of the defendant"; but the plaintiff's counsel, although his attention was directed to it, disclaimed a wish to proffer requests or exceptions. While the doctrine of res ipsa loquitur was applicable, the plaintiff did not invoke it, and was contented that the court should not, and the verdict upon the issues submitted was not against the weight of evidence.

The judgment and order as to the Brooklyn Union Elevated Railroad Company should be affirmed, with costs, and the judgment as to the Long Island Railroad Company reversed, and a new trial granted; costs to abide the event.

(158 App. Div. 692)

THOMAS v. AMERICAN MOLASSES CO.

(Supreme Court, Appellate Division, Second Department. October 24, 1913.)

1. APPEAL AND ERROR (§ 570*)—RESETTLEMENT OF CASE.

A motion to resettle a case on appeal to the Appellate Division is not favored, and a determination of the Appellate Term as to proceedings at the trial is conclusive, unless there was a manifest abuse of power.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2546–2549; Dec. Dig. § 570.*]

2. APPEAL AND ERROR (§ 570*)—RESETTLEMENT OF CASE—EVIDENCE.

The recollection of the trial justice, sustained by the stenographer's minutes of the trial, to the effect that no motion to dismiss was made, will control over a contrary affidavit made by counsel on a motion to resettle the case on appeal to the Appellate Division, so as to show that such motion was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2546–2549; Dec. Dig. § 570.*]

Appeal from Special Term, Kings County.

Action by Alphonse H. Thomas against the American Molasses Company. From an order denying defendant's motion for a resettlement of the case on appeal, it appeals. Affirmed as modified.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

Leo Levy, of New York City, for appellant.

Henry Waldman, of New York City, for respondent.

PER CURIAM. This is an appeal from an order denying a motion to resettle the case on appeal with respect to four proposed amendments thereto, numbered 6, 8, 12, and 13.

[1] The law does not look with favor upon contests of this character, and the orderly administration of the law requires that the determination of the court at Special Term with regard to what occurred during the trial shall be conclusive unless there is a manifest

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

abuse of power. Ditmas v. McKane, 87 App. Div. 54, 83 N. Y. Supp. 1077.

With regard to the proposed amendments 6, 8, and 12, neither the case as actually proposed nor the case as settled by the trial justice conforms to actual occurrences as disclosed by the stenographer's minutes. Exact justice may be done the parties by inserting therein a transcript of the stenographer's minutes of the colloquy between court and counsel respecting the questions then being considered.

Proposed amendment 13 strikes out from the proposed case on appeal the words:

"Defendant moved to dismiss for a direction of a verdict, motion denied. Exception."

The moving affidavits assert that, while this trial was going on, another jury in the rear of the courtroom was being selected in the case that was to follow:

"That the evidence in the case with two exceptions was closed at the hour of the noon recess; that, upon return from lunch at the hour indicated by the court for reconvening, the parties presented themselves, and * * * defendant sought to have a certain concession appear in the record, which was agreed to, and which now appears therein; that the court stenographer had not returned from lunch at that time; that with the concession the case on both sides was deemed closed and deponent" (defendant's counsel) "moved for a dismissal of the complaint and a direction, which motions were denied; that it was then found that the court stenographer was not there and deponent" (defendant's counsel) "asked the court to have the concession and the motions placed on the record, which the court said would be done; that thereupon both sides were directed to retire to the anteroom with the jury and there sum up the case so that the court might proceed with the other trial. * * * The directions of the court in this respect were obeyed; and just as the jury and counsel were about to retire to the anteroom the official court stenographer appeared and was notified by deponent with respect to the concession and the motion and stated that he would place the same upon the record."

[2] The concession appears in the stenographer's minutes, but no record of any motion to dismiss or to direct a verdict, and the trial justice states that in accordance with his recollection no such motion was made. With regard to this, the recollection of the trial justice, sustained by the stenographer's minutes of the trial, must control.

The order appealed from should be modified by amending the proposed case on appeal so far as amendments 6, 8, and 12 relate thereto, by substituting therefor a transcript of the stenographer's minutes of the trial, and, as thus modified, it should be affirmed, without costs.

(158 App. Div. 555.)

BEST v. NEW YORK CITY WATERFRONT CO. et al.

(Supreme Court, Appellate Division, Second Department. October 24, 1913.)

INTERPLEADER (§ 18*)—FORECLOSURE OF MORTGAGE—WITHDRAWAL OF ANSWER.

Where the assignee of a mortgage started foreclosure proceedings in which the owner of the premises filed an answer denying the assignment and the default, and thereafter the assignor at his own request was made a party to the suit in order to contest the assignment, the owner should

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be permitted to withdraw its answer, pay the amount due on the mortgage into court, be discharged from all liability to either claimant, and have the mortgage discharged of record, since the action is not within the terms of Code Civ. Proc. § 820, allowing interpleader in actions of ejectment and for the recovery of chattels before answer is filed, but is governed by equitable rules.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 40; Dec. Dig. § 18.*]

Appeal from Special Term, Queens County.

Action by Catherine Best against the New York City Waterfront Company and others to foreclose a mortgage. From an order of the Special Term denying a motion of the New York City Waterfront Company for permission to withdraw its answer, pay the amount of the mortgage into court, and be dismissed from the action, the company appeals. Order reversed, and motion granted.

Argued before JENKS, P. J., and THOMAS, CARR, RICH, and PUTNAM, JJ.

J. Lewis Parks, Jr., of New York City, for appellant.

Edward G. Nelson, of Brooklyn, for respondent.

CARR, J. This is an action brought to foreclose a mortgage on real estate situated in Queens county. The mortgage in question was made by one Allen to one Josiah S. Packard, for the purpose of securing the payment of the sum of $8,500, dated May 18, 1903, and payable on May 18, 1905, with interest thereon at the rate of 5 per cent. payable semiannually on the first days of November and May in each and every year. The plaintiff in her complaint claimed ownership of said bond and mortgage by virtue of an assignment thereof to her by one Ambrose Packard, as executor of the last will and testament of Josiah Packard, deceased. The property covered by the mortgage is now owned by the New York City Waterfront Company. It answered the complaint of the plaintiff by denying the assignment of said mortgage to the plaintiff, and her ownership thereof, and by likewise denying the allegations in said complaint as to a default in the compliance with the terms of said mortgage as to the payment of semiannual interest. It served an amended answer repeating the denials set forth in the original answer. In the meantime, Ambrose Packard, as executor of the last will of Josiah Packard, deceased, made an application to this court at Special Term to be brought into the action as a party defendant, and an order was entered accordingly. A supplemental summons and complaint was issued against said Packard as executor, and he answered, asking affirmative relief that the assignment of the mortgage, as set forth in the complaint, should be set aside as fraudulent, and that the plaintiff should be directed to deliver over to him the bond and mortgage in question. Thereupon the defendant the New York City Waterfront Company applied at Special Term for an order permitting it to withdraw its answers and to pay into court the amount of the bond and mortgage with the accrued interest, and to be discharged from all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

liability to either claimant of the bond and mortgage and that on making said payment into court the mortgage should be marked discharged of record and the notice of lis pendens canceled. This motion was denied at Special Term, and, from an order made accordingly, the defendant the New York City Waterfront Company appeals to this court.

It appears from the motion papers that this defendant no longer disputes the validity of the bond and mortgage nor default in compliance with its terms, and that the entry of the defendant Packard into the action was not due to collusion between it and him, and that it has no further interest in the present controversy than to pay the indebtedness due on said bond and mortgage to whomever may be legally entitled to it. If the defendant's answer be withdrawn, then nothing further is to be litigated in this action except the question of the ownership of the bond and mortgage, and that question would concern only the rival claimants, both of whom are already parties to the action. Why, then, should the appellant be compelled to await the determination of that controversy against its will and to its great prejudice? The respondent defends the order of the Special Term on the ground that the application of the appellant is in its nature an application for interpleader under section 820 of the Code of Civil Procedure and cannot be granted under said section when the defendant has already answered the complaint. I think section 820 of the Code of Civil Procedure does not control under the circumstances of this case. The appellant did not seek an interpleader to bring in a new party defendant in substitution for itself. The new party had come in of his own motion by order of court, from which no appeal was taken. The action is governed by equitable rules, and it seems to me that the court should have allowed the withdrawal of the answer and the deposit of the money in court under proper conditions, in pursuance of its general equity powers, unless such permission would unnecessarily prejudice the plaintiff. The fact that the appellant has answered, denying the plaintiff's title to the bond and mortgage, is explained on the ground that it had received notice before answering of a hostile claim by the defendant Packard. Doubtless it should have then sought interpleader before answering. But, strictly speaking, it is not seeking interpleader now. No precedents as to similar facts are cited to us. We think the court had power to grant the appellant's motion and should have done so in the exercise of discretion.

Order reversed, with $10 costs and disbursements, and motion granted on condition that the appellant pay into the court, to await the determination of this action, the amount due on the bond and mortgage, together with interest accrued to the date of said deposit, and at the same time pay to the plaintiff her taxable costs and disbursements. All concur.

(158 App. Div. 551)

VASLIGATO v. YELLOW PINE CO.

(Supreme Court, Appellate Division, Second Department. October 31, 1913.)

MASTER AND SERVANT (§ 301*)—EXISTENCE OF RELATION.

Plaintiff was run over by a lumber truck owned and used by defendant but driven by a driver furnished by a public truckman, from whom defendant had engaged extra horses and drivers. The driver received his wages from the truckman and on the morning of the accident was directed to harness his horses and go to defendant's lumber yard and take out defendant's trucks as directed by him; he selecting his own route. He was not accompanied by defendant's representative, and defendant had no power to engage or discharge him. *Held*, that the relation of master and servant did not exist between the driver and defendant, so that the latter was not responsible for the former's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210–1216; Dec. Dig. § 301.*]

Appeal from Trial Term, Kings County.

Action by Louis Vasligato, an infant, by Frank Vasligato, his guardian ad litem, against the Yellow Pine Company. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, STAPLETON, and PUTNAM, JJ.

Frederick S. Martyn, of Brooklyn (Frank V. Johnson, of New York City, on the brief), for appellant.

Edgar J. Treacy, of New York City, for respondent.

PUTNAM, J. At a time when defendant had to make large deliveries of lumber, it engaged extra horses and drivers from a public truckman, one James J. McAllister. While driving along Hudson avenue, Brooklyn, a lumber truck, owned and used by defendant, but driven by a driver furnished by McAllister, ran over the plaintiff. This driver received his wages weekly from Mr. McAllister. On the morning of this accident the driver had reported to the McAllister stables, where he took his orders for the day. He was to harness his horses, go with them to defendant's lumber yard, and drive out defendant's loaded trucks, as defendant directed. At the yard the driver was given the destination of his loads and he proceeded to make deliveries, without being accompanied by any representative of defendant. At the end of the month, defendant paid Mr. McAllister at the rate of $7 a day for the horses and driver. Defendant could not select, engage, or discharge the driver; if dissatisfied, defendant could only complain to Mr. McAllister and perhaps demand another driver to be substituted. The defendant had merely told the driver where to drive, without directing his route or otherwise interfering with the driver's actions.

These undisputed facts showed that the driver remained the servant of his general employer and had not come under the exclusive control of defendant. As the legal relation of master and servant did not exist between the defendant and this driver, the complaint was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

properly dismissed. Kellogg v. Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883; Weaver v. Jackson, 153 App. Div. 661, 138 N. Y. Supp. 609.

I advise that the judgment of dismissal be affirmed, with costs. All concur.

(158 App. Div. 936)

PEOPLE ex rel. LANGDON v. WALDO, Police Commissioner.

(Supreme Court, Appellate Division, Second Department. October 24, 1913.)

1. EVIDENCE (§ 14*)—JUDICIAL NOTICE—CONTAGIOUS DISEASES.
The Appellate Division will take judicial notice that syphilis may be contracted by a person entirely innocent of sexual commerce with one tainted therewith.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 19; Dec. Dig. § 14.*]

2. MUNICIPAL CORPORATIONS (§ 185*) — OFFICES — POLICE DEPARTMENT — GROUNDS FOR DISMISSAL.
It was improper to dismiss a policeman from the force on the ground of conduct unbecoming an officer in contracting syphilis, where it was not shown that the disease resulted from immoral practices.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492–509; Dec. Dig. § 185.*]

Certiorari by the People, on the relation of Leroy Langdon, against Rhinelander Waldo, as Police Commissioner, to review a determination of the respondent, dismissing relator from the police force. Determination annulled, and relator reinstated.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

Jacob Rouss, of New York City, for relator.

James D. Bell, of Brooklyn (Frank Julian Price, of Brooklyn, on the brief), for respondent.

JENKS, P. J. [1, 2] This relator was dismissed from the police force of the city of New York on a finding of guilty upon charges of conduct unbecoming an officer. The specification is that he contracted syphilis at some time in the past, and is now affected with syphilis. There is proof in the record that syphilis is an infectious disease. And we may take judicial notice that it may be contracted by a person entirely innocent of sexual commerce with one tainted therewith. No attempt was made to show that the relator contracted directly this disease as the result of immoral practices or of loose conduct. On the other hand, he was not suffered to testify that such was not the cause of his affliction if that ailment was established to the satisfaction of the trial commissioner. For aught that appears, the punishment of dismissal was inflicted for innocent misfortune, not conscious misdoing. If the relator be tainted with the disease to the peril of present association with other members of the force, that is a matter for physicians to regulate.

The determination is annulled, and the relator is reinstated, with $50 costs and disbursements. All concur.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(158 App. Div. 517.)

McLAUGHLIN v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. October 3, 1913.)

MUNICIPAL CORPORATIONS (§ 214*) — EMPLOYÉS — POWER TO EMPLOY — SURVEYOR.

The ordinance of New York authorizing borough presidents to employ surveyors to make surveys and damage maps and assessment lists of assessable property owners for street openings or other improvements does not authorize the employment of a surveyor to make a map of an assessment district for the construction of a sewage disposal plant, since that work is by authority of Greater New York Charter (Laws 1901, c. 466) §§ 942–954, imposed upon the board of assessors.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 582–588; Dec. Dig. § 214.*]

Appeal from Trial Term, Queens County.

Action by Adelaide M. McLaughlin against the City of New York. Judgment for the defendant, and plaintiff appeals. Affirmed.

The following is the opinion of Kapper, J., at the Trial Term:

At the close of the trial, the court, being of the opinion that the facts were undisputed, ruled that the cause should not be submitted to the jury, but that judgment would be directed for the plaintiff or the defendant, after consideration, as the law of the case required. To this procedure no objection was interposed.

The action is to cover $74,707.85 for services performed by one Sylvester H. McLaughlin, a city surveyor, who claims to have been employed by the borough president of the borough of Queens to make maps and lists of owners of property of a district or area of assessment alleged to have been adopted by the board of estimate and apportionment of the city of New York for the purposes of providing for the payment of the construction of a city sewage disposal plant at Jamaica, in the borough of Queens. The claim was assigned to the plaintiff's testator in his lifetime. The cost of constructing the disposal plant was $143,799.75. The amount for which the plaintiff sues is based upon rates or charges said to be fixed by an ordinance of the board of aldermen of the city which purports to authorize the employment of city surveyors by borough presidents to make surveys and furnish copies of damage maps and assessment lists of assessable property owners "for street openings or other improvements." The specified rates are three cents per linear foot of map front for a first copy, and two cents per linear foot for each additional copy. The plaintiff claims that Sylvester H. McLaughlin furnished three sets of maps of the said district or area of assessment together with the lists of the owners of property whom it was proposed to assess for this sewage disposal plant, and that his services upon the basis of the rates fixed by the ordinance amount to $116,000, from which sum, by agreement between the surveyor and the borough president, a reduction of about $42,000 was made in the claim, leaving due the sum now sued for, as before stated.

The case, as presented, bristles with propositions of law; but, as I view the controversy, it may be narrowed to the single question of whether or not the borough president was authorized by law to employ a city surveyor under and pursuant to the ordinance in question for the purpose of making maps of a district or area of assessment to pay for the construction of a sewage disposal plant. To determine this question it is not necessary to pass upon the validity of the ordinance referred to, nor the borough president's power to employ a surveyor for the purposes mentioned in the ordinance. The ordi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nance does not refer specifically to the employment of a surveyor to make maps for sewer improvements, but does set out at length and in great detail the various kinds of surveying and mapping for which a city surveyor might be employed by a borough president, none of which, in my opinion, applies to sewer work. If there were no other and recognized authority or means for the making of maps of an assessment district for sewer work to be found in the charter (were such maps deemed to be necessary), it might be that the words in the ordinance "for street openings or other improvements" could be held to include sewer work. The ordinance may be passed by as valid, and likewise the authority of the borough president to employ a surveyor for the purposes defined in the ordinance might, too, be sustained. The case of People ex rel. Crane v. Ahearn, 125 App. Div. 795, 110 N. Y. Supp. 306, may be regarded as sanctioning the employment of a city surveyor for the purposes mentioned in the ordinance. The employment in the Crane Case was in a street opening improvement, and such an employment probably finds support in section 448 of the Greater New York Charter, where the borough president may be looked to by a street opening commission to furnish surveys, diagrams, or other information to enable the commissioners to perform their duties. Similar provisions may be found in section 979 of the charter. Nor can any basis for the employment be found in the alleged adoption by the board of estimate of the "area of assessment." The only resolution of that board in any manner affecting this particular local improvement was one adopting a map as a "drainage map" of territory to be so improved, but nothing that the board of estimate did can be said to have fixed an area or district of assessment to pay for the improvement.

What the borough president has attempted to do here is to extend the power which the ordinance gave him to employ a city surveyor in the specific instances mentioned therein to the case of mapping an assessment district which does not come within his jurisdiction at all, but is lodged by the charter in another municipal body, namely, the board of assessors, with the most plenary powers called for by the requirements of the case.

A reading of title 2 of chapter 17 of the Greater New York Charter convinces me that the work which the borough president intended to authorize here was work that devolved upon the board of assessors. The assessment to be levied to meet the cost of constructing the sewage disposal plant involved in this case was one wholly within the jurisdiction of the board of assessors. It was an assessment for a local improvement "which may be lawfully confirmed in any other manner than by a court of record" (Charter, § 942), and that board is charged with the duty of making all assessments, other than those required by law to be confirmed by a court of record, for local improvements for which assessments may be legally imposed in any part of the city of New York (Id. § 943).

The duty of the borough president with regard to this work was only to "certify to the board of assessors the total amount of all the expenses which shall have been actually incurred by the city of New York on account thereof," after which the board of assessors is commanded to "assess upon the property benefited, in the manner authorized by law," the aggregate amount of the cost of the improvement (Id. § 946). To levy this assessment the charter (section 949) gives to the board of assessors the most explisit directions for procedure, viz.: "In all the cases the assessors shall describe in the assessment the property assessed by the same ward or block numbers, or other designations as shall be used to designate the said property on the tax books of the city of New York. They shall also describe the houses and lots assessed by their street numbers, if any. The assessors shall also state the name of the owner or owners and occupant or occupants, if they be known to the assessors, and it shall be their duty to ascertain, as far as may be, by inquiry from the commissioners of taxes and assessments or others, such ownership and occupation, and such commissioners shall afford the requisite information" (Id. § 949).

Now, what was the work the surveyor did in this case? The testimony is undisputed, and nothing is left to inference. It is explicit that his maps were

"copies of the tax maps now in the tax department" of the city, that he made up the number of linear feet by an "addition of the map frontage," and that he made up his lists by copying the names of the parties owning the property and the amount thereof facing on any one street from the tax books and maps in the department of taxes of the city, and nothing that I can find from the testimony indicates that a single thing was done by this surveyor which section 949 of the charter did not call upon the board of assessors of the city of New York to do in this particular instance.

Of course, if the plaintiff is to prevail, this $74,000 claim for making maps of an area of assessment of private property to pay for a $140,000 improvement will be the subject of a tax upon that property, with the imposing, levying, or collecting of which the borough president's duties and functions are wholly foreign. There is no doubt but that the authority to require property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. And this power has uniformly been vested exclusively in the board of assessors of the city of New York in cases of local improvements for sewers, not alone as to the area and property benefited, but also the proportion of benefits as to each property owner. As was said in People ex rel. Davidson v. Gilon, 126 N. Y. at page 157, 27 N. E. 285: "Such board is, by the charter, made the exclusive judge * * * of the property supposed to be benefited, and the extent of such benefit."

In Matter of Cruger, 84 N. Y. 619, 621, the court, in disposing of an objection that an area of assessment for benefit was too small, said that: "The law committed that question to the assessors and the board of revision. They acted upon such knowledge and observation as they had, and such proof as was presented. They had a discretion to exercise in this respect which we cannot review. The petitioner is in substance asking us to substitute the opinion and judgment of his witnesses as to the area of benefit, for that of the officers to whom it was committed by the statute."

So, too, in the Matter of Munn, 165 N. Y. at page 155, 58 N. E. 883, the court, in determining a claim of disproportionate assessment for a sewer improvement, say: "Inasmuch as the assessors and the board of revision had the exclusive power to determine what property was benefited and the proportion of benefits as to each property owner, it seems to be quite clear that the court had no power in this case to set aside the assessment. This limitation on the power of the courts has no reference to condemnation or street opening proceedings or other proceedings under special statutes that are subject to confirmation by the courts."

The cases cited arose under the Consolidation Act of the City of New York (L. 1882, c. 410), but the Greater New York Charter is the same in terms.

It is clear, therefore, that both by the charter, and under the authorities construing it, the board of assessors was the sole municipal body or board or officer authorized to obtain information by way of maps or surveys or copies of the tax lists or whatever else was necessary to determine what property should be assessed for the improvement in question, and this express devolution of power eliminates any implied power that might have been extracted from the use of the words "or other improvements," as set forth in the ordinance authorizing the borough president to employ a surveyor to make maps and surveys for the purposes therein stated.

The claim here in suit was presented to Mr. Justice Stapleton at Special Term on an application for a mandamus to compel its payments. That application was denied (70 Misc. Rep. 6, 127 N. Y. Supp. 1057). Although the decision of the learned justice was placed upon the ground that mandamus would not lie for the reason that there had been no audit of the claim, he gave expression to views with regard to the power of the borough president and the board of assessors similar to those herein entertained and which I now follow.

Judgment is directed for the defendant dismissing the plaintiff's complaint upon the merits, with costs.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

L. Laflin Kellogg, of New York City, for appellant.

Archibald R. Watson, Corp. Counsel, of New York City, R. P. Chittenden, of Rowayton, Conn., and Francis Martin and John F. Collins, Asst. Corp. Counsels, both of New York City, for appellee.

PER CURIAM. Judgment affirmed, with costs, upon the opinion of Mr. Justice Kapper at Trial Term.

(158 App. Div. 528.)

PHELPS et al. v. McQUADE.

(Supreme Court, Appellate Division, First Department. October 31, 1913.)

1. SALES (§ 234*)—BONA FIDE PURCHASERS OF STOLEN GOODS.

In a case of common-law larceny the thief acquires no title, and a bona fide purchaser from him obtains none which is good against the owner.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 645, 657–677, 679, 680; Dec. Dig. § 234.*]

2. SALES (§ 234*)—COMMON-LAW LARCENY—BONA FIDE PURCHASER.

Where defendant's vendor represented himself as another person, and thus obtained goods upon credit, plaintiffs intending, however, to sell the goods to defendant's vendor and pass title to him, he was not guilty of common-law larceny, but obtained such title that a bona fide purchaser from him might hold the property as against plaintiffs.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 645, 657–677, 679, 680; Dec. Dig. § 234.*]

3. SALES (§ 234*)—PROPERTY OBTAINED BY FRAUD—BONA FIDE PURCHASER.

A bona fide purchaser for value without notice will be protected even where his vendor obtained the goods by fraud, if the fraudulent act is a felony by statute only and would not have been a felony at common law.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 645, 657–677, 679, 680; Dec. Dig. § 234.*]

Appeal from Trial Term, New York County.

Action by William R. Phelps and another against Dennis Charles McQuade. From a judgment for plaintiffs, defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Bartley J. Wright, of New York City, for appellant.

Monteith Gilpin, of New York City (Hartwell Cabell, of New York City, of counsel), for respondents.

CLARKE, J. The plaintiffs were jewelers. On February 15, 1911, one Walter C. Gwynne falsely represented himself to the plaintiffs to be Baldwin J. Gwynne, a resident of the Lincoln Hotel in Columbus, Ohio, with a satisfactory rating in the reports of the Dun and Bradstreet Mercantile Agencies, and, later on the same day, the manager of Jules S. Bache & Co., bankers, identified the said Walter C. Gwynne to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiffs' manager as being Baldwin J. Gwynne of Columbus, Ohio. That was brought about in this way: Gwynne had become acquainted with one of Bache's customers in an uptown hotel and had told this customer that he had had a falling out with his sweetheart, that he had some jewelry he wished to dispose of, and asked this gentleman if he would be willing to purchase any of these goods. He said he could not take them back to the parties that he had purchased them from. After some conversation, the gentleman decided to purchase one of these pieces and asked him what the name was. He told him Baldwin J. Gwynne, and so this customer of Bache's wrote out a check for the amount agreed upon. After this the supposed Baldwin J. Gwynne went down to Bache's office to cash the check and was told that as he was not known he would have to identify himself. He replied that would be very easy; he would call the maker of the check. This was satisfactory to Bache & Co. The maker did call and told the bankers that this was the person the money was intended for.

The plaintiffs, relying upon the representations of Gwynne and said identification, sold him a ring, a gold mesh purse, and a diamond and pearl scarf pin of the aggregate value of $838, and delivered the articles to him under the belief that they were delivering the same under the terms of a sale on credits to Baldwin J. Gwynne of the Lincoln Hotel of Columbus, Ohio, and whom they found to be satisfactorily rated in the said Mercantile Agencies' reports.

Thereafter Gwynne sold the jewelry to the defendant, McQuade, for a valuable consideration. It is admitted that McQuade was a bona fide purchaser for value, without any notice of any defect in the title. Due demand was made and refused. Both sides moved for judgment, and the court granted judgment to the plaintiffs for the immediate possession of the property or for the sum of $838 with interest from the commencement of the action.

The question is presented as to which of the two innocent parties, the original owners, or the bona fide purchaser, will have to stand the loss.

[1] The careful consideration of the cases and the authorities reduces the question to the determination of whether the transaction by which Gwynne obtained possession of the jewelry from the plaintiffs was or was not common-law larceny. If it was, I think the authorities are in accord that no title passed and that recovery can be had from the innocent purchaser. The possession of personal property obtained by common-law larceny confers no title which can protect an innocent purchaser from the thief.

[2] I have reached the conclusion that the transaction does not come within the definition of common-law larceny. This property was obtained by Gwynne by fraud and false representations. It was larceny, but statutory larceny. He falsely represented to the plaintiffs the existence of certain material facts; that he was Baldwin J. Gwynne; that he resided in the Lincoln Hotel at Columbus; that he was rated for credit in Dun and Bradstreet. Dealing face to face with him, upon the investigation they made and the identification they received, they gave the jewelry to the identical man with whom they were dealing.

They were deceived by his false representations, and yet they intended to pass to the person whom they believed him to be not only the possession but the title to the property upon the credit which he asked.

[3] A bona fide purchaser for value without notice will be protected even where his vendor obtained the goods by fraud, if the fraudulent act is a felony by statute only and would not have been a felony at common law.

In American Sugar Refining Co. v. Fancher, 145 N. Y. 552, 560, 40 N. E. 206, 208 (27 L. R. A. 757), Andrews, C. J., said:

"Much was said on the argument upon the difference between a trespasser taking and disposing of the property of another and the case of a sale of personal property to a vendee induced by fraud. It is the law of this state, as in England, that title passes on such a sale to the fraudulent vendee, notwithstanding that the crime of false pretenses is included in the statute definition of a felony, but which was not such at common law. Barnard v. Campbell, 58 N. Y. 76 [17 Am. Rep. 208]; Wise v. Grant, 140 N. Y. 593 [35 N. E. 1078]; Benj. on Sales (6th Ed.) § 433; Fassett v. Smith, 23 N. Y. 252; Benedict v. Williams, 48 Hun, 124."

In People v. Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546, Miller was indicted under the common-law count for larceny. The court said:

"There can be no doubt that the complainant delivered the money to the defendant for the purpose of speculation, with the understanding that the deposit should be returned with the accumulated profits, and had the defendant actually used the money in speculation, however improvident or reckless, and lost, his act would not amount to larceny. But it is plain that he never intended to use the money in speculation. The sole purpose of the pretense and device referred to was to enable him to get possession of the money of others and to appropriate it to his own use. * * * The jury were authorized to find, and by their verdict have found, that the complainant did not intend to part with the title or the possession of the money, but merely to give the defendant the custody of it for the purposes specified. * * * The real question is whether, upon any view of the evidence which the jury was authorized to take, the defendant could be convicted of larceny as that offense was known at common law. If so, then the verdict should be sustained. Larceny, as defined by section 528 of the Penal Code, embraces every act which was larceny at common law besides other offenses which were formerly indictable as false pretenses or embezzlement. The offense of larceny at common law is established by proof on the part of the prosecution showing that the defendant obtained possession of the property by some trick, fraudulent device, or artifice, animo furandi, with the intention at the time of subsequently appropriating it to his own use. * * * The learned counsel for the defendant contends that the proof in this case established no criminal offense other than obtaining money by fraudulent pretenses, and since that offense was not stated in the indictment the defendant was improperly convicted, and such was evidently the view of the majority of the learned court below. It is very doubtful, however, if such a charge could be sustained by the proof in this case. False pretenses, as understood in the criminal law, as a means of obtaining the title or possession of money or personal property, import an intentional false statement concerning a material matter of fact upon which the complainant relied in parting with the property or in delivering the possession. It would be difficult to show that the defendant in this case made any material false statement concerning any existing fact. His statements were all promissory in nature and character. He represented to the public very little, if anything, concerning any fact existing at the time. His statements consisted in persuading the depositors that he could and would obtain for the use of their money large profits in the form of dividends. These statements were all in the nature of promises, and,

although they were very effective in producing the result desired by the defendant, they would hardly constitute the basis for a criminal charge of obtaining money by false pretenses."

On the other hand, in People v. Dumar, 106 N. Y. 502, 13 N. E. 325, the Court of Appeals reversed a conviction upon an indictment for common-law larceny; the proof showing that the defendant obtained possession of the property by fraudulent pretenses and representations made as to certain securities given by him in order to induce the sale.

In Mercantile National Bank v. Silverman, 148 App. Div. 1, 132 N. Y. Supp. 1017, Mr. Justice Laughlin said:

"With respect to the sale and delivery of property to an imposter, where the vendor passes on the question of his identity, it has been held that the title passes, although the transaction may be rescinded for fraud."

One of the cases cited by him was Edmunds v. Merchants' Transportation Co., 135 Mass. 283. In that case a swindler, falsely representing himself to be Edward Pape of Dayton, Ohio, a reputable merchant, bought of plaintiffs in Boston the goods which were the subject of the suit. Plaintiffs, on the ground that there was no sale, endeavored to hold defendants as carriers for delivery of the goods to the swindler. It was held that title passed from the plaintiffs to the fraudulent vendee and judgment for the defendants was affirmed. The court said:

"We think it clear, upon principle and authority, that there was a sale, and the property in the goods passed to the purchaser. The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price, and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name, or practiced any other deceit to induce the vendor to sell."

The property in question having thus been sold to defendant's vendor, although the sale was brought about by fraud and false pretense, the plaintiffs intended to pass title as they transferred the possession. The sale was merely voidable and had not been rescinded before the purchase by the defendant, who was an innocent purchaser for value. Under these circumstances, I reach the conclusion that this judgment is wrong, and that the plaintiffs, and not the bona fide purchaser, must stand the loss.

The judgment should be reversed, with costs and disbursements, and judgment directed for the defendant, with costs. All concur.

(158 App. Div. 533)

MORRISSY v. RHINELANDER REAL ESTATE CO. et al.

(Supreme Court, Appellate Division, First Department. October 31, 1913.)

LANDLORD AND TENANT (§ 152*)—CONSTRUCTION OF LEASE—COMPLIANCE WITH ORDINANCES.

A lease provided that the lessee would comply with all orders and regulations of the corporation of the city of New York or other governmental authority, and on failure so to do the lessor might do so and recover the expense thereof from the lessee, and that the lessee would indemnify the lessor from all claims for damages from the management of the sidewalk and would comply with all ordinances of the city of New York or as to the sidewalks, etc. *Held*, that the lessee would be required to pay the cost of the removal of encroachments on the sidewalk in front of the premises pursuant to a resolution of the board of estimate and apportionment, especially where the lessee erected such encroachments at his own expense.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152, 538–543, 545–549, 551–557; Dec. Dig. § 152.*]

Action by Thomas Morrissy against the Rhinelander Real Estate Company and others. Submission of controversy on agreed statement of facts. Action dismissed as against part of defendants, and judgment rendered for plaintiff as against the other defendants.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Wesselman & Kraus, of New York City (Henry B. Wesselman, of New York City, of counsel), for plaintiff.

Bowers & Sands, of New York City (J. M. Bowers, of New York City, of counsel), for defendants Rhinelander Real Estate Co. and B. Ogden Chisolm.

Nathan Burkan, of New York City, for defendants Finkelstein.

CLARKE, J. On June 17, 1908, the Rhinelander Real Estate Company and the defendant Chisolm, each owners of adjoining property on West Fourteenth street, entered into leases of said properties to the plaintiff for a term of years. The said leases contained the following covenants:

"The party of the second part further covenants and agrees with the party of the first part that he will, at his own expense, perform, comply with, and discharge, all orders, requirements, rules and regulations of every nature and kind whatsoever of the corporation of the city of New York, or of any department thereof, or of the borough of Manhattan, or any department thereof, or of the state of New York, or other governmental authority having jurisdiction in the premises, and that the party of the second part will at his own expense, perform and comply with all requirements, rules and regulations of the board of fire underwriters; and if the party of the second part shall not execute and carry out within the time specified, any orders or regulations of any of the aforesaid departments, municipal or state authorities, or of the board of fire underwriters, the party of the first part may execute and comply with any such orders or requirements, the cost and expense whereof the party of the second part covenants and agrees to repay, and the same shall become and be treated as rent under the terms of this lease. And it is further agreed by and between the parties hereto, that the said party of the second part will indemnify and save harmless the party of the first part of and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from all claims for damages arising out of the conduct or management of the demised premises by the party of the second part, or on account of any conditions thereof created by him, or arising out of the conduct or management by him of the street or sidewalk adjoining the said premises, or on account of any conditions thereof created by him. * * * Also that the party of the second part will keep and maintain the sidewalk in front of all the demised premises in good order and condition, and comply with all ordinances, regulations and orders of the city of New York, or of the borough of Manhattan, or any department of either, in respect thereto."

On the 9th day of June, 1910, plaintiff subleased both parcels to the defendants Finkelstein by an agreement in writing for a term of 12 years, 8 months, and 29 days. This sublease contained identical covenants to those above quoted, and the sublease was made under the consent in writing of the two owners.

Prior to the execution and delivery of the leases to Morrissy, quoted above, and in the year 1906, while the said tenant was holding under previous leases between the same parties, he, with the consent of the landlords, made certain alterations in the entrance ways, window spaces, and show windows of the said premises, the cost of which alterations was shared equally between the tenant and the landlords, and consisted in changing the glass and frame work of said entrance ways, window spaces, and show windows; but the fronts as reconstructed or altered were placed on the identical lines as previously inclosed the same. At the time of the execution and delivery of the leases hereinbefore first mentioned, and up to the 2d of October, 1912, the ground or store floors of said buildings on Fourteenth street included entrance ways, window spaces, and show windows projecting for the entire length of said buildings about four feet beyond the building line of the southerly side of Fourteenth street, which projections were encroachments upon said street.

In July, 1910, the owners and Morrissy executed agreements in writing to the Finkelsteins consenting to certain alterations to said buildings to be made by the Finkelsteins at their own expense. Thereafter and in pursuance of said last agreements the Finkelsteins altered the entrance ways, window spaces, and show windows of said buildings so as to shape the fronts with a rounded effect instead of a square; but the new windows were placed upon the identical lines with the old windows, and no greater encroachments were created by the rebuilding of the windows than theretofore existed.

In May, 1911, the board of estimate and apportionment passed a resolution directing the removal of all encroachments of store fronts, show windows, and entrance ways projecting on Fourteenth street between Third and Sixth avenues in the borough of Manhattan. On or about July 7, 1911, the president of the borough of Manhattan duly served upon the plaintiff and the defendants an order directing them to remove all encroachments of every description projecting on Fourteenth street in front of said premises. After the receipt of said order, defendants Finkelstein demanded of the plaintiff that as their landlord he proceed at his own expense to remove said encroachments. The plaintiff declined to do said work, contending that under the terms of the lease made between him and defendants Finkelstein it was in-

cumbent upon them to perform said work and to bear the expense thereof. Thereafter the said Finkelsteins removed the encroachments in question and complied with the order of the president of the borough of Manhattan at a cost to them of $1,865, which was the reasonable value thereof, and deducted the said amount from the rent which thereafter accrued to this plaintiff under their lease, and refused to pay to the plaintiff such moneys so deducted by them although duly demanded. When the defendants Finkelstein demanded of the plaintiff that he perform the work necessary to comply with said order, the plaintiff demanded of the owners, as his landlords, that they comply with said order and bear the expense thereof. Said owners and lessors declined to comply with said order and to bear the expense of removal of said encroachments.

Plaintiff claims upon the foregoing facts that he is entitled to a judgment either against the defendants Finkelstein for the sum of $1,865 or for a judgment against the defendants Rhinelander Real Estate Company and B. Ogden Chisolm for said amount. The defendants Finkelstein deny the plaintiff's claim and ask judgment dismissing it. The defendants Rhinelander Real Estate Company and Chisolm deny plaintiff's claim and contend that the plaintiff's only claim is against the defendants Finkelstein. The controversy submitted for decision is: Which of the parties hereto ought to bear the cost of the removal of said encroachments?

In Herald Square Realty Co. v. Saks & Co., 157 App. Div. 566, 142 N. Y. Supp. 808, where a controversy was submitted to this court as to whether the landlord or the tenant should pay for the removal of certain encroachments as ordered by the municipal authorities, this court distinguished the case of City of New York v. United States Trust Co., 116 App. Div. 349, 101 N. Y. Supp. 574, where the owner and lessor had been compelled to pay for such removal:

"Upon the ground that * * * the building in question" (in the Herald Square Realty Co. Case) "was constructed for the tenant with these encroachments, the removal of which it was bound to know might lawfully be required, and in the lease in that case it was not, as here, expressly provided in the clause requiring the tenant to comply with lawful rules, regulations, and ordinances, that such compliance should be at his expense, which left that clause open to the construction that it was intended to relate to rules, regulations, and ordinances with respect to the use of the premises, as distinguished from changes and alterations. Moreover, this lease was for a much longer term, and its provisions all tend to show that the tenant was to bear all expenses, and that the landlord was to receive the rent as a return on its investment without any deduction or liability on account of the premises during the term of the lease."

In the case at bar the covenants are much stronger in favor of the landlord than those under consideration in either of the two cases referred to. They also contain the provision that the tenant should at his own expense "perform, comply with and discharge all orders, requirements, rules and regulations of every nature and kind whatsoever" of the corporation of the city of New York or of any department thereof, or of the borough of Manhattan or of any department thereof, or of the state of New York or other governmental authority. And there is also a direct allusion to compliance with all ordinances,

regulations, and orders with respect to the sidewalk in front of the premises. The leases were also for a long term of years; they were made subsequent to the decision in the City of New York v. United States Trust Co. Case, supra, so that it is fairly inferable that the more comprehensive and explicit language of the covenants was drafted in view of that decision. In addition thereto, the defendants Finkelstein themselves erected for their own use and, as stipulated by the owners and their immediate landlord, Morrissy, at their own expense, the structures which have been removed as incumbrances.

So that it seems to me that this case is controlled by our decision in the Herald Square Realty Co. Case, supra, and that under the facts agreed to and the covenants and agreements referred to, the obligation rests upon the defendants Finkelstein to meet the cost of the removal of the encroachments erected by them.

It follows, therefore, that the cause of action as against the owners should be dismissed, and that the plaintiff have judgment against the defendants Finkelstein for the sum of $1,865 with interest from the 11th day of November, 1912, without costs as agreed to.

INGRAHAM, P. J., and McLAUGHLIN and LAUGHLIN, JJ., concur.

SCOTT, J. I concur upon the ground that defendants Finkelstein themselves erected the obstruction they were afterwards obliged to remove. In my opinion the resolution of the board of estimate and apportionment added nothing to the power and duty of the borough president as to the removal of street encroachments. The duty to remove or compel the removal of illegal obstructions rested on the borough president. The board of estimate and apportionment had no power to permit such obstructions to be erected or to continue, and its resolution directing their removal added nothing to the power of the borough president in the premises, but were merely advisory, furnishing perhaps a sort of moral support. I do not think therefore that the resolution of the board of estimate and apportionment affects the question involved in this appeal. Precisely the same question would have been presented if the borough president had acted upon his own initiative and no resolution had been passed by the board of estimate and apportionment.

As I have said the determining fact in the present case, as it appears to me, is that the Finkelsteins themselves erected the particular obstruction which was removed, and it harmonizes a judgment in their favor with both of the cases cited by Mr. Justice CLARKE.

(158 App. Div. 560)

SAUL v. BARSE.

(Supreme Court, Appellate Division, Second Department. October 31, 1913.)

1. ACCOUNT (§ 20*)—CONVERSION—DAMAGES.
Defendant, who was in possession of corporate stock belonging to plaintiff, was authorized by him to sell it and invest the proceeds in the stock of other corporations. Defendant pooled the stock belonging to plaintiff with that belonging to himself and others, and sold it all, and invested the proceeds generally in the stock of the other corporations, keeping no account so that the shares to which plaintiff was entitled could be distinguished from the others. *Held* that, in an accounting, defendant might be charged with the value of plaintiff's stock which he originally sold but not with the highest prices at which any of such stock was sold.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 109–126, 128–131; Dec. Dig. § 20.*]

2. ACCOUNT (§ 16*)—PARTIES—NECESSARY PARTIES.
In an action for an accounting, where it appeared that defendant, who sold stock belonging to plaintiff, associated other persons with him in reinvesting the proceeds of plaintiff's stock and that of stock owned by himself and others, the persons interested with defendant are not necessary parties plaintiff, being entitled to hold defendant with whom they had dealings.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 74–76; Dec. Dig. § 16.*]

3. COURTS (§ 493*)—STATE AND FEDERAL COURTS—PRIOR ACTION PENDING—EFFECT.
Where defendant, who sold corporate stock belonging to plaintiff under an agreement to reinvest the proceeds in stocks of another company, associated with himself other persons in the reinvestment, forming a syndicate for the control of the second corporation, the fact that the property of the syndicate was in the custody of the federal courts in a suit to wind up its affairs will not deprive plaintiff of the right to sue for an accounting against defendant; it appearing that plaintiff's stock was so commingled with that of the syndicate it could not be determined what belonged to him, plaintiff thus having the right to hold defendant for the money value of the stock.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346–1352; Dec. Dig. § 493.*]

4. INTEREST (§ 20*)—ACCOUNTING—FUNDS IN LITIGATION.
Where defendant, who was authorized to purchase corporate stock for plaintiff out of the proceeds of the sale of other stock, commingled the stock purchased for plaintiff with that of a syndicate so that it could not be distinguished and was thus unable to deliver to plaintiff the stocks purchased for reinvestment until the affairs of the syndicate should be adjudicated, he is chargeable with interest on his purchases for plaintiff from the time of his refusal or failure to deliver.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 41; Dec. Dig. § 20.*]

Appeal from Trial Term, Kings County.

Action by George W. Saul against Mills W. Barse. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

David Leventritt, of New York City, for appellant.
Frank P. Ufford, of New York City, for respondent.

THOMAS, J. Plaintiff was entitled to $400,000 (16 per cent.) of the undivided $2,500,000 of the stock of the Michigan Peninsular Car Company and authorized the defendant and his partner Ives, now deceased, who owned the balance of it and had custody of all of it, to convert it into the stock of railway companies, among others the Ohio Southern and Cleveland, Akron & Columbus, which they did, save to the extent of 1,000 shares preferred and 880 shares common, which were delivered to him. In this action the plaintiff asks the defendant to account. This the defendant has been unable to do beyond showing that, as the Peninsular stock was held in custody as an indistinguishable part of the whole stock, a syndicate, composed of himself, Ives, and one Morehead, used it as a common fund for obtaining a controlling interest in the companies named; that by the voting power of such stock they made the plaintiff president thereof, used the stock for the benefit of the undertaking and on occasions for the personal benefit of the plaintiff, and finally at his instance sold the shares of Cleveland, Akron, & Columbus stock for a sum whereof he received one-half the net proceeds, or $138,750. And the defendant urges that he cannot give the definite information because the purchase of the stock in the two companies was a joint adventure by plaintiff and the syndicate, but that upon winding it up the plaintiff would be entitled to his proper proportion, which by reason of the decline of the stocks and the payment of the $138,750 was largely overpaid. If there was a joint venture, the defendant is quite logical in his position, and in any case his misfortune is that he and his partner have so treated the matter. But the court has found that it was not that, and the finding is not disturbed, notwithstanding the intimacy of the parties in regard to the pooling and sale of the Peninsular stock, the acquisition of the controlling interest in the railroads, and the control of the same, and the use of the substitute stock for a variety of purposes to which the plaintiff was in instances privy. Under the date of December 16, 1892, Barse and Ives, in reply to a letter from plaintiff, stated that they held plaintiff's Peninsular stock and that they were converting it into the stocks of several companies named; that the dividends would be credited to the plaintiff as declared; and that "the holdings of the above stocks are to be transferred to you or put in such name as you may designate, when you may deem necessary." But now the plaintiff would have fulfillment of this declaration, and the defendant cannot do more than answer that the Peninsular stock went directly or indirectly into the stock of the two companies purchased at varying prices, and that plaintiff's interest either as to price or quantity or company is indistinguishable from that of the syndicate. And so as to dividends. In this predicament the referee, who was appointed to state the account, charged defendant with the highest average prices at which Peninsular shares aggregating the amounts that plaintiff was entitled to sold. Such manner of ascertaining value in some instances would be just, and whether it is in the present case will be later considered.

[1] But, however it should be computed, the value of the Peninsular stock should be the basis of ascertaining the value of the substitute stocks. The argument leads to that. How much Ohio Southern and how much Cleveland, Akron & Columbus did that value procure for plaintiff? The defendant never bought any specifically for plaintiff; no investment was made for him. No price can be mentioned that is applicable to any stock bought for him. Plaintiff was cast into the adventure and treated as a member of the purchasing syndicate. Barse shows what the syndicate bought and the prices paid by them. Is the stock most cheaply bought the plaintiff's stock? The defendant cannot tell. Was plaintiff's stock purchased at highest prices? That defendant does not know. Was the purchase in the Ohio Southern or in the Cleveland, Akron & Columbus? The defendant does not know that. The defendant is one of the syndicate enlarged from Barse and Ives, who undertook to act for plaintiff, to Barse, Ives, Morehead, and perchance others. What, then, is fairer than that the defendant should be charged with the value of what he took to convert into other stocks and to hold for plaintiff, but which he duly converted and used for a syndicate whereof he regarded plaintiff a member? This was a misadventure for plaintiff's property caused by defendant's breach of duty whereby plaintiff's interest cannot be discriminated, so the value of the thing committed to him becomes for the purposes of measurement the value of the thing into which it should have been converted. The substitute stocks have declined. Theoretically the plaintiff should bear the loss. This would be so if it could be shown when the conversion of one to the other was made for the plaintiff and into what it was made. But there is no such knowledge. From the sums charged to the defendant the referee has deducted the sum of $138,750, the amount paid the plaintiff, leaving a balance of $91,609.65, to which $76,188.68 interest has been added. The defendant urges that the payment credited on account was in full settlement of the plaintiff's claims. It could have been indifferently found that it was or was not. The referee found that it was not, and there seems to be no reason for distinguishing the defendant's version of the event as the more probable. The plaintiff arranged with the purchaser of the stock from the parties hereto to let him share the purchase and later sold his interest so obtained for $300,000. The defendant would share the profit of it. The plaintiff stood in no confidential relation to the defendant. He bought into the purchase, which he and defendant made, and later sold again, at a profit. The defendant was paying him a half of the purchase money on his debt, and, to free the stock from technical title to some of it in Saul, he joined in the sale. It does, indeed, seem strange that the plaintiff was related so intimately to the members of the syndicate and their transactions and yet was unconscious that his Peninsular stock was a part of the general holdings. Such complacency under the circumstances is incredible. Nor can I believe that it was so. But the question is whether he knew that Barse and Ives had so confused his holdings with the general fund that they could not be extricated and given identity and whether he ratified such condition. There the

defendant and Ives failed in their duty to him and in such respect Saul may complain, for, when he asks to know what he had and when and at what cost it was obtained, he receives only the reply that he was made a party to a joint adventure and that his interest never has been and cannot be particularized.

[2, 3] There is no suggestion that Saul was a member of the syndicate but rather that he and the syndicate were in a joint venture, and that plaintiff must abide by the disposition of the property by the federal court in Morehead v. Striker, a suit to liquidate the affairs of the syndicate. So it is urged that the firm in which Morehead was a partner did whatever was done, and that Morehead should be a party to this action, and that in any case this court has no jurisdiction as the partnership and its assets were involved in the other action. But the federal court properly refused to stay this action on such grounds. Barse and Ives owed plaintiff a duty; they took his Peninsular stock. The plaintiff is asking what they did in furtherance of their undertaking to him. If they included Morehead in the syndicate, they did not thereby relate him to the joint undertaking of Barse and Ives to convert plaintiff's Peninsular stock into that of other companies. Plaintiff looks to the men who made the engagement with him, and it matters not that they, in co-operation with others, converted the securities into substitute stocks and thereby confused plaintiff's holdings. The plaintiff is not asking for any stocks belonging to a partnership in which Morehead was interested. Initially he is asking Barse what he and Ives did with his Peninsular stock. Barse answers that they were converted into other stocks by authority of the agreement. Plaintiff then asks when and how they did it and at what prices. Barse answers that he cannot tell, as he and Ives massed them in the business of a partnership to which he belonged. This court then adjudged that Barse must pay personally a sum equal to the value of the stock received, less credits. There is no interference with the Morehead suit or any property involved in it. If the stock that was bought with the avails of Saul's Peninsular stock was in fact within the custody of the federal court, then it was there by defendant's wrongdoing, and the plaintiff is not obliged to follow it, and if he should it could not be identified.

[4] The referee has charged defendant with dividends on the Peninsular stock. The latest date of sales of Michigan Peninsular stock for which the referee charges defendant was on March 1, 1893. If the stock is to be deemed sold, then it later drew no dividends in defendant's hands. But $14,160 of the $16,560 dividends charged accrued on March 1st or later, so that sum should in any case be deducted from the judgment. Should interest be given? Barse held the Peninsular stock for conversion into other stocks and not for investment in dividend paying stocks. Plaintiff knew that neither Ohio Southern or Cleveland Akron & Columbus could pay dividends. He had the stocks bought in part at times in his name, and some of them were transferred to him and some pledged as a collateral for a personal loan to him. If Barse and Ives had strictly followed the letter of December 16th, no dividends would have accrued to him,

and it is probable that the plaintiff would have suffered considerable loss and would have been largely overpaid by the $138,750. But when plaintiff demanded his stocks on December 28, 1894, defendant should have been prepared to account and deliver them to him, and then plaintiff would have had the benefit of their value. This action was begun on that date, and on January 3, 1895, plaintiff by his attorney made another demand. Among other things, the answer is that, "until the affairs of said syndicate have been definitely wound up, it will be impossible to determine to what securities, if any, the defendant is entitled under the instrument" of December 16th. So the defendant had so conducted the undertaking that he could render no account, and it is proper that he should pay interest on the value of the substitute securities, which is presumably that of the Peninsular shares ascertained from the selling price. But thus far it has been assumed that the value ascribed to Peninsular stock by the referee is correct. I consider that it is not so. The court found that the plaintiff consented, as he did, that the Michigan Peninsular stock should be placed in a general pool of all the stock. That agreement was dated January 7, 1893, and continued to July 7, 1893, and on July 8, 1893, plaintiff received 1,000 preferred shares, and on December 8, 1894, 880 common shares, leaving 1,200 shares of preferred stock and 920 shares of common stock. The referee has fixed the value of plaintiff's stock not delivered at the highest average price at which similar amounts sold between January and March, 1893, which was during the existence of the pool. I regard this preference for plaintiff as an undeserved benefit. At that time plaintiff's interest was a part of the general holding, which, as regards the syndicate interest, was 55 per cent. preferred (2,200 shares) and 45 per cent. common (1,800 shares), and he must have known that the stock was so held in solido. There was no tortious conversion by Barse and his associates of this stock while in pool or at any other time. The pool was not peculiarly to sell plaintiff's stock but to keep all the stock and make sales through a common agency so that prices would be maintained. The sales were manifestly for the benefit of all participants who were entitled to share with equal advantage. Hence it is quite unjust, as it is not the fact, to assume that, as plaintiff's stocks were not segregated while the pool lasted, they must be deemed to have been sold meantime, and that, too, at highest average price for lots aggregating the number of shares in question. Plaintiff's interest was a part of the whole acquisition of Peninsular stock, and it was left to be sold by Barse and Ives at prices and at times by them deemed proper and to be employed in obtaining the new stocks. It was such part when the agreement was made. It so remained during the pool; that is, to July 7, 1893. Except as delivered, it was left to share the fortune of the other stocks. The fact was, and plaintiff must have known it, that his stock was kept in association with that of Ives and Barse; that it was to be sold indistinguishably from the whole and to be a part of the new stock obtained by them. It does not follow from this that the defendant and Ives should not have kept account of the substitute stocks purchased for plaintiff. If, now, the sales of the Peninsular stock be inspected, it appears that they began in

August, 1892, and ended January 2, 1894, and the average price as found for both common and preferred (and their value was approximately the same) was $81 per share. The defendant is not a wrongdoer for selling the stock but sold with authority, and the plaintiff should have the benefit of the whole sale and nothing more. The average price is the fair price for plaintiff's stock. Hence the account would be:

2,120 shares at $81	$171,720
In such computation the dividends received in 1893 should be allowed	16,560
	$188,280
Cr. sale of Cleveland, Akron & Columbus	138,750
	$ 49,530

—to which should be added interest from December 28, 1894, to the date of the report, and the judgment as so modified should be affirmed, without costs. The other points suggested by defendant do not require discussion. All concur.

(158 App. Div. 542)

UNITED STATES TITLE GUARANTY CO. v. BROWN.

(Supreme Court, Appellate Division, Second Department. October 24, 1913.)

1. COURTS (§ 207*)—APPELLATE DIVISION—INJUNCTION—STATUTORY POWER.
Code Civ. Proc. § 606, providing that, except where otherwise specially prescribed, an injunction order may be granted by the court in which the action is brought, or a judge thereof, was amended by Laws 1913, c. 112, so as to provide that an injunction which might be "modified or vacated" by the Appellate Division might also be granted or continued by it, or a justice thereof, pending appeal to that court or to the Court of Appeals from an order or judgment denying or vacating an injunction. *Held*, that an injunction order which, if granted, might have been modified or vacated by the Appellate Division could be granted or continued by it or a judge thereof pending appeal to it.
[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.*]

2. COURTS (§ 207*)—INJUNCTION—CONTINUANCE PENDING APPEAL—GROUNDS.
Where, in an action to cancel an agreement by which defendant attorney was to appear in condemnation proceedings against persons with whom plaintiff had contracts relating to such proceedings, the nature of the contracts are not shown by the injunction papers and the allegation of defendant's insolvency is denied, the Appellate Division will not, pending appeal, enjoin defendant from collecting any fees due plaintiff under such contracts.
[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.*]

3. INJUNCTION (§ 175*)—BURDEN OF PROOF.
In an action to cancel an agreement by which defendant attorney was to appear in condemnation proceedings against persons with whom plaintiff had agreements relative thereto, the burden is on plaintiff to show the right to an injunction restraining defendant, pending appeal, from collecting fees or amounts due plaintiff under such contracts.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 388; Dec. Dig. § 175.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the United States Title Guaranty Company against Arthur A. Brown. On motion by plaintiff for an injunction. Motion denied, and temporary injunction vacated.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Hirsh & Newman, of Brooklyn, for the motion.

Van Zandt & Webb, of New York City, opposed.

BURR, J. Plaintiff brings this action against defendant, an attorney of this court, among other things to cancel an agreement made between the parties by which defendant was to appear in various condemnation proceedings brought by the city of New York against certain persons with whom plaintiff claims to have agreements relative to such proceedings, and an assignment of a portion of the awards which have been or may be made therein, and to compel an accounting by defendant as to all moneys collected by him in such proceedings. At the commencement of the action plaintiff obtained ex parte an order enjoining defendant "from in any manner collecting any of the fees or percentages of the awards due the plaintiff, by reason of its contracts with the owners or claimants, as appears in said complaint, and from exacting or receiving from any of such owners or claimants any sum or sums of money whatsoever for his services heretofore rendered, or that may hereafter be rendered in connection therewith, or from soliciting any retainers of fees from any such owners or claimants or influencing such owner to cancel his contract and from in any manner interfering with plaintiff's said business and from revealing to any person the names of plaintiff's clients." A motion to continue such injunction was after argument denied by the Special Term of this court, and from such order plaintiff has appealed to this Appellate Division. Thereafter, upon application to a justice thereof, an order was granted requiring defendant to show cause before the said Appellate Division why the temporary injunction order should not be continued pending the hearing and decision of the said appeal. Upon the hearing of such motion two questions arise: First, as to the power of this court in the premises; and, second, if the power exists, as to the propriety of its exercise.

[1] Prior to September 1, 1913, the statute regulating the granting of injunction orders pending the trial of an action was as follows:

"Except where it is otherwise specially prescribed by law, an injunction order may be granted by the court in which the action is brought, or by a judge thereof, or by any county judge; and where it is granted by a judge, it may be enforced as the order of the court." Code Civ. Proc. § 606.

Construing a similar provision of the Code of Procedure (section 218), it was held that when the court at Special Term, after argument, had denied an application for a temporary injunction, there was no power in an appellate tribunal to revive and continue that injunction pending an appeal from such order or judgment. Spears v. Mathews, 66 N. Y. 127. In 1913 the section above referred to was amended by adding thereto the following clause:

"An injunction order which may be modified or vacated by the Appellate Division may also be granted or continued by the Appellate Division, or a justice thereof, pending appeal to that court or to the Court of Appeals from an order or judgment denying or vacating an injunction." Laws of 1913, c. 112.

The language of this amendment is not entirely clear. The first clause thereof, literally construed, would seem to say that, if an injunction order had been granted by the court at Special Term and an appeal had been taken therefrom, the Appellate Division or a justice thereof might continue such restraining order pending such appeal. Such a construction would be absurd. Remembering the difficulty which was to be overcome, we think that we do not transgress the limits of judicial construction if we transpose its clauses, adding thereto two words. It would then read as follows:

"Pending appeal to the Appellate Division or to the Court of Appeals from an order or judgment denying or vacating an injunction, an injunction order which (if granted) may be modified or vacated by the Appellate Division may also be granted or continued by the Appellate Division or a justice thereof."

[2] Assuming, then, the power to exist, we pass to the second question, and in respect to that we are of opinion that the power should not be exercised upon the papers presented to the court at Special Term or to this court. One important question in the case is as to the nature of the agreements between plaintiff and the various property owners with whom it claims to have made contracts. Whether they are of the character condemned in Matter of City of New York (Bowsky v. Realty Protective Co.) 144 App. Div. 107, 128 N. Y. Supp. 999, and in Matter of City of New York (Murphy v. Realty Protective Co.) 146 App. Div. 125, 130 N. Y. Supp. 540, or whether they are legally enforceable in character, is better determined by an inspection of the contracts themselves. As plaintiff's rights must depend upon these contracts, it is important that we should be advised accurately as to their character.

[3] Plaintiff, upon whom rests the burden of establishing its right to this extraordinary provisional remedy, has not seen fit to make these important documents a part of the motion papers. Again, while the insolvency of defendant is alleged as one of the grounds for the injunction order, the only evidence in support thereof consists of certain admissions claimed to have been made by him, the making of which is positively denied. We think, therefore, that, until the case is tried and determined, plaintiff's right to succeed therein is not so clearly established upon the papers before us that we would be justified in granting or continuing the injunction prayed for pending the hearing and decision of the appeal herein.

The motion for such injunction is denied, and the temporary injunction granted in the order to show cause is vacated, with $10 costs. All concur.

(158 App. Div. 549)

SWASEY v. GRANITE SPRING WATER CO.

(Supreme Court, Appellate Division, Second Department. October 31, 1913.)

1. MECHANICS' LIENS (§ 36*)—NATURE OF SERVICES RENDERED—ARCHITECTS.
An architect cannot have a mechanic's lien for his plans, but may assert such a lien if he superintends the work under his plans.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 41; Dec. Dig. § 36.*]

2. MECHANICS' LIENS (§ 281*)—ACTIONS—SUFFICIENCY OF EVIDENCE.
In an architect's action to enforce a mechanic's lien, evidence as to the use of his plans and specifications and as to the superintendence of the work *held* insufficient to support a judgment in his favor.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565–572; Dec. Dig. § 281.*]

Appeal from Special Term, Westchester County.

Action by William Albert Swasey against the Granite Spring Water Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

See, also, 141 N. Y. Supp. 1148.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and STAPLETON, JJ.

Walter H. Griffin, of New York City, for appellant.

Lewis Schuldenfrei, of New York City (Emanuel Tepper, of New York City, on the brief), for respondent.

JENKS, P. J. [1] Although an architect cannot have a mechanic's lien for his plans, it seems to be settled in this court that, if he superintend work done under such plans, he may assert such lien. Rinn v. Electric Power Co., 3 App. Div. 305, 38 N. Y. Supp. 345. See, too, Thompson-Starrett Co. v. Brooklyn Heights Realty Co., 111 App. Div. 358, 98 N. Y. Supp. 128. Consequently the plaintiff was bound to establish this relation between plans and specifications and superintendence.

[2] But he testifies:

"There was such a rush for the work that we had to do the work while the plans were being made. In order to start the work immediately, I got up the necessary plans with the engineer. * * * The work went ahead until the full set of plans and specifications were completed."

This testimony is ambiguous upon the proposition that plans and specifications were articulated with the superintendence. On the other hand, the testimony of Mr. Waller, the contractor and engineer:

"Q. Has any work been done on the premises of the defendant subsequent to January 25th, when the plaintiff says he was discharged, in accordance with the plans and specifications? A. We had no plans. We went ahead with the work by duplicating the work that was done. Q. No work was done under the plans and specifications? A. No, sir."

Although this testimony is not entirely clear, yet it casts some doubt, to say the least, upon the contention that the plans and specifications which are a part of the plaintiff's claim were used in the work. There

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is, of course, a distinction between the recovery by enforcement of a lien and by personal judgment for services in the preparation of plans.

Upon this record I think that there should be a new trial granted, costs to abide the final award of costs. I add that in my opinion the present record did not justify an extra allowance to the plaintiff. All concur.

(82 Misc. Rep. 193.)

In re EVANS.

(Supreme Court, Special Term, New York County. September, 1913.)

GUARDIAN AND WARD (§ 77*)—SALE OF REAL PROPERTY—DISCRETION.

Under Real Property Law (Consol. Laws 1909, c. 50) § 116, vesting the court with entire discretion in the matter, an application by a guardian of infants as tenants in common of certain realty for leave to convey the infants' interest in conjunction with all other owners to a corporation formed to hold the property and to issue stock to the guardian for the infants, will be denied, where the property could be tied up indefinitely the value of the stock would be uncertain, and the guardian would be a minority stockholder.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 327–329; Dec. Dig. § 77.*]

Application by Samuel M. Evans, as general guardian of Ellen J. Evans and others, for leave to sell real property. Application denied.

Dixon & Holmes, of New York City, for Samuel M. Evans, petitioner.

Daly, Hoyt & Mason, of New York City, for Laura Carter et al.

Edward G. Pringle, of New York City, for Frederick W. H. Crane and Phineas P. Chew, executors.

Standish Chard, of New York City, special guardian, in person.

WHITAKER, J. This is an application to the court by the guardian of infants as tenants in common in certain real property for leave to convey the infants' interest, in conjunction with all other owners, to a corporation incorporated for the purpose of holding the property, and to issue shares of stock of such corporation to the guardian for and on behalf of the infants.

Section 116 of the Real Property Law (Consol. Laws 1909, c. 50) vests the court with entire discretion in the matter. The court, therefore, must use its best judgment. It is my best judgment that the prayer of the petitioner should be denied for the following reasons: The nature of the infants' property would be changed from an available and enforceable to an unavailable and unenforceable unconvertible asset. The guardian would be a minority stockholder in a corporation in which he might have no influence or control otherwise than the power to vote upon the stock. The value of the stock would be always uncertain and could not be definitely ascertained for the purposes of conversion into money. It would be practically unsalable, and to fully protect the guardian, in case he desired to sell his stock, it would probably be necessary to apply to the court to ascertain its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

value, inasmuch as in all essentials the corporate stock would be an interest in real estate the value of which would be always open to question, and the value of the stock would depend upon the value of the real estate held by the corporation. As a minority stockholder the guardian would be at the mercy of the majority. His own business judgment in reference to his wards' property could not be freely exercised. His hands would be tied. In fact, matters might shape themselves in such a manner that the guardian would find himself in possession of an unavailable, unmarketable, and unenforceable asset, decreasing in value, with no power in the guardian to help himself. The value of the stock would depend very largely upon the integrity, the good judgment, and business capacity of the management of the property, in which the guardian, as a minority stockholder, might be deprived of all say. The infants on arriving at age would find their property completely tied up in unavailable securities. This should not, in my judgment, be permitted. Upon arriving at age they are entitled to either the money or securities that are readily convertible into money.

I have no doubt that while in the hands of the present owners, with the relations existing as at present, the infants' interest might be best served for the time being by granting the petition; still, no one can tell how long the present relations may continue.

Should the petition be granted the property of the infants will be tied up indefinitely without the free and untrammeled right of the guardian to realize upon it. The court being vested with discretion, and the consummation of the proposed arrangement resting, as it does, upon the court's approval, I do not feel that I can give such approval without running counter to my best judgment. While I have no doubt that all the parties to the present proceeding are acting in accordance with their honest judgment, nevertheless, it is the honest judgment of the court that must prevail. The application to confirm the referee's report is denied, and the exceptions of the special guardian are sustained.

Application denied.

(158 App. Div. 915)

INGEMAN v. SNARE & TRIEST CO. et al.

(Supreme Court, Appellate Division, First Department. October 31, 1913.)

COSTS (§ 91*)—RIGHT TO COSTS.

A defendant, sued for a cause of action which the plaintiff did not sustain upon the trial, is entitled to costs, even though represented by the same attorney as the other defendant, who was also given costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 356–368; Dec. Dig. § 91.*]

Appeal from Special Term, New York County.

Action by Martin Ingeman against the Snare & Triest Company and the Steel & Masonry Contracting Company. From an order denying a motion to set aside taxation of costs in favor of plaintiff and against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

one defendant, and to direct taxation of costs in favor of one of the defendants against plaintiff, defendants appeal. Order reversed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, BOWLING, and HOTCHKISS, JJ.

Hector M. Hitchings, of New York City, for appellants.

Ralph Gillette, of New York City, for respondent.

PER CURIAM. That the plaintiff was not entitled to costs against the Steel & Masonry Contracting Company was settled by this court in Moraff v. Kohn, 157 App. Div. 648, 142 N. Y. Supp. 775. As to the defendant Snare & Triest Company, this defendant was sued for a cause of action which the plaintiff did not sustain upon the trial. It had to appear and answer the complaint, and, having succeeded upon the trial, we think it is entitled to costs against the plaintiff. The fact that both defendants appeared by the same attorney is not at all controlling, as both defendants would be liable to the attorney for the reasonable value of his services in defending the action.

The order appealed from is therefore reversed, with $10 costs and disbursements, and the motion for costs against the plaintiff in favor of the Snare & Triest Company and to strike out costs in favor of the plaintiff against the Steel & Masonry Contracting Company granted.

(158 App. Div. 552)

EARLE v. EARLE.

(Supreme Court, Appellate Division, Second Department. October 24, 1913.)

1. DIVORCE (§ 309*)—DECREE—CUSTODY OF CHILD—AMENDMENT.
Where a divorce decree awarded an infant child to the mother, the successful party, and provided for its maintenance by her, the decree will not be modified so as to compel the father to maintain the child, in absence of a showing that the mother is unable to do so.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 803; Dec. Dig. § 309.*]

2. DIVORCE (§ 306*)—MAINTENANCE OF CHILD—CONTROLLING CONSIDERATION.
The principal consideration in requiring one or the other of the parents to maintain an infant child upon granting a divorce is the suitable maintenance of the child according to its station in life.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 798; Dec. Dig. § 306.*]

3. DIVORCE (§ 306*)—MAINTENANCE OF CHILD—GROUNDS OF AWARD.
While both parents are charged with the maintenance of their infant child, the father primarily has that duty, since he is usually more able to do so.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 798; Dec. Dig. § 306.*]

4. DIVORCE (§ 306*)—MAINTENANCE OF CHILD.
The father may be required to maintain his infant child upon granting a divorce to the mother, though its custody be not committed to a suitable third person as desired by the father.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 798; Dec. Dig. § 306.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. DIVORCE (§ 308*)—MAINTENANCE OF CHILD—CUSTODY.

If a divorced husband is required to maintain his infant child while it is in the custody of some one else, the decree should make provision to insure that the money furnished by him should be applied exclusively to the infant's use, so that it cannot be misapplied by some one else.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802; Dec. Dig. § 308.*]

Appeal from Special Term, Westchester County.

Action by Helen Hicks Earle against Charles Earle. From an order denying plaintiff's motion to amend a judgment of divorce, she appeals. Reversed, and application remitted to the Special Term.

See, also, 141 App. Div. 611, 126 N. Y. Supp. 317.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

Frank Trenholm, of New York City, for appellant.

Carlisle Norwood, of New York City, for respondent.

JENKS, P. J. The plaintiff appeals from an order of the Special Term that denies her application to amend her judgment for absolute divorce by insertion of a provision requiring the defendant to maintain the infant child now in the custody of the plaintiff pursuant to that decree.

In 1903, the defendant obtained a decree of separation for abandonment. By that decree the sole maintenance, care, custody, and control of the child Charles was awarded to this defendant, of the infant child Caroline was awarded to this plaintiff. In 1912, this plaintiff obtained a decree of absolute divorce, which did not make provision for alimony but contained a provision similar to that in the said separation decree as to the said children. It appears that the defendant asserted that the adultery charged was committed with the connivance and by the procurement of the plaintiff, and that the defendant determined not to plead his defense provided the plaintiff made no claim for alimony. Prior to the trial a stipulation was entered into between the parties that the plaintiff waived and agreed to waive any rights to counsel fee or alimony, "her financial standing being such that she requires no support for herself or daughter." The action was not defended.

[1] The sole question is that of the proper maintenance of the said infant Caroline. When in such an action the decree awards the custody of an infant to the mother as the successful plaintiff, the courts in other jurisdictions are not in accord upon the question whether the father may be compelled to respond for necessaries furnished thereafter for maintenance of the infant. The argument on the one hand is that the father should not be compelled to support the child, because he had no right to take the child and support it himself or to employ any one to support it without the mother's consent. The argument on the other hand is that the duty of support is not to be evaded by the misconduct of the father which resulted in his loss of custody. See Bishop on Marriage, Divorce & Separation, vol. 2, § 1223, and cases cited. But the decree in this case is not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

silent, for it contains a provision for the "maintenance" of this infant child by the mother, as well as for her "care, custody, and control" of it. Irrespective of any bargain between the parties, I assume that the court was moved for good reasons to make such an affirmative provision. And I cannot assume that the custody of this infant was thus awarded for the reason that the mother stood ready to maintain it, because such an award was made to the innocent party, as was natural.

[2] The paramount consideration is the suitable maintenance of the child in accord with its station in life.

[3] Both parents are charged with such maintenance; primarily that duty is cast upon the father, as he generally has "more ample means." Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441. But as this decree has cast maintenance upon the mother, I see no present reason to disturb its provisions unless the mother is now unable to afford proper maintenance. She represents her present inability so to do. The defendant admits his present ability, but denies the plaintiff's inability. I think that, with an eye single to the good of the child, the learned Special Term should have informed itself as to the ability of the plaintiff, for, if her inability exists, its refusal to charge the defendant with the duty worked injury to the infant.

[4] The defendant asserts his willingness to support the child, provided its care and custody be committed to a specified third person who apparently would be a proper custodian if neither the mother nor the father should be considered. But the duty of maintenance may be required of the defendant irrespective of any such condition. If the plaintiff be an improper person as custodian in view of her morals, or if the present surroundings of this child are adverse to its decent tutelage, there is a remedy, for, as I have said, the chief consideration is the welfare of the infant.

[5] If the defendant be charged with maintenance, then, so long as the infant is in any other custody than that of the defendant, there should be made such restrictions as insure that all moneys furnished by the defendant should be applied exclusively to the infant, and not misapplied by any person directly or indirectly for any other purpose.

The order must be reversed, without costs, and the application is remitted to the Special Term. All concur.

(82 Misc. Rep. 375)

In re BANKERS' TRUST CO. OF CITY OF NEW YORK.

(Surrogate's Court, New York County. October 31, 1913.)

1. PERPETUITIES (§ 6*)—SUSPENSION OF POWER OF ALIENATION—POWER OF APPOINTMENT—EXECUTION.

In determining the application of the rule against perpetuities, the provisions in a will executing a power of appointment relate back to the instrument creating the power and must be considered as if embodied therein.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4–47, 49–53, 56; Dec. Dig. § 6.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PERPETUITIES (§ 6*)—DEVISEES—VALIDITY.

Where a testator devised property in trust to his grandson for life, giving a power of appointment to the grandson, who exercised the power by will devising the property in trust, the income from one moiety to be paid to his wife for life, and that from the remainder to be paid to her until the grandson's child should reach the age of twenty-one years, the interest of the widow in both moieties cannot be defeated by the statute against perpetuities, as she was in being at the time of the death of the original testator and such bequests can be separated from those in favor of the child.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4–47, 49–53, 56; Dec. Dig. § 6.*]

3. EXECUTORS AND ADMINISTRATORS (§ 507*)—ACCOUNTING—MATTERS JUSTICIABLE.

Upon an accounting by the executor of the original testator, the validity of trusts, created by the devisee's exercise of a power of appointment, which are to commence in futuro, should not be determined.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2004, 2005, 2178–2191; Dec. Dig. § 507.*]

In the matter of the judicial settlement of the accounts of the Bankers' Trust Company of the City of New York, as substituted trustee for Harry Dillon Ripley, under the will of Sidney Dillon. Account settled.

John C. Thomson and George S. Clay, both of New York City, for substituted trustee.

Edward D. Bettens, of New York City (Samuel B. Clarke, of New York City, of counsel), for the executors and trustees and for Mrs. Ripley individually.

Dawson Coleman Glover, of New York City, special guardian.

FOWLER, S. This matter is before the court on the settlement of the account of the Bankers' Trust Company, as substituted trustee for Harry Dillon Ripley under the will of the late Mr. Sidney Dillon. No objections have been filed to the account, and the question here concerns the disposition to be made of the trust property now in the possession of the accountant. Answers have been filed by Alice Louise Ripley, the widow of Mr. Harry Dillon Ripley, individually and as executrix of Harry Dillon Ripley's will, and by Emerson Foote, Jr., as executor and trustee under the will of Harry Dillon Ripley, in which answers they admit the correctness of the account, and in which they claim that the trust property, less proper reservations, ought to be immediately transferred and delivered by the trustee to the executors under the will of Harry Dillon Ripley for due administration. Mr. Dawson Coleman Glover, the special guardian for Harry Dwight Dillon Ripley, the infant son of Harry Dillon Ripley, files his report, in which he finds the account of the trustee to be correct, and recommends that the trust property be immediately transferred and delivered by the trustee to the executors under the will of Harry Dillon Ripley for administration, as claimed by the answers interposed by Mrs. Ripley and Mr. Foote.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Sidney Dillon died June 10, 1892, and his will was admitted to probate in July, 1892. By article 2 of the will of Mr. Dillon a trust was created for the use of his grandson Harry Dillon Ripley during his life, and the following direction was made by the said testator as to the payment of the interest and as to the disposition of the share at the death of the life beneficiary:

"The current income of their respective shares in said trust property shall be paid semiannually to the said daughters and grandsons, but the principal thereof shall be retained and kept and reinvested by the said trustees during the respective lives of said daughters and grandsons, and on the death of either leaving lawful issue surviving, the share of the one so dying, shall, unless otherwise disposed of as directed by the last will of the one so dying, be held for the use and benefit of such lawful issue, equally, share and share alike, and failing such issue, shall go to and vest in my surviving daughter or daughters, alike equally share and share, and the lawful issue of such of them as shall have deceased, such issue taking the share the parent would have taken if living, and the trustees shall pay and convey accordingly, or to the guardians of such as may be under age."

Harry Dillon Ripley, a grandson of Sidney Dillon, died February 8, 1913, leaving a will made in England which was admitted to probate in this jurisdiction on May 5, 1913, by which will Harry Dillon Ripley sought to exercise the power of appointment created in the foregoing clause of the will of Sidney Dillon. Harry Dillon Ripley left him surviving Alice Louise Ripley, his widow, who was in being at the time of the death of Sidney Dillon, and one child, Harry Dwight Dillon Ripley, an infant under the age of 14 years, who was born October 30, 1908, and was not in being at the time of the death of Sidney Dillon.

After providing for the payment of debts, funeral expenses, and testamentary charges, and making certain bequests, the will of Harry Dillon Ripley, in the ninth clause thereof, provides as follows:

"All the rest, residue and remainder of my estate, both real and personal, of whatever nature and wherever situated, including all estate or property over which I may now or hereafter have power of appointment or disposal under the will of the late Sidney Dillon or under deed of trust dated twenty-seventh April, one thousand eight hundred and ninety-nine, executed by me to the Knickerbocker Trust Company and Sidney Dillon Ripley, or otherwise, I give, devise and bequeath to my executors hereinafter named as trustees, to have and to hold the same for and upon the following trusts, videlicet:

"(1) To hold, invest and reinvest, etc."

"(2) To pay the rents, issues, profits, interest, dividends and other income (all of which premises are hereinafter referred to as the said income) of the said trust estate to my said wife Alice Louise Ripley during her life, but subject as regards one moiety of the said income to the provisions hereinafter contained in favor of my children and issue.

"(3) As soon as my son or any other child of mine shall attain the age of twenty-one years then to pay one-fourth part of the said income (subject to clause (6) next hereinafter contained) to him or her during his or her life unless and until some event shall have happened or shall happen whereby the same fourth part or any part thereof if belonging absolutely to him or her would become vested in or charged in favor of some other person or a corporation."

(The fourth paragraph of Harry Dillon Ripley's will makes provision for the payment of the income of one-fourth in the event of having two or more children who attain the age of 21 years.)

"(5) As soon as any child of mine shall attain the age of twenty-five years, then to pay another fourth part of the said income (subject to clause 8 next hereinafter contained) to him or her during his or her life, subject to the like

provision for forfeiture of the same income as hereinbefore contained concerning the first mentioned one-fourth part."

(The sixth paragraph makes provision for the payment of the income of the second one-fourth part in the event of two or more children attaining the age of 25 years.)

"(7) To pay over, convey and transfer one moiety of my residuary real and personal estate to and amongst all such of my children as shall attain the age of thirty years, if more than one in equal shares, unless some event shall have happened or shall happen whereby the same premises or any part thereof if belonging absolutely to him or her would become vested in or charged in favor of some other person or a corporation, and upon such payment over and transfer the directions hereinbefore contained for payment of income to him or her shall cease."

(The eighth paragraph provides for the contingency of any child dying before attaining the age of 30 years.)

(The ninth paragraph provides for the failure or determination during the life of any child of the trusts.)

(The tenth paragraph makes provision by which the issue of any child dying before attaining the age of 30 years shall take the share of the parent.)

"(11) Upon the death of my said wife then to hold the remaining moiety of my said estate upon trust for all or any of my children or child who being sons attain the age of twenty-one years, or being a daughter or daughters attain that age or marry, if more than one in equal shares, but subject to the trusts and powers hereinafter declared concerning the same."

The twelfth clause of the will provides as follows:

"(12) Upon the death of my said wife Alice Louise Ripley, leaving no issue of mine who shall live to attain a vested interest in the said premises under the trusts aforesaid, then and in that event my trustee shall pay the said income of the said trust estate to my wife's sister, Maud Cross, during her life, and after her death my trustees shall hold all my said estate and the income thereof in trust for such of my two brothers, Julien Ashton Ripley and Louis Arthur Ripley, as shall be living at the time of the failure or determination of the prior trusts hereinbefore contained, and the children then living of such of my said two brothers as shall be then dead in equal shares per stirpes."

[1] The accounting trustee incidentally asks the court to decide whether or not the trusts sought to be created by the will of Harry Dillon Ripley offend the statute of New York against perpetuities. First, it is claimed by the trustee, accountant, that the provisions contained in the will of Harry Dillon Ripley, executing, or attempting to execute, the power of appointment conferred by the will of Sidney Dillon, must be read into the will of Sidney Dillon, and that the validity or invalidity of these provisions is to be determined as if they were so read into said will of Sidney Dillon, or as if they had been originally limited by the donor of the power, or as of the date of the death of Sidney Dillon, in other words. This contention is not questioned and cannot be. It is suggested by the accountant trustee that there are three possible constructions of the power of appointment, none of which would violate the New York statute against perpetuities: First, that the power of appointment deals with the estate as an entirety, and that the whole is then invalid. In that event the share of the widow would be involved in the invalidity of the provisions for the son of Harry Dillon Ripley, and the principal should be paid to the general guardian of the son under the terms of Sidney Dillon's will. Second, if there can be a division of the principal of the trust fund into sepa-

rate parts, the widow's share may be restricted to a life estate in one-half the trust fund, and the other one-half paid to the general guardian of the son. Third, the segregation may not take place until the son attains the age of 21 and 25 years, respectively, and the whole trust be valid as to the widow until the son attains 21 years, when one-fourth would be segregated and become payable to the son; then three-fourths of the trust, valid as to the widow until the son attains 25, when another one-fourth would be segregated and become payable to the son, and the remaining one-half be a valid trust as to the widow for life.

[2] The will of Sidney Dillon, which confers the power of appointment on his grandson, Harry Dillon Ripley, if read in connection with the will of the latter, executing the power, and it is conceded that this must be done (Fargo v. Squiers, 154 N. Y. 250, 259, 48 N. E. 509; Genet v. Hunt, 113 N. Y. 158, 170, 21 N. E. 91; Dana v. Murray, 122 N. Y. 604, 26 N. E. 21; Farmers' Loan & Trust Co. v. Kip, 120 App. Div. 347, 349, 104 N. Y. Supp. 1092, affirmed 192 N. Y. 266, 85 N. E. 59; Farmers' Loan & Trust Co. v. Shaw, 127 App. Div. 656, 659, 107 N. Y. Supp. 337, 111 N. Y. Supp. 1118), creates a suspension of the power of alienation during the life of the grandson of Sidney Dillon, and also during the life of the latter's widow, as to one-half of the interest given to her by her husband for life. As to the other one-half of such interest, one-fourth thereof upon the infant son of Harry Dillon Ripley reaching the age of 21 years, and another one-fourth thereof upon his reaching the age of 25 years, were to be held in trust for such son until he reached 30 years of age; he becoming then absolutely entitled to the capital so directed to be held in trust for him, but in the event of his death before reaching 30 years of age, the same were to go over to others, not including the widow. The interest of the widow in the one-half, which she took for life, as well as in the other one-half which was liable to be defeated by the infant attaining the ages mentioned, can, as well as the trust created for the grandson, be treated as separable and segregated from the dispositions made for the benefit of the son of Harry Dillon Ripley and the other parties to whom the will of the grandson of Sidney Dillon, under certain contingencies, provided they should go. The interest of the wife in the one-half, given for the benefit of the child, may be treated as, and in substance and effect is, a provision, for a trust for the wife until the child in one event reaches 21, and in the other 25 years of age, provided she so long lives, and then the child reaching these ages the respective trusts for his benefit to commence and to continue until he reaches thirty. Obviously the trust for the wife, either in the share that she retains for life, or in the share that is liable to be defeated by the contingencies mentioned, could not exceed one life. This being so, and the trust for her benefit being treated, as it should be, as separable from the other dispositions made by the will, the trust for her can in any event be sustained and is valid, as its duration and that of the trust for her husband created by the will of Sidney Dillon would not, taken together, endure for more than two lives in being at the death of Sidney Dillon. Whether or not the trusts for the benefit of the said child of Harry Dillon Ripley, which are to commence at the times men-

tioned, or the other dispositions made in the will of Harry Dillon Ripley in regard to the property affected by it, are valid, are questions which cannot be determined now, because no occasion arises for it. Mount v. Mount, 185 N. Y. 162, 77 N. E. 999.

[3] It being determined that the trust for the benefit of the wife of Harry Dillon Ripley is valid, the other questions as to the validity or invalidity of the other dispositions of the will of Harry Dillon Ripley are purely abstract, or at this time academic, as their solution could not affect any present distribution or disposition of the trust property, and therefore the Surrogate does not feel called upon to express an opinion in regard thereto.

The trust fund, subject to the necessary reservations to be agreed upon by the parties, should be turned over by the trustee to the executors of Harry Dillon Ripley, subject to such rights as any persons may have acquired by virtue of the exercise of the power given to Harry Dillon Ripley. Settle decree accordingly.

(159 App. Div. 98)

In re NAGY'S ESTATE.

(Surrogate's Court, New York County. July 31, 1909.)

AMBASSADORS AND CONSULS (§ 5*)—FOREIGN CONSUL GENERAL—REPRESENTATION OF NONRESIDENT ALIENS.

Under the treaty between Austria-Hungary and the United States, giving the representatives of the former country all of the prerogatives and privileges granted to the same functionaries of the most favored nation, the consul general of Austria-Hungary is entitled to represent and appear for all nonresident alien next of kin who are subjects of Austria-Hungary and interested in an estate in this country.

[Ed. Note.—For other cases, see Ambassadors and Consuls, Cent. Dig. §§ 12–15; Dec. Dig. § 5.*]

In the matter of the estate of Alexander Nagy. Administrator appointed as stated.

COHALAN, S. The consul general of Austria-Hungary, by virtue of the requirements of the treaty between that country and the United States, which secures him all the prerogatives and privileges granted to the functionaries of the same class of the most favored nation, is entitled to represent and appear for all of the nonresident alien next of kin interested, who are citizens or subjects of Austria-Hungary. Estates of Domenico Iaro and Donato D'Eusibio, Surr. Decs. 1908, p. 960, and cases cited in these decisions.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(159 App. Div. 98)

PEOPLE ex rel. GLYNN, Comptroller, v. MERCANTILE SAFE DEPOSIT CO.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

TAXATION (§ 906*) — TRANSFER TAX — SECURITIES — DELIVERY TO PERSONAL REPRESENTATIVE—SAFE DEPOSIT COMPANY—"POSSESSION OR CONTROL."

Defendant rented a safe deposit box to S. or O., who were severally to have access to the same; O.'s right to be uninterrupted in case of the death of S. Defendant's boxes so rented were in a vault room; the customer retaining sole control of the contents of his box and means of access, and defendant having no control except such as was involved in guarding the premises and the means of access to the general vault. On the death of S., O. removed from the box from time to time securities belonging to himself and also to S., for whom he was executor. *Held*, that defendant had neither possession nor control of the securities of S. within the box, within Tax Law (Laws 1905, c. 368) § 227, prohibiting a safe deposit company, having possession or control of assets belonging to a decedent, from delivering the same to the executors except on ten days' notice to the State Comptroller, and providing a fine for violation thereof.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1732–1736; Dec. Dig. § 906.*]

Appeal from Trial Term, New York County.

Action by the People of the State of New York, on the relation of Martin H. Glynn, Comptroller, against the Mercantile Safe Deposit Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Robert P. Beyer, of New York City, for appellant.

Charles W. Pierson, of New York City, for respondent.

HOTCHKISS, J. The action was brought to recover a penalty under section 227 of the Tax Law as it stood on July 22, 1906 (Laws 1905, c. 368).

The defendant, the Mercantile Safe Deposit Company, was organized under chapter 613, Laws 1875 (since incorporated into section 300 of the Banking Law [Consol. Laws 1909, c. 2]), authorizing it to act as bailee for the storage and safe-keeping of jewelry, plate, and other valuables, and to guarantee their safety; also, to let vaults, safes, and other receptacles for the use of its customers, and the safe-keeping of their possession. Under this charter, the defendant has conducted what are practically two distinct classes of business—a storage business and a safe and box renting business. In the course of the former, the defendant receives articles to be stored, issues a receipt therefor, and takes manual possession thereof; the articles being placed in vaults to which representatives of the company alone have access. On the surrender of the receipt, the articles covered thereby are delivered to the owner. In the business of renting, the defendant rents to its customers vaults, safes, and boxes, all of which are contained in a larger vault or room to which access is had through a gate guarded by one of defendant's employés. The customer re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceives the key or fixes the combination of the lock to his particular vault, safe, or box, and during the period of the letting has sole control of the only means of access thereto, and uses the same as a place of safe-keeping for whatever valuables he chooses to place therein; such valuables never coming into the manual custody of the company, and the company having no control over the same whatsoever, except such as is involved in guarding the premises and the means of access to the general vault.

Through the agency of one Osborne, in April, 1897, the defendant rented a safe, which was recorded on defendant's books in the name of "Russell Sage or Charles W. Osborne," who were severally to have access to the same; Osborne's right of access to be uninterrupted in the event of Sage's death. Sage never visited the safe, but Osborne used it constantly, putting in and taking out securities. On July 22, 1906, Sage died, a fact which was almost immediately brought to the knowledge of defendant's officers. Thereafter Osborne's use of the safe continued as theretofore, and defendant did nothing to interfere with his removing any of the valuables contained therein, and gave no notice of any kind to the State Comptroller. Although defendant had no knowledge whatsoever, at any time, of the contents of the safe, in fact, at the time of Sage's death, there was contained therein securities belonging to Sage individually, securities belonging to Osborne individually, and securities belonging to persons who had pledged the same to Sage as collateral for loans made by him, but under circumstances which gave Osborne, in the event of Sage's death, the right to receive payment of the debt and surrender the collateral. These various securities were contained in one or more tin boxes.

After Sage's death, Osborne, who became one of his executors, continued to look after his loans, and from time to time, as required, took away securities which had been pledged to Sage, but none of the securities belonging to Sage personally were removed, save as some of them may have been contained in a tin box in which some of Osborne's securities or some of the pledged securities were kept, which tin box was taken by Osborne to his office for use in the business of the day, and was returned at the end of the day with Sage's individual securities intact.

At a date suiting his earliest convenience, a representative of the State Comptroller visited the safe in company with a representative of the Sage estate, and inspected all of the contents belonging to Sage. Proceedings to fix the transfer tax on the Sage estate were duly begun and concluded, and the tax was duly paid in full.

Section 227 of the Tax Law contains the following:

"No safe deposit company * * * having in possession or under control, securities, deposits, or other assets belonging to or standing in the name of a decedent * * * including the shares of the capital stock of, or other interests in the safe deposit company * * * making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors, when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery shall personally be served upon the State Comptroller at

least ten days prior to said delivery or transfer; nor shall any such safe deposit company * * * deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, * * * without retaining a sufficient portion or amount thereof to pay any tax and interest which may be assessed on account of the delivery or transfer of such securities, deposits or other assets. * * * And it shall be lawful for the said State Comptroller, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer."

For a failure to serve notice or allow the examination provided for, and for a failure to retain sufficient of the securities or assets to pay the tax, the offender is made liable for the full amount of the tax with interest, "and in addition thereto, a penalty of not less than five or more than twenty-five thousand dollars."

There are several grounds upon which we might affirm the judgment appealed from, but we prefer to put our decision on the broad ground that the statute does not cover any such situation as the evidence discloses in this case. It is not necessary for us to resort to the rule of strict construction, applicable to statutes under which penalties are sought to be enforced, for in no legal sense can the defendant be said to have had "possession" or "control" of any of Sage's securities. In a limited sense, it had the custody of such securities because of the relation which it occupied to the safe in which they were contained. Having neither "possession" nor "control" of the securities, the statute imposed no duty whatsoever upon the defendant, nor could it have obeyed the statute without invading the legal rights of its customer. The relation between the defendant and its customer, whether in this case he be regarded as Osborne and Sage jointly or severally, may have some elements comparable to those in a case of bailment; but the legal status of the parties seems to me to bear a closer analogy to that arising from the relation which exists between tenants of a general office building and the landlord thereof, who keeps within his control and under his care and protection the common means of access to the building and to the suites of offices therein, but as to which, subject to any regulations that may have been established by the landlord, the rights of the tenants are exclusive.

So far as I can see, the defendant in this case had no more "possession" of or "control" over the securities contained in the box in question, than such a landlord has over securities contained in a safe belonging to one of his tenants and contained in the private office of the latter. The situation of the defendant with respect to securities contained in safes or other receptacles of deposit rented to its customers was manifestly different from the relation which it occupied toward those who made physical deposit of valuables with defendant, for which a receipt was issued. In every such case, the defendant was clearly a bailee, having physical custody of the articles with power to control the delivery thereof.

The judgment and order should be affirmed, with costs. All concur.

(158 App. Div. 607.)

In re WILSON.

(Supreme Court, Appellate Division, Second Department. October 10, 1913.)

ATTORNEY AND CLIENT (§ 48*)—INVESTIGATION OF CHARGES—APPOINTMENT OF COMMITTEE.

Under Judiciary Law (Consol. Laws 1909, c. 30) § 88, subd. 2, as amended by Laws 1912, c. 253, § 2, authorizing the Appellate Division to censure, suspend, or remove from practice any attorney, where an attorney moves to investigate the truth of charges or insinuations in the opinion of a justice of the Supreme Court, as to his conduct of a litigation, the Appellate Division will appoint members of the bar to prepare charges in the premises and report them to the court for its action.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 64, 65, 68; Dec. Dig. § 48.*]

Motion by an attorney relative to alleged reflection upon his professional conduct in an opinion of the Supreme Court. Motion granted.

Argued before JENKS, P. J., and THOMAS, CARR, RICH, and PUTNAM, JJ.

Robert H. Wilson, of Brooklyn, for the motion.

Stephen C. Baldwin, of Brooklyn, opposed.

PER CURIAM. This is an application by an attorney and counsellor for inquiry into his own professional conduct of a litigation. The Judiciary Law provides:

"2. The Supreme Court shall have power and control over attorneys and counsellors at law, and the Appellate Division of the Supreme Court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor at law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice."

It is our duty, upon presentation of any matter that may or might require discipline of an attorney and counsellor, to examine it, and, if we determine that it requires investigation, to cause the institution of proceedings. Such proceedings contemplate presentation of charges to be delivered to the attorney, to whom must be afforded an opportunity of being heard in his defense. We think that the subject-matter justifies such proceedings as are prescribed by the Judiciary Law. The court designates William N. Dykman, Esq., and Stephen C. Baldwin, Esq., to prepare charges in the premises, and to report them to this court for its action. Any other person who may make known to this court any information touching the conduct of the attorney and counsellor in the matter now before us will have his communication considered and acted upon. We appreciate and commend the formal offer of the Brooklyn Bar Association to act or to aid in this matter, but we do not now avail ourselves of its offer, as the petitioner is an officer thereof.

Settle order before the Presiding Justice.

RICH, J., not voting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(158 App. Div. 591.)

COIRO v. BARON et al.

(Supreme Court, Appellate Division, Second Department. October 31, 1913.)

CHATTEL MORTGAGES (§ 279*)—SEIZURE OF GOODS—CONDITIONS PRECEDENT.

Under Code Civ. Proc. § 1738 (Lien Law [Consol. Laws 1909, c. 33] § 207), providing that, where an action is brought to enforce a lien on a chattel, and the plaintiff is out of possession, a warrant may be granted commanding the sheriff to seize the chattel, the provisions of sections 635–712 of the Code of Civil Procedure applying as if it was a warrant of attachment, the plaintiff may, where a chattel mortgage is in default, procure a writ of seizure without making such a showing as would authorize an attachment; the reference to that portion of the Code referring to the procedure in attachment merely governing the practice.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 529; Dec. Dig. § 279.*]

Appeal from Special Term, Kings County.

Action by Carmine Coiro against Moe Baron and the Inn Corporation. From an order denying the last-named defendant's motion to vacate a warrant of seizure, it appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, STAPLETON, and PUTNAM, JJ.

Henry M. Goldfogle, of New York City, for appellant.

Ralph K. Jacobs, of Brooklyn, for respondent.

PER CURIAM. This proceeding to foreclose a chattel mortgage after default alleged a demand for payment, and averred that the mortgaged chattels were in the possession of the defendant, Baron. The affidavit for the warrant of seizure did not attempt to state any of the grounds for an attachment. A warrant of seizure issued, reciting the value of the chattels, and that a cause of action, as specified in section 1737 of the Code of Civil Procedure, existed in favor of the plaintiff, who had given the requisite undertaking. After the chattels had been taken under the warrant, a motion was made on behalf of the Inn Corporation, defendant, to vacate, because the warrant and the papers on which it was granted did not set forth the matters required by section 636 of the Code of Civil Procedure. This motion was denied. Defendant has appealed from the order denying its application to vacate the warrant of seizure, and cites Faraci v. Maller, 154 App. Div. 303, 138 N. Y. Supp. 961.

The decision of Faraci v. Maller, supra, was made without the court's attention having been called to the previous holding by this court in Wuertz v. Braun, 113 App. Div. 459, 99 N. Y. Supp. 340, that a warrant of seizure under Code Civ. Proc. § 1738, is justified, if the plaintiff is out of possession, and that the legislative reference to attachment is merely to provide a definite procedure, and did not impose, in addition to nonpossession, a further condition before obtaining the warrant of seizure. Blake v. Crowley, 44 Hun, 344. Section 1738 of the Code is now re-enacted without change as section 207 of the Lien Law. Laws of 1909, c. 38. The course of legislation to protect liens upon chattels (Laws of 1869, c. 738; Throop's Code

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Civ. Proc. § 1738, Ed. 1880, vol. 2, p. 112, note) manifests a clear intent to give the remedy of seizure to lienors so as to recover possession, and not to restrict the right to seize the chattels pledged or under a lien—a right vital to the lienor's security—to those grounds that are requisite for an attachment against the general property of the debtor. The case of Faraci v. Maller is therefore overruled, and that of Wuertz v. Braun is now followed, and reaffirmed.

The order refusing to vacate the seizure is therefore affirmed, but without costs.

(158 App. Div. 571.)

In re THAW.

(Supreme Court, Appellate Division, Second Department. October 31, 1913.)

1. ASYLUMS (§ 5*)—CONFINEMENT—REGULATION—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under Const. art. 8, §§ 11, 12, creating a commission in lunacy, and Insanity Law (Laws 1909, c. 32 [Consol. Laws 1909, c. 27]) §§ 6, 9, 92, 125, 111, prescribing the powers of such Commission and the rules governing the inmates of state asylums, the state did not delegate its prerogative powers over lunatics to the Supreme Court but retained the right to regulate the custody of them for itself through its Commission, superintendent of prisons, and other supervising officers, and the Supreme Court is without jurisdiction to order that an inmate of the State Hospital at Matteawan be permitted to consult his attorneys privately, contrary to the rules of that institution adopted by the superintendent under the authority given by Insanity Law (Laws 1909, c. 32 [Consol. Laws 1909, c. 27]) § 111.

[Ed. Note.—For other cases, see Asylums, Cent. Dig. § 4; Dec. Dig. § 5.*]

2. ASYLUMS (§ 5*)—CONFINEMENT—CONSULTATION WITH ATTORNEYS.

Evidence *held* not to justify the granting of an order to permit an inmate of the State Hospital at Matteawan to consult his attorneys privately, even if the court had jurisdiction to make such an order.

[Ed. Note.—For other cases, see Asylums, Cent. Dig. § 4; Dec. Dig. § 5.*]

3. ASYLUMS (§ 5*)—REGULATIONS—CONSULTATION WITH ATTORNEYS—ORDER OF COURT—PARTIES.

Where the order to show cause upon an application by an inmate of the State Hospital at Matteawan for permission to consult his attorneys privately was addressed only to the Superintendent of State Prisons and the acting superintendent of the hospital, and the State Lunacy Commission was not made a party thereto, the application should be denied.

[Ed. Note.—For other cases, see Asylums, Cent. Dig. § 4; Dec. Dig. § 5.*]

Appeal from Special Term, Dutchess County.

Application by Harry K. Thaw for an order permitting him, while an inmate in the State Hospital at Matteawan, to confer privately with his attorneys and with his mother. Order granted as to the attorneys but denied as to the mother, and both parties appeal. Order reversed, and motion denied in all respects.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and STAPLETON, JJ.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William Vanamee and Henry Hirschberg, both of Newburgh, William A. Stone, and A. H. F. Seeger, of Newburgh, for Harry K. Thaw.

Franklin Kennedy, Deputy Atty. Gen., of Albany, for the People.

JENKS, P. J. These are cross-appeals from an order of the Special Term. There is a rule and regulation of the State Hospital at Matteawan that patients may see their relatives or their personal attorneys on any day of the week between the hours of 2 and 5 p. m. except Sundays and legal holidays, but such visits must be made in the presence of one of the assistants or attendants of the institution. The rule is of uniform application to the 817 inmates of the hospital. The Special Term upon motion ordered the Superintendent of State Prisons and the acting superintendent of this hospital to permit certain attorneys at law, together or any one of them, to confer privately with Mr. Thaw, an inmate of this hospital, in a room to be assigned for that purpose, not oftener than twice a week and not longer than two hours at a time, but not on any day when visitors were excluded by rule of the institution, and denied permission to Mr. Thaw to see his mother without the presence of an attendant.

[1] It is not contended that specific authority is vested in the Supreme Court to make such rules or regulations, or to annul, to abrogate, or to amend them, or that the court is clothed with any right of direct summary review of them. But the court avowedly asserted jurisdiction upon this proposition:

"Thaw was committed to the hospital by this court, which also has the power to discharge him, upon proof that his discharge would not be dangerous to the public peace and safety; and, being thus in the custody and under the control of the court, I think the court has the power to make any order in respect to his treatment while in confinement, not inconsistent with any reasonable rule or regulation of the hospital or the Prison Department of this state."

It seems to me that the rule made by the court is "inconsistent" in that it is contrary and even contradictory to the present rule, which it may be observed provides for interviews with attorneys. Mr. Thaw was not committed by the court in the exercise of its jurisdiction over the person and property of an incompetent by the prescribed procedure therefor but pursuant to section 454 of the Code of Criminal Procedure, and he is held, not as the ward of the court subject to its direction, but by the state itself in its own public institution erected and maintained by the state in the exercise of its prerogative as parens patriæ and as the possessor of the police power. Matter of Thaw, 138 App. Div. 91, 93, 94, 122 N. Y. Supp. 970. He then is the ward of the state, not of the Supreme Court.

It has been pointed out heretofore that our law respecting idiots and insane persons is derived from the law of England in that the care and custody of such persons were a part of the prerogative of the sovereign, and that:

"On our separation from Great Britain at the time of the Revolution, so much of the law as formed a part of the King's prerogative which was applicable under our form of government was vested in the people of the state

and by legislative enactments was transferred to the chancellor," etc. Sporza v. German Savings Bank, 192 N. Y. 8, 84 N. E. 406; Church of Jesus Christ v. United States, 136 U. S. 1, 51, 56, et seq., 10 Sup. Ct. 792, 34 L. Ed. 478; Matter of Thaw, 138 App. Div. 91, 122 N. Y. Supp. 970.

While it is entirely true that the present Constitution of New York, adopted in 1894, continues the Supreme Court "with general jurisdiction in law and in equity," this provision is not to be read as a devolution wholly and exclusively upon the Supreme Court of the prerogative of the state as parens patriæ and of the police power in the premises. The same instrument, by section 11 of article 8, provides that the Legislature shall provide for a state commission in lunacy which *"shall visit and inspect* all institutions, either public or private, used for the care and treatment of the insane"; and section 12 provides for the appointment of the Commission by the Governor by and with the consent of the Senate. The Legislature enacted the Insanity Law providing for such Commission and clothed it with broad powers of visitation and with ample powers to make such visitation both practical and effective. See sections 6, 9, 92, of chapter 32, of the Laws of 1909; In re Thaw, supra, 138 App. Div. 94, 95, 122 N. Y. Supp. 970. And the Legislature has provided, by section 125 of the Insanity Law:

"Communications with Patients. No person not authorized by law or by written permission, from the Superintendent of State Prisons shall visit the Matteawan State Hospital, or communicate with any patient therein without the consent of the medical superintendent; nor without such consent shall any person bring into or convey out of the Matteawan State Hospital any letter or writing to or from any patient; nor shall any letter or writing be delivered to a patient, or if written by a patient, be sent from the Matteawan State Hospital, until the same shall have been examined and read by the medical superintendent or some other officer of the hospital duly authorized by the medical superintendent. But communications addressed by such patient to the county judge or district attorney of the county from which he was sentenced, shall be forwarded, after examination by such medical superintendent, to their destination."

And the rule thus modified by this order, as to a single inmate, was made pursuant to section 111 of the Insanity Law, that provides:

"The superintendent of state prisons, subject to the approval of the State Commission in Lunacy, shall make by-laws and regulations for the government of the hospital and the management of its affairs."

Any confusion may perhaps be cleared away by reference to the law of England, the source of our law. The Crown acquired wardship of the lands and of persons of unsound mind to the exclusion of the lord probably in the reign of Henry III. The jurisdiction of the chancellor rested "upon two bases": First, the share which he took in issuing writs of inquiry into the alleged insanity, the procedure being a part of the common-law jurisdiction of the Court of Chancery; second, the express delegation by the Crown to himself personally. Holdsworth, A History of English Law, p. 242. And, as Holdsworth points out, such delegation could have been made equally to any other great officer of state, and in fact such jurisdiction was exercised by the Court of Wards while in existence. As we have seen, supra, "so much of the law as formed a part of the King's prerogative * * * was

vested in the people of the state," who, "by legislative enactments," transferred it to the chancellor, etc. Sporza v. German Savings Bank, supra. This transference of the prerogative was, like that of the English Crown, an express delegation by our sovereign people to our chancellor personally and could have been transferred to another officer of the state; e. g., the Attorney General. I think, then, that the state has not delegated its prerogative to the Supreme Court in this instance, but in exercise thereof it keeps Thaw in its own custody, and that such custody and the incidents thereof are regulated by the state, acting through its State Commission in Lunacy, its Superintendent of Prisons, and its other specified officers to whom certain powers of administration are specifically delegated by statute. And no power like that exercised in the premises is delegated to the Supreme Court with respect to such administration, nor is that court vested with any visitorial power that enables it to dispense with the rules or to change them in a summary way.

[2] Even conceding that the court had jurisdiction in the premises, yet I think that the order should not stand. For the learned court says in discussion:

"Such a general rule, as I have already said, seems proper and necessary; but it should be relaxed in the case of an inmate who has need of the advice and services of a lawyer."

But then the court proceeds:

"The motion papers do not disclose the exact nature of the legal matters concerning which counsel for Mr. Thaw now desire to consult with him; but it is alleged that they have matters in charge for him besides the question of his discharge from custody; and that it is necessary for them to confer with him in respect thereto."

There is, then, no specific exigency apparent. On the other hand, the affidavit of the acting superintendent of the hospital shows that there are 817 patients in the institution, which is maintained exclusively for the custody of insane persons committed to the institution by courts of criminal jurisdiction or transferred thereto by the State Commission in Lunacy, and that the most dangerous class of insane persons are confined therein. The said affiant further deposes that, before he became acting superintendent, this regulation was relaxed in the case of Mr. Thaw, who was permitted to see privately almost any person who came to see him; and the affiant details episodes with which the observers of current events are more or less familiar, which resulted more or less in matters of "public scandal," to use affiant's own words. And it is his opinion that the activities resulting therefrom have been a great detriment to the proper discipline, welfare, and organization of the institution. And the affiant further points out that private communication with patients would permit the smuggling of dangerous weapons, poisons, or matches into the institution, as experience has shown. He closes his affidavit with these words:

"The complaint of Thaw seems to be that he is made a part of this organization and subjected to the same rules and method of life as the rest of the patients in the institution. To permit one patient such as Thaw to disregard and violate the general rules of the institution governing all the other

inmates and accord him a method of life peculiar to himself would result in the dissolution of the organization, which can scarcely be contemplated."

[3] The order to show cause was addressed only to the Superintendent of State Prisons and the acting superintendent of the hospital; none intervened; and thus it appears that the State Lunacy Commission was not made a party to the proceedings. Aside from every other reason, I think that we might well reverse this order for the omission of the procedure indicated in Matter of Thaw, supra, where this court concluded:

"Under such circumstances I think that the Supreme Court could well, in the exercise of its sound discretion, dismiss any application that rests upon complaint against internal administration upon the ground that there had been no application to the State Commission, which is clothed with full authority in the premises, and therefore that such body had not been afforded opportunity 'to exert its administrative functions.' See Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co., 215 U. S. 493, 30 Sup. Ct. 164, 54 L. Ed. 292; People ex rel. Linton v. B. H. R. R. Co., 172 N. Y. 90, 64 N. E. 788. See, too, People ex rel. Board of Charities v. N. Y. Soc. P. C. C., 161 N. Y. 233, 55 N. E. 1063. My conclusion in no way denies the visitorial power of the Supreme Court."

Inasmuch as I think that the Supreme Court was impuissant in the premises, I advise that the order be reversed, without costs, and the motion be in all respects denied, without costs. All concur.

(159 App. Div. 885)

ZANG v. JOLINE et al.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT.
The weight to be given to plaintiff's testimony, though it was far from satisfactory, was essentially a matter for the jury, with whose verdict the Appellate Division is not disposed to interfere if the evidence, viewed from the standpoint most favorable to plaintiff, supports the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. § 1001.*]

2. STREET RAILROADS (§ 114*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.
In an action for injuries to an infant struck by one of the horses drawing a street car, the mere happening of the accident was not sufficient evidence of negligence, and hence, where the fact that plaintiff was not more seriously injured showed that the driver was not proceeding at an unreasonable rate of speed and that he had his car well under control, a verdict for plaintiff could not be sustained.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239–250; Dec. Dig. § 114.*]

3. APPEAL AND ERROR (§ 294*)—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR A NEW TRIAL.
Where no motion is made to dismiss the complaint, the insufficiency of the evidence to sustain the verdict is brought up upon the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1724, 1725, 1727–1735; Dec. Dig. § 294.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, New York County.

Action by Rosie Zang, an infant, by Tillie Zang, her guardian ad litem, against Adrian H. Joline and another, as receivers of the Metropolitan Street Railway Company. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed, and new trial granted.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Frederick J. Moses, of New York City, for appellants.

John V. Bouvier, of New York City, for respondent.

SCOTT, J. [1] This is an action for damages suffered by the infant plaintiff through being struck and knocked down by one of a team of horses drawing a street car operated by defendant. The character of the testimony offered by plaintiff was far from satisfactory, but the weight to be given to it was essentially a matter for the jury, with whose verdict we should not be disposed to interfere, if the evidence, such as it was, from a standpoint most favorable to the plaintiff, disclosed any culpable negligence on the part of defendant's servant.

[2] It is a well-established rule that the mere happening of the accident is not sufficient to establish negligence, and there is no other evidence thereof in the present case. That the driver of the car was not proceeding at an unreasonable rate of speed, and that he had his car well under control, is very satisfactorily established by the fact that plaintiff was not much more seriously injured.

[3] If a motion had been made for a dismissal of the complaint upon this ground, the court might well have granted it. In the absence of such a motion, the insufficiency of the evidence to sustain the verdict was brought up upon the motion for a new trial, which as we think should have been granted.

Judgment and order appealed from reversed, and new trial granted, with costs to appellant to abide the event. All concur.

(158 App. Div. 916)

In re BRAKER'S ESTATE.

Appeal of FLETCHER.

(Supreme Court, Appellate Division, First Department. October 17, 1913.)

1. APPEAL AND ERROR (§ 373*)—UNDERTAKING ON APPEAL—NECESSITY.

Under Code Civ. Proc. § 2577, providing that, to render a notice of appeal effectual for any purpose, except as provided, appellant must give a written undertaking for payment of costs as provided, the appeal was not effectual where no undertaking was given; the case not coming within any statutory exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2001–2004; Dec. Dig. § 373.*]

2. COURTS (§ 202*)—PROBATE APPEAL—FILING PAPERS.

The surrogate had no authority to relieve from a default in filing the papers on appeal to the Appellate Division.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 480–486; Dec. Dig. § 202.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of the estate of Conrad M. Braker. On motion to dismiss the appeal of one Fletcher. Motion granted.

Argued before Ingraham, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

William P. S. Melvin, of New York City, for the motion.

Frederic W. Frost, of New York City, opposed.

PER CURIAM. [1] No undertaking having been given by appellant, the appeal was not effective under section 2577 of the Code of Civil Procedure. Appellant was also in default for failing to file or serve papers upon which appeal was based. The answer is that the attorneys were acting under the advice and direction of a Philadelphia lawyer, and motion was made before the surrogate to open the default.

[2] The surrogate has no authority over default in filing of papers on appeal to this court; and, no excuse having been given for failure to file the printed papers on appeal, the motion is granted.

(158 App. Div. 916)

In re BRAKER'S ESTATE.

Appeal of FLETCHER.

(Supreme Court, Appellate Division, First Department. October 17, 1913.)

1. COURTS (§ 202*)—PROBATE APPEAL—SERVING PAPERS—OPENING DEFAULT.
The surrogate has no authority to open a default in serving printed papers on appeal to the Appellate Division.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 480–486; Dec. Dig. § 202.*]

2. APPEAL AND ERROR (§ 633*)—DISMISSAL OF APPEAL—GROUNDS.
In the absence of a valid reason why the printed papers on appeal to the Appellate Division were not filed and served, a motion to dismiss the appeal will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2772–2774; Dec. Dig. § 633.*]

In the matter of the estate of Conrad Braker. On motion to dismiss Fletcher's appeal. Motion granted.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

William P. S. Melvin, of New York City, for the motion.

Frederic W. Frost, of New York City, opposed.

PER CURIAM. [1] The surrogate has no authority to open a default in serving printed papers on appeal to this court. The question whether the default is to be enforced, and whether appellant is to be given more time to file and serve printed papers and perfect the appeal, is for this court.

[2] As no reason is given why the printed papers were not filed, the motion to dismiss the appeal is granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(158 App. Div. 577.)

PEOPLE v. SHEARS.

(Supreme Court, Appellate Division, Second Department. October 10, 1913.)

1. EMBEZZLEMENT (§ 18*)—BY TRUSTEE—DEFENSES—INTENTION TO RETURN.
While it was not larceny at common law, and a criminal intent is necessary to render the conversion of trust property by the trustee larceny, under Penal Law (Consol. Laws 1909, c. 40) § 1302, providing that a person acting as a trustee, etc., who appropriates to his own use or that of another any money or other valuables is guilty of larceny, it is no defense to a prosecution for larceny under the statute to show that the accused had a concurrent intention of returning the property at some future time, after he had enjoyed the use thereof; for the conscious violation of the statute constituted a crime.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 20; Dec. Dig. § 18.*]

2. EMBEZZLEMENT (§ 23*)—DEFENSES—RESTITUTION.
Under Penal Law (Consol. Laws 1909, c. 40) § 1302, providing that the fact that the defendant intended to restore the property stolen is no ground of defense or mitigation if it has not been restored before complaint is made, the restitution before the making of the complaint is no defense to a prosecution for larceny by a trustee where the offense had been completely consummated; the statute merely declaring the common law.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 31–35½; Dec. Dig. § 23.*]

Appeal from Trial Term, Kings County.

Broc R. Shears was convicted of larceny, and he appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Robert H. Elder, of New York City, for appellant.

Edward A. Freshman, Asst. Dist. Atty., of Brooklyn (James C. Cropsey, Dist. Atty., and Hersey Egginton, Asst. Dist. Atty., both of Brooklyn, on the brief), for the People.

CARR, J. The defendant has been convicted in the Supreme Court in Kings county of the crime of grand larceny in the first degree. From the judgment of conviction he has appealed to this court.

The question now involved is wholly one of law. For a correct understanding of the contention of the appellant, a brief consideration of the facts proved at the trial is necessary. The defendant and two others, Thomas F. Martin and Hermann H. Lucke, were appointed by the Supreme Court in Nassau county as trustees for the benefit of the creditors and stockholders of the Hollis Park Company, a corporation which had been dissolved voluntarily under section 57 of the Stock Corporation Law.† This corporation had considerable money on deposit to its credit with a banking corporation known as the Borough Bank, in the borough of Brooklyn. The Borough Bank had been taken over by the Banking Department of the State of New York and was undergoing liquidation. On October 2, 1911, the Superintendent of Banks drew his check for $3,334.44 to order of "Thos. F. Martin, and others, trustees Hollis Park Co." This check was in part payment of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Consol. Laws 1909, c. 59.

the amount on deposit with said bank to the credit of the Hollis Park Company. It came into the possession of the defendant as one of said trustees. He took it to his fellow trustees, and all three of them indorsed it under an express mutual agreement that the defendant should take it to the Mechanics' Bank in the borough of Brooklyn and deposit it to the credit of the trustees of the Hollis Park Company, in an account then to be opened in favor of said trustees. The defendant took the check, so indorsed, and deposited it with the Mechanics' Bank to the credit of a corporation known as the Crescent Mortgage Company, of which he was the president. This latter corporation had no connection whatever with the Hollis Park Company or its trustees. It had an account with the Mechanics' Bank, which had been practically exhausted at the time of the deposit to its credit of the trustees' check, and within a short time thereafter practically all the proceeds of said check were drawn out and expended in the purposes of said Crescent Mortgage Company.

On October 6, 1912, the defendant, as president of the Crescent Mortgage Company, drew a check for $334.44 to the "order of ourselves." He indorsed this check in the name of said corporation and deposited it in the Mechanics' Bank to the credit of "Thomas F. Martin, Hermann H. Lucke & Broc R. Shears Trustees Hollis Park Gardens." This was the first act on his part to apply any portion of the proceeds of the original check to the purposes for which he had received and held it as a trustee. On making this deposit, he received from the Mechanics' Bank a passbook showing the account between it and the trustees of the Hollis Park Company. This passbook contained as its first entry an item as follows: 1911, Oct. 7, "B. 334.44." The defendant changed this entry by inserting an additional figure "3," so that the entry appeared to read "3,334.44." He thereafter exhibited the passbook, with the false entry, to his fellow trustees, and thus misled them as to his conduct and induced them to believe that the original check to their order had been deposited to their credit as trustees of the Hollis Park Company. It happened that the Borough Bank Company was interested largely in the Hollis Park Company, and the State Banking Department had occasion to inquire as to the disposition of the proceeds of the original check. In making such inquiry the facts above briefly outlined were discovered. The defendant was threatened with criminal proceedings and his two brothers came to his aid and raised moneys by which restitution was made as to the proceeds of the original check, with interest on the sum diverted. This restitution was made before the beginning of any criminal proceedings.

[1] The defense consisted of evidence as to the defendant's previous good reputation and of testimony by the defendant's brothers that at or about the time of the diversion of the original check he had been endeavoring to procure an advance of a considerable sum of money from his father and had expected to secure it. At various stages of the trial, the learned counsel for the defendant attempted to secure from the trial court a ruling that if the defendant, when he diverted the check which he received as trustee, had an intent of making subsequent restoration, reparation, or restitution of the proceeds thereof, he could not be convicted of larceny, because under such circumstances

there was an absence of criminal intent, and hence no larceny. The learned trial court repeatedly refused so to rule, and numerous exceptions were taken by the defendant's counsel. The defendant himself gave no testimony. In considering the point presented by the appellant, we shall assume that there was sufficient evidence from which the jury might infer that the defendant had a present intention of making future restitution at the time he misapplied the check. According to the proofs, he had then no present ability to make reparation or restitution, and his intention, if such he had, was based upon simple hope or expectation. Every act he did in connection with the misapplication of the check was conscious, deliberate, and apparently with full knowledge that he was acting illegally. There was no mistaken but honest claim of right on his part. His act in making a false entry in the passbook and exhibiting it to his fellow trustees so characterizes his conduct as to require no comment.

It is true that at common law and under our Penal Code and the present Penal Law, a criminal intent is essential to the crime of larceny. Our books are full of cases in which this rule has been declared and applied under varying circumstances, some of which, to say the least, are quite curious, and in the short space of a judicial opinion it would be an impossible task to summarize or classify these precedents. It may be pointed out, however, that the acts of the defendant were not larceny at common law and not cognizable in a criminal prosecution. The underlying concept of larceny at common law was an initial trespass and trover. Where there was no trespass there was no larceny, though trespass and trover in themselves were not necessarily larceny. 3 Pollock & Maitland, 398; 3 Holdsworth, 286; 3 Stephen's History of the Criminal Law, 121 et seq. The defendant's conduct amounted to what was known formerly as "a criminal breach of trust," and until quite recent times was cognizable only in a court of equity and punishable only as contempt of court, where restitution was not made in obedience to a judgment so decreeing. 3 Stephen's History of Criminal Law, 129. Nor did the defendant's act come within the scope of the early statutes creating the crime of embezzlement, which statutes were enacted to meet some of the deficiencies of the common-law rules as to larceny.

In the case at bar, the misappropriation of the original check was to use of another, i. e., the Crescent Mortgage Company. This would not have constituted embezzlement under the definition of section 59, art. 5, tit. 3, pt. 4, of the Revised Statutes. In 1874 this statute was amended by chapter 207 of the Laws of that year in such manner that a misappropriation of property to the use of another by certain defined persons was made the crime of embezzlement. Even in this act, there was an omission of a great number of individuals who might obtain possession of property in a fiduciary capacity and subsequently misappropriate it fraudulently, for example executors, administrators, guardians, and trustees of express trusts. However, in 1877, by chapter 208 of the Laws of that year, a fraudulent misappropriation of property by such persons was declared to constitute the crime of embezzlement, and was made punishable by a fine and imprisonment to enforce payment of the fine. In 1881, the Penal

Code was enacted, and the previous statutory provisions on this subject as applicable to this case were recast and enacted in section 541 thereof, which now appears as section 1302 of the Penal Law, and which provides in part as follows:

"A person acting as executor, administrator, committee, guardian, receiver, collector or trustee of any description, appointed by a deed, will, or other instrument, or by an order or judgment of a court or officer, who secretes, withholds, or otherwise appropriates to his own use, or that of any person other than the true owner, or person entitled thereto, any money, goods, thing in action, security, evidence of debt or of property, or other valuable thing, or any proceeds thereof, in his possession or custody by virtue of his office, employment, or appointment, is guilty of grand or petit larceny in such degree as is herein prescribed, with reference to the amount of such property," etc.

Of course, this statute requires, as an element of criminality in its violation, a conscious and willful intent to disregard its prohibitions. Where, however, such intent exists, its criminality is in no way lessened by the fact that with the conscious intent to violate this statute there went at the same time an intent to make future restitution after such violation. If such were the case, the statute might just as well have never been enacted, for it would have been practically useless to prevent the evils at which it was aimed. We are of opinion that the learned trial court committed no error in its rulings on this point, and that the question of the defendant's guilt, under the proofs presented at the trial and hereinabove recited, was in no way affected by the existence of any concurrent intent of future restitution, when he consciously and deliberately did the act prohibited by the statute, for it is indisputable that he then and there intended knowingly to do an unlawful act at that moment, whatever he may have intended to do at some future time by way of reparation or restitution if he should be able.

[2] The learned trial court, however, granted the defendant a "certificate of reasonable doubt," which stayed the execution of the judgment of conviction. This certificate was granted apparently because of a question as to the proper interpretation of section 1307 of the Penal Law, which was formerly section 549 of the Penal Code. This statute reads as follows:

"The fact that the defendant intended to restore the property stolen or embezzled, is no ground of defense, or of mitigation of punishment, if it has not been restored before complaint to a magistrate, charging the commission of the crime."

This provision appeared in our statutes for the first time in 1881, as section 549 of the Penal Code. As then enacted, and as it now stands, it is almost a literal transcript of section 609 of the draft proposed Penal Code submitted to the Legislature in 1865, where it was proposed in relation to the then statutory crime of "embezzlement." It has been construed infrequently. In Parr v. Loder, 97 App. Div. 218, 221, 89 N. Y. Supp. 823, it was said to be "rather a declaration than a departure in the criminal law," where it was always well settled that if a crime had been committed in the taking, or misappropriation, a subsequent restoration of the property did not constitute a defense.

Nor does the learned counsel for the defendant so contend. Undeniably, if the defendant had actually committed larceny, the fact that he or his brothers subsequently made restitution, on the discovery of the offense but before criminal proceedings, in no way purged the act of its criminal character, either before or since the enactment of this statutory provision. The only real dispute involved in this appeal arises from the question hereinbefore discussed, whether the defendant escaped criminality in his conduct by accompanying his willful, conscious, and deliberate violation of the statute with a secret intent, based upon hope or expectation, of making restitution some time thereafter, either before or after discovery of his offense.

If the existence of an intent to make subsequent restitution purged the defendant's acts of criminality, then the trial court erred in the theory on which it submitted the case to the jury. But, as we have said above, we do not deem the presence of such intention a legal defense available to the defendant under the indictment and proofs in this case. It must be admitted that there are many precedents, especially among early English cases, from which the appellant has sought support for his contention; but each of these cases must be considered in the light of its own facts. They are not susceptible of such generalization of rule as the appellant asserts. It is true enough that in many cases there are declarations that to constitute a criminal intent to commit common-law larceny and even statutory embezzlement there must have been an intent to deprive the true owner of his property "permanently." But this did not mean that a concurrent intent to make restitution some time or some how thereafter purged a deliberately unlawful taking and misappropriation of criminality. The defendant by misappropriating and diverting this check consumed it entirely. He could not thereafter restore it as property because it would have been then but a valueless piece of paper. His act deprived the owners of this check of their property "permanently" enough, and he was indicted for unlawful and intentional misapplication of the check itself.

We think the judgment of conviction should be affirmed. All concur.

(159 App. Div. 102)

In re LEASK et al.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. TRUSTS (§ 331*)—ACCOUNTING BY TRUSTEE—CONCLUSIVENESS.
A surrogate's decree, approving an account filed by testamentary trustees, in which they credited the stock dividend as capital held for the benefit of remaindermen, was conclusive on the owners of such stock, where there was no objection to the account by the life tenants.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 494; Dec. Dig. § 331.*]

2. TRUSTS (§ 272*)—STOCK DIVIDENDS—INCOME.
The stockholders of a corporation adopted a resolution reciting that the value of the assets exceeded the par value of the capital stock in the sum stated, and resolving that, for the purpose of representing in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

capitalization existing surplus assets to that extent, the capital stock was thereby increased to that amount, and that the directors were authorized to distribute the stock pro rata to stockholders. *Held*, that presumptively all dividends, whether paid in cash or in stock, are income so as to belong to the life tenant, and the resolution of the stockholders did not rebut such presumption.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 383–385; Dec. Dig. § 272.*]

Appeal from Surrogate's Court, New York County.

Judicial settlement of the accounts of George Leask and others, as trustees under the will of Hudson Hoagland. From a decree settling the account (142 N. Y. Supp. 462), certain of the beneficiaries appeal. Modified and affirmed.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

James Gillin, of New York City, for appellants Laura Hoagland and Mary E. McCarty.

Henry W. Baird, of New York City, for appellant Charles F. Hoagland.

Thomas S. Ormiston, of New York City, for appellant Mary F. Rose.

J. Hampden Dougherty and William H. Hamilton, both of New York City, for respondents.

HOTCHKISS, J. In December, 1906, the Pullman Company declared a stock dividend, in pursuance of which the trustees came into possession of certain shares of that company. Thereafter the trustees filed with the surrogate an account in which they credited as capital, held for the benefit of remaindermen, the shares so received. No objection was made to this account by any of the parties representing the life interests, and a decree was passed approving the account as filed. Thereafter, in March, 1910, the Pullman Company distributed among its stockholders a further stock dividend, in pursuance of which the trustees received additional shares. In their account, upon which the decree was made which gives rise to this appeal, the trustees credited these additional shares to the remaindermen, following the same course they had pursued with respect to the shares received in pursuance of the 1906 dividend. To this last account, the appellants, representing various life interests, filed exceptions, by virtue of which they claim all of the shares received by the trustees from both of the aforesaid stock dividends. The issues were sent to a referee, who held that the stock resulting from both dividends should be treated as income belonging to the representatives of the life interests, and that the latter were not estopped by the decree on the former accounting, but were entitled to raise the question of the proper disposition of the shares received as the result of the 1906 dividend. The learned surrogate refused to confirm the report, holding: (1) That the decree upon the former accounting was binding so far as it related to the 1906 dividend, and as to that dividend only; and (2) that the evidence

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with respect to the 1910 dividend was prima facie sufficient to justify a holding that such dividend was capital, and that the burden lay upon the life interests to prove to the contrary, a burden which they had not sustained.

[1] So far as the former accounting is concerned, there is no doubt that the learned surrogate was right. Matter of Bannin, 142 App. Div. 436, 127 N. Y. Supp. 92. But we do not agree with his conclusions with respect to 1910 dividend.

[2] Presumptively, all dividends, whether paid in cash or in stock, are income. The only evidence with respect to the circumstances under which the dividend of 1910 was declared is the following statement appearing in one of the schedules attached to the account filed by the trustees:

"On March 21, 1910, the stockholders of the Pullman Company adopted the following resolution: Whereas, the value of the assets of this company exceeds the par value of the capital stock by more than twenty million dollars: Resolved, that for the purpose of representing in the capitalization of this company existing surplus assets to the extent of twenty million dollars, the capital stock of the company is hereby increased * * * to the amount of twenty million dollars, and * * * that the directors be authorized to distribute said twenty million dollars capital stock pro rata, to stockholders of the company," etc.

There is nothing in this resolution to indicate from what source the surplus assets of the company, represented by the dividend, were derived, and nothing to rebut the presumption that such surplus represented an accumulation of earnings or profits. In this situation, the stock dividend prima facie belonged to the life interests (Lowry v. Farmers' Loan & Trust Co., 172 N. Y. 137, 64 N. E. 796), and the burden was upon the trustees to prove to the contrary before they could properly include the shares in their account under the head of capital.

The decree appealed from should be modified so far as it sustained the objections to the referee's report relating to the stock dividend of 1910, and the referee's report as to such dividend confirmed. If, however, the executors desire to take testimony as to the source from which the assets representing such dividend were derived, a referee will be appointed for that purpose, and the entry of the final order reserved until the coming in of the report.

As to the dividend of 1906, the decree should be affirmed, without costs to either party. All concur.

(82 Misc. Rep. 243.)

HILDRETH GRANITE CO. v. CITY OF WATERVLIET et al.

(Supreme Court, Special Term, Albany County. September, 1913.)

BANKRUPTCY (§ 192*)—LIEN—ENFORCEMENT AGAINST TRUSTEE.

A lien for materials furnished to a contractor and used by him in the paving of a public street is not enforceable against the fund, under Bankr. Act July 1, 1898, c. 541, § 47a, subd. 2, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(U. S. Comp. St. Supp. 1911, p. 1500), as against his trustee in bankruptcy, who was appointed prior to the filing of the lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 294; Dec. Dig. § 192.*]

Action by the Hildreth Granite Company against the City of Watervliet and others. On motion to dismiss complaint. Granted.

Lester T. Hubbard, of Albany, for plaintiff.

Clark Cipperly, of Troy (Thomas S. Fagan, of counsel), for defendant Nolan.

John H. McMahon, of Watervliet (Thomas S. Fagan, of counsel), for defendant Claessens.

J. A. Cipperly, of Troy (Thomas S. Fagan, of counsel), for defendant United States Fidelity & Guaranty Company.

RUDD, J. The defendants move for the dismissal of the complaint.

The plaintiff seeks the foreclosure of a mechanic's lien. Notice of lien was filed January 13, 1913. The lien is for material furnished defendant Nolan, a contractor, and used by him in the pavement of a street in the city of Watervliet. Two days before the lien was filed the defendant Nolan was adjudged a bankrupt and defendant Claessens was appointed trustee. These facts are alleged in the complaint.

Upon the complaint the defendants move for a dismissal, upon the ground that the complaint does not set forth a cause of action, for the reason that, the trustee in bankruptcy having been appointed before the filing of the lien, such appointment destroys the preference which would otherwise attach under the lien. The United States Bankruptcy Law (section 47, cl. 2, subd. "a") reads as follows:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

This provision of the Bankruptcy Law is an amendment which became effective June 25, 1910. Prior to this amendment it is admitted by the parties hereto that the courts had held, and that it was the law, that a trustee in bankruptcy did not acquire priority over one furnishing material who had a right under the law to file a mechanic's lien, holding in effect that the trustee had no greater right than the bankrupt and that the trustee stood in the place of the bankrupt, so far as rights and equities of creditors were concerned. One of the cases holding to this effect was York Mfg. Co. v. Cassell, 201 U. S. 344–352, 26 Sup. Ct. 481, 50 L. Ed. 782. In the amendment, however, which is above quoted, the law is different, and decisions of the court have been made in accordance with the law as amended.

It seems, too, that the amendment was enacted for the purpose of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

changing the statute law, so as to modify the law as set forth in the York Manufacturing Co. Case. The court has well said:

"In the disposition of property among creditors, equality is equity. It was the genius and purpose of the statute to secure this result as far as possible from the moment its aid was invoked, whether by debtor or creditor."

The writers upon the Bankruptcy Law seem to agree upon the effect of the amendment of 1910 that it was intended to change the law as laid down by the courts, and that it was intended to overcome the decision of the court in the York Manufacturing Co. Case. While it is true that prior to the filing of the lien the materialman had an inchoate right of lien, it was not effective and did not become a lien until the filing of the same, and the Bankruptcy Law gives effect to the state law only to the extent of making effective existing liens.

The court's attention is called to a decision (Matter of Interstate Paving Co., 197 Fed. 371) of the United States District Court in the Northern District of New York, made by Judge Ray in June, 1912, as one made subsequently to the amendment under discussion, and as authority for the contention of plaintiff here. Even in that case Judge Ray, referring to the matter of an assignment for the benefit of creditors, says:

"The title to these moneys passed to the assignee of the Interstate Paving Company as against all creditors who had no right to file a lien, and as against those who had such right, but failed to do so."

Upon the face of the complaint there does not seem to be set forth a cause of action. The lien cannot be enforced as against the trustee in bankruptcy.

The motion of the defendants to dismiss the complaint, with costs, is granted.

Motion granted.

(159 App. Div. 883)

REILLY v. FRIAS et al.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

INJUNCTION (§ 162*)—INJUNCTION PENDENTE LITE.

Where an injunction was granted restraining plaintiff from doing certain acts pendente lite, plaintiff should be given leave to renew the motion to vacate the injunction, if defendant interposed unreasonable delay to the trial of the action.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 348; Dec. Dig. § 162.*]

Appeal from Special Term, New York County.

Action by Hugh J. Reilly against Jose Antonio Frias and another. From an order granting an injunction pendente lite, plaintiff appeals. Affirmed as modified.

See, also, 143 N. Y. Supp. 1141.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John J. Buckley, of New York City (Ralph Stout, of New York City, of counsel), for appellant.

Smith, Gormly & Salomon, of New York City (W. T. Jerome, of New York City, of counsel), for respondents.

PER CURIAM. This court cannot undertake to decide the disputed questions of fact upon the hopelessly contradictory affidavits contained in this record. As those are the very matters put in issue by the complaint, counterclaim, and reply, an injunction pendente lite preserving the status quo seems authorized.

We think, however, that the bond required of the defendant Latin American Contracting & Improvement Company should be increased to $5,000, and that the plaintiff should have leave to renew the motion to vacate the injunction if the defendants interpose unreasonable delay to the trial of the action.

The order appealed from should be modified accordingly, and, as so modified, affirmed, without costs in this court to either party. Settle order on notice.

(158 App. Div. 697)

In re SALANT.

SANDLER v. SHEBAR et al.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. ATTORNEY AND CLIENT (§ 189*)—COMPENSATION AND LIEN OF ATTORNEY.
A written retainer, by which a client agreed to pay his attorney 30 per cent. of all moneys realized either by settlement or suit, did not make the attorney the equitable assignee of that much of the client's cause of action, but, under the express provisions of Judiciary Law (Consol. Laws 1909, c. 30) § 475, he had a lien upon his client's cause of action which attached to a judgment and could not be affected by any settlement between the parties.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 407–411; Dec. Dig. § 189.*]

2. ATTORNEY AND CLIENT (§ 189*)—LIEN OF ATTORNEY.
As between attorney and client, even after judgment the client still retains the right to satisfy a judgment for less than its face, providing he acts fairly and in good faith, and in reasonable apprehension that the defendant might become insolvent, or that the judgment might be reversed on appeal.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 407–411; Dec. Dig. § 189.*]

3. ATTORNEY AND CLIENT (§ 190*)—COMPENSATION AND LIEN OF ATTORNEY.
In such a case, as between attorney and client, the burden is on the client to justify his action in settling.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412–417; Dec. Dig. § 190.*]

4. ATTORNEY AND CLIENT (§ 190*)—LIEN—ENFORCEMENT.
The summary proceedings for the determination and enforcement of an attorney's lien authorized by Judiciary Law (Consol. Laws 1909, c. 30) § 475, is applicable only to disputes between attorney and client, and, where the attorney sought to enforce his lien against a third party, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

question whether the client acted fairly and in good faith in compromising could not be determined.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412–417; Dec. Dig. § 190.*]

Appeal from Special Term, New York County.

Proceedings against Abraham Shebar and another, by Henry Salant, an attorney, to have an attorney's lien determined and enforced upon the judgment of David Sandler against Abraham Shebar and Henry Klein. From an order vacating the satisfaction of the judgment, defendants appeal. Modified and affirmed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Charles L. Meckenberg, of Brooklyn, for appellants.

Henry Salant, of New York City, in pro. per.

SCOTT, J. [1] The respondent was retained by plaintiff to prosecute a claim for commissions against the defendants. Suit was begun and a judgment entered in favor of the plaintiff for $1,264.83, which included $181.85 costs. Respondent was employed under a written retainer by which plaintiff agreed to pay him "thirty per cent. of any and all moneys realized in such proceedings either by way of settlement or suit." The defendants appealed from the judgment, but do not seem to have prosecuted their appeal with much vigor. Some time after the entry of the judgment, plaintiff and defendants came to an agreement to settle the matter by payment of $650 to the plaintiff, of which 30 per cent., or $195, was set apart to be paid to respondent. Thereupon plaintiff executed a satisfaction piece which was duly filed and the judgment satisfied of record. The respondent appears to claim that by virtue of his contract with plaintiff he became, as he expresses it, the "equitable assignee" of so much of the judgment as amounts to his agreed fee. Although this expression is to be found in some of the reported cases, we do not consider that it accurately states the nature of the attorney's interest in the judgment. The language of the statute is that the attorney "has a lien upon his client's cause of action which attaches to a judgment and which cannot be affected by any settlement between the parties." Judiciary Law (Consol. Laws 1909, c. 30) § 475. The respondent's position therefore is that he had a lien upon the judgment which the parties could not destroy by any settlement. The order appealed from was therefore clearly right in so far as it vacated the satisfaction of judgment. A more serious question is presented by that portion of the order appealed from which permits the respondent to issue execution for $506.75. This sum represents not only 30 per cent. of the amount recovered as damages, but also the whole amount of costs included in the judgment. This is considerably more than the attorney would be entitled to under his written retainer, and is attempted to be justified by his statement that in addition to the written retainer he had a verbal agreement as to his right to the costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2, 3] If there was no doubt as to the amount due to the attorney, the order appealed from would find justification in Peri v. N. Y. C. & H. R. R. Co., 152 N. Y. 521, 46 N. E. 849. There is, however, a doubt not only as to the alleged oral agreement as to costs, but also as to the amount due to the attorney under his written retainer. The terms of that agreement were that he should be entitled to a percentage of any and all moneys "realized" in such proceeding either by way of settlement or suit. The amount "realized" here was $650, and if the settlement was fair and honest it would seem that the attorney's recovery ought to be limited to a percentage of that sum. It is claimed by the respondent, and there are expressions to be found in some reported cases to support the claim, that while a party may settle a claim for less than the amount claimed without his attorney's consent before judgment, providing the settlement be fair, yet after judgment the right of the attorney to an agreed percentage of the judgment, if he has an agreement for a percentage, is absolutely fixed, and if the owner of the judgment accepts less than the face thereof, even in good faith and to save a possible loss of all, the attorney is entitled to a lien, based upon the face value of the judgment. We are not prepared to go to that length, but should be disposed to hold that even after judgment the client still retains the right to satisfy a judgment for less than its face, providing he acts fairly and in good faith, and in reasonable apprehension that the defendant might become insolvent or that the judgment might be reversed on appeal. In such a case, however, it would clearly rest upon the client to bear the burden of justifying his action in settling.

[4] In the present case, however, the question does not arise. The form of the retainer to which we have already referred left the amount of the attorney's compensation to be determined by the sum "realized," and if the amount of $650, which was the amount realized, was fairly arrived at, it is that sum on which the attorney's fee must be estimated. This question cannot be summarily determined as between the attorney and the defendants who were not his clients. The summary proceeding authorized by section 475 of the Judiciary Law is applicable only to disputes between attorney and client. If the attorney seeks to enforce his lien against a third party, except when the amount due is beyond dispute, he must proceed to foreclose his lien otherwise. Pilkington v. Brooklyn Heights R. Co., 49 App. Div. 22, 63 N. Y. Supp. 211; In re Evan's Will, 58 App. Div. 502, 69 N. Y. Supp. 482; Rochfort v. Met. R. Co., 50 App. Div. 261, 63 N. Y. Supp. 1036.

It follows that the order appealed from must be so far modified as to strike out the provision authorizing the respondent to issue execution for the sum of $506.66, and as so modified affirmed, without costs to either party. All concur.

(158 App. Div. 828)

MOORE v. DE GROOTE.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. WILLS (§ 704*)—CONSTRUCTION—JURISDICTION—SURROGATE'S COURT.
The Surrogate's Court has jurisdiction to determine, in a suit to construe a will, as to how the residuary estate should be divided between the residuary legatees.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1680, 1681; Dec. Dig. § 704.*]

2. COURTS (§ 472*)—JURISDICTION—SURROGATE'S COURT.
When complete relief can be obtained in the Surrogate's Court, the Supreme Court will refuse to take cognizance of an action, and, before it will assume jurisdiction, the complaint must allege facts showing that adequate relief can only be obtained in the Supreme Court.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 442, 451, 459, 465, 619, 1199–1202, 1204–1224, 1247–1259; Dec. Dig. § 472.*]

3. APPEARANCE (§ 8*)—INEFFECTIVE DEMURRER.
A demurrer to the complaint, though insufficient as a demurrer, was good as an appearance by defendant.
[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 23–41; Dec. Dig. § 8.*]

4. WILLS (§ 702*)—ACTION TO CONSTRUE—JUDGMENT—APPLICATION.
Since judgment construing a will and determining how the residuary estate should be divided could only be taken upon application to the court, defendant was entitled to be heard upon such application on the questions whether the court had jurisdiction, and, if it had, whether it should exercise it, which were raised by its demurrer to the complaint, even if the demurrer was bad as such.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1679; Dec. Dig. § 702.*]

Appeal from Special Term, New York County.

Action by Elizabeth A. Moore, individually and as executrix of Albert H. Moore, against Kittie P. De Groote, individually and as executrix of Albert H. Moore. From an order overruling a demurrer to the complaint and awarding judgment for plaintiff, defendant appeals. Reversed and motion denied, and judgment directed dismissing the complaint.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Edwin L. Kalish, of New York City, for appellant.
John M. Gardner, of New York City, for respondent.

SCOTT, J. The controversy is between the two executrices of the last will and testament of Albert H. Moore, deceased, and the complaint is addressed to the equitable side of the court, asking a construction of said will. The plaintiff and defendant, besides being coexecutrices, are colegatees of the residuary estate. The will contains no trust provisions and relates only to personal property.

[1] The question which perplexes the plaintiff is as to how the residuary estate should be divided, when the time for division arrives,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

between the two residuary legatees—a question well within the competency of the Surrogate's Court to determine and which should be left to the determination of that tribunal.

[2] The rule is of quite general application that, when complete relief can be obtained in the Surrogate's Court, the Supreme Court will refuse to take cognizance of an action, and that, before it will do so, facts must be set out in the complaint sufficient to show that adequate relief cannot be obtained except in the Supreme Court. Pyle v. Pyle, 137 App. Div. 571, 122 N. Y. Supp. 256. No such facts are alleged in the present complaint.

[3, 4] The demurrer was to the jurisdiction of the court, as well as that the complaint stated no facts sufficient to constitute a cause of action, and it is urged that this demurrer is bad because the Supreme Court has jurisdiction of the action if it sees fit to exercise it. This may be true, but the pleading, if insufficient as a demurrer, was good as an appearance, and the case was one in which judgment could not be taken except upon application to the court, and upon that application the defendant was entitled to be heard, and to argue either that the court had no jurisdiction or, if it had, that it should not exercise it. For the reasons above stated the plaintiff's application for judgment should have been denied.

The order appealed from must therefore be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs, and judgment directed for the defendant dismissing the complaint, with costs. All concur.

(158 App. Div. 723)

EVERALL v. STEVENS et al.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. JUDGMENT (§ 890*)—SATISFACTION—ARREST OF DEBTOR.
   All other remedies against a debtor held in execution are suspended while the imprisonment continues.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1689–1701; Dec. Dig. § 890.*]

2. JUDGMENT (§ 890*)—SATISFACTION—EFFECT OF ARREST OF DEBTOR.
   Where one of two partners was arrested on execution under a judgment against both for a firm debt, all remedies against any property in which the imprisoned debtor had an interest, including partnership property, were suspended during the imprisonment, and the other partner could not be examined in supplementary proceedings even to discover his individual property, since his individual liability would only arise after the partnership assets had been exhausted or proven insufficient.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1689–1701; Dec. Dig. § 890.*]

3. PARTNERSHIP (§ 187*)—LIABILITY OF PARTNERS TO THIRD PERSONS—EXHAUSTING PARTNERSHIP ASSETS.
   The several liability of a partner and the obligation to apply his individual property to the payment of a partnership debt attaches only after the partnership assets have been exhausted or proven insufficient.
   [Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 340, 342; Dec. Dig. § 187.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Action by Emma Carus Everall against W. Lewis Stevens and James W. Henning. From an order refusing to vacate an order for his examination in supplementary proceedings, the defendant Henning appeals. Order modified.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles T. Payne, of New York City, for appellant.

Gerald B. Rosenheim, of New York City, for respondent.

SCOTT, J. This action was begun by the service of the summons and complaint upon the defendant James W. Henning on April 24, 1912. The defendant W. Lewis Stevens voluntarily appeared herein on May 20, 1912. Issue was joined by the service of the answer of said defendants on June 10, 1912. On March 11, 1913, upon the consent of the said defendants, a judgment was entered in favor of the plaintiff and against the said defendants for the sum of $2,234.88. Execution upon said judgment against the property of said defendants was, on March 28, 1913, issued to the sheriff of the county of New York and was returned unsatisfied by him. Thereafter execution against the person of both defendants was, on April 16, 1913, issued to the sheriff of the county of New York. The defendant W. Lewis Stevens was arrested by the sheriff of the county of New York on April 18, 1913, and has since been in his custody. The defendant James W. Henning was not arrested and is not and has not been in custody.

[1] On April 29, 1913, an order was made for the examination of both defendants in supplementary proceedings. On May 6, 1913, an order to show cause why the aforesaid order should not be vacated was granted. On June 23, 1913, this motion was granted to the extent of vacating the original order for examination with respect to the defendant W. Lewis Stevens, but refusing to vacate it with respect to the defendant James W. Henning and directing that the said Henning appear for examination. From said last-mentioned order the defendant James W. Henning now appeals. The defendants were copartners and are sued as such. The question is whether the arrest upon execution of one of two joint and several judgment debtors suspends all other remedies against both. It is certain, and it is conceded, that as to the debtor held in execution all other remedies are suspended while the imprisonment continues. Koenig v. Steckel, 58 N. Y. 475.

[2] We think that they are also suspended as to all property in which the imprisoned debtor has an interest, as for instance copartnership property, for to permit the creditor to reach copartnership property by proceedings against the debtor not held in execution would in effect authorize proceedings against the imprisoned debtor's property and thus do by indirection what may not be done directly.

[3] It is urged, however, that notwithstanding the imprisoned debtor may not be proceeded against in supplementary proceedings, and assuming that because of his imprisonment such proceedings may not

be prosecuted to discover copartnership property, still the proceedings may be continued for the purpose of discovering the individual property of the nonimprisoned debtor and compelling its application to the payment of the judgment debt for which he is severally as well as jointly liable. This suggestion, however, loses sight of the fact that the several liability of a copartner and the obligation to apply his individual property to the payment of a copartnership debt attach only after the copartnership assets have been exhausted or have proven insufficient to pay the debt. If therefore, for the reasons above stated, recourse cannot be had to the copartnership assets while one copartner is held in execution, the condition cannot arise or be created in which it would be permissible to resort to the individual property of any one of the copartners even if he were not the one held in execution.

The motion to vacate the order for the examination of the defendants should therefore have been vacated in toto, and the order appealed from will be modified accordingly, with $10 costs and disbursements to the appellant. All concur.

(158 App. Div. 704)

HUTCHINSON v. SPERRY.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. PARTNERSHIP (§ 336*) — ACTION FOR ACCOUNTING — SUFFICIENCY OF EVIDENCE.

In an action by a member of a partnership for an accounting, evidence *held* insufficient to show that the partnership, when it assigned all its business in certain states to a corporation, was carrying on business in states other than those covered by the assignment, with the exception of one state, the business in which it shortly thereafter disposed of.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. § 336.*]

2. PARTNERSHIP (§ 263*)—DISSOLUTION—ACTS CONSTITUTING.

Where a partner not only ceased to take an active part in the business and withdrew himself from all participation in its affairs, but united with his copartner in forming a corporation to take over the partnership business and in transferring to it all the assets and business of the partnership, and for ten years never performed any act or made any claim indicating that he considered the partnership to be still alive, the partnership would be treated as having been dissolved when its last remaining asset was disposed of, notwithstanding the general rule that a partnership at will continues until dissolved by the act of one or both of the parties and that the mere retirement from active participation in the affairs of a partnership is not of itself an abandonment and dissolution thereof.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 600–602, 607; Dec. Dig. § 263.*]

3. PARTNERSHIP (§ 321*)—ACCRUAL OF CAUSE OF ACTION—PARTNERSHIP ACCOUNTING.

Where a partnership transferred all of its business and assets to a corporation, there being no occasion for a liquidation of its affairs, the right of a partner to demand an accounting accrued immediately and was barred by limitations in ten years from that time.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 742–745; Dec. Dig. § 321.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. PARTNERSHIP (§ 321*)—ACCOUNTING—LACHES.
Where a member of a partnership withdrew from its affairs and joined with his copartner in transferring its business to a corporation organized by them, and for ten years made no claim to an accounting and acquiesced in all that his copartner did upon the faith of the transfer and his abandonment of all interest in the business, his acts amounted to laches justifying a court of equity in denying an accounting, even if the statute of limitations was not strictly applicable.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 742–745; Dec. Dig. § 321.*]

5. PARTNERSHIP (§§ 313, 321*)—ACCOUNTING—LACHES.
A partner's action for an accounting is essentially one of equitable cognizance both in form and substance, and hence the relief sought may be denied for laches.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 679, 729, 729½, 742–745; Dec. Dig. §§ 313, 321.*]

6. APPEAL AND ERROR (§ 1176*)—DISPOSITION OF CAUSE—RENDERING FINAL JUDGMENT.
On reversal of a judgment for plaintiff, where it appeared that all the essential facts were developed at the trial and that there were no facts beyond those in the case which would avail to meet the objection to a recovery, the complaint would be dismissed.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588–4596; Dec. Dig. § 1176.*]

Appeal from Special Term, New York County.

Action by Shelley B. Hutchinson against Thomas A. Sperry. From an interlocutory judgment (79 Misc. Rep. 523, 140 N. Y. Supp. 220) dissolving a partnership and appointing a referee to take an account, defendant appeals. Reversed, and complaint dismissed.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Morgan J. O'Brien, of New York City, for appellant.
Edw. Herrmann, of New York City, for respondent.

SCOTT, J. In January, 1897, plaintiff and defendant, with one Jackson, organized the copartnership of Sperry & Hutchinson for the purpose of carrying on the trading stamp business. Jackson afterwards dropped out, leaving only plaintiff and defendant in the firm. The partnership agreement was oral and was to continue at will; no time being set for its termination. The firm began business at once and extended it to a number of states. In November, 1897, plaintiff and defendant, together with Wm. M. Sperry, a brother of defendant, R. J. Alexander, and A. E. Wiedenbach, organized a corporation known as the International Trading Stamp Company with a capital of $100,000. Sperry & Hutchinson agreed to turn over to this corporation the trading stamp business in certain states and cities for 635 shares of the capital stock, which was divided equally between them. The balance of the stock was assigned to the other incorporators for the assignment of territory covered by them. Thereafter plaintiff and defendant acquired all the stock of said company as equal partners. It is not made entirely clear how extensive a territory was covered by this company, but it appears that its operations went

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

far beyond New Jersey, the state of its incorporation, and it certainly extended into New York state. Among other places, it did business in Atlanta, Ga. This business seems to have sold out to one Connant in July or August, 1899, and did not pass to the firm of Sperry & Hutchinson, by the sale hereafter mentioned. In September, 1899, the International Trading Stamp Company sold all of its business, assets, and good will to the copartnership, which assumed payment of its debts, and in January, 1900, the said company became formally and legally dissolved.

[1] In October, 1900, a corporation was organized under the laws of the state of New Jersey, under the name of the Sperry & Hutchinson Company, to take over and carry on the business of the copartnership, and plaintiff and defendant each subscribed for 4,985 shares of the stock, taking together 9,970 out of the 10,000 shares of the stock, and on October 25, 1900, plaintiff and defendant assigned to the corporation all the business then carried on by them in the following states, New Jersey, California, Ohio, Indiana, Pennsylvania, Connecticut, Rhode Island, and Illinois, together with all the assets, good will, etc., appertaining to said business. Much is made by respondent of the limited number of states enumerated in this assignment, from which it is sought to draw the inference that there must have been business going on in other states at this time, and consequently that the firm retained a part of its business and sold only a part of it to the corporation. Excepting as to the state of Michigan (of which more hereafter), I am unable to find any evidence in the case to support the finding that at the time of the transfer to the corporation the copartnership carried on business in any state except those enumerated, and a competent witness, Miss Hirsh, the principal bookkeeper both of the copartnership and of the corporation testified positively that the assignment carried with it all the business then conducted by the partnership except in Michigan, and that after the assignment the copartnership carried on no business anywhere save in Michigan.

It is true that there are exhibits apparently showing that in 1898 the International Company had carried on a business in six states, excluding Michigan, not specifically covered by the bill of sale; but, as certain other exhibits show, the business was threatened about this time with much adverse litigation in numerous states, and it is a matter of public record that from September, 1900, to May, 1902, there was in force in this state a statute forbidding the transaction of business of this character. Laws 1900, c. 768, taking effect September 1, 1900; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111. I conclude therefore that, save as to Michigan, there is no evidence in the case that the firm of Sperry & Hutchinson reserved any of the business which it carried on prior to October 25, 1900, the date of the assignment to the corporation. The only positive evidence is to the contrary. The Michigan business, which was reserved out of the assignment, apparently for sentimental reasons, was sold in July, 1901, to the firm of Witherbee & Hyatt, at the price of $12,000, under a contract which provided for payment by

October 1, 1901. Plaintiff was notified of this sale and asked that his share of the proceeds be paid over to him. Defendant refused to do this and notified plaintiff that it would all be paid over to the corporation. Plaintiff seems to have acquiesced in this at the time. About July 24, 1901, plaintiff sold all of his stock in the corporation, and on August 3, 1901, he left New York and went to Ypsilanti, Mich., where he has ever since resided and still resides, having engaged in other business there. The Michigan sale was fully consummated in November, 1901. The corporation paid debts of the copartnership greatly exceeding in amount the sum received from the sale of the Michigan business.

At no time between July, 1901, and immediately before the commencement of this action did plaintiff ask for any statement, settlement, or accounting. During all that period he has concerned himself in no way in the business formerly conducted by the copartnership.

The complaint asks specifically for an accounting of the sale of the Michigan business, of the sale of the business in Atlanta, and generally of the copartnership business. The defendant relies: (1) On the ten-year statute of limitation; (2) on plaintiff's laches.

Our examination of the case leads us to the following conclusions:

1. That the so-called Atlanta business never passed to the copartnership, but was sold by the International Company before its sale to the copartnership.

2. That there is no evidence that the copartnership owned or carried on at the time of the assignment to the corporation or carried on after the time of the assignment to the corporation any business except that specifically covered by the assignment, save only Michigan. That the evidence is all to the contrary.

3. That if the copartnership did in fact then own and carry on any other business, the practical construction given to the assignment by all parties, if not the language of the assignment, was that all its business was assigned.

4. That the only excepted territory, to wit, Michigan, was completely sold, disposed of, and paid for in November, 1901.

5. That by the transfer of all its business and property in 1901, and the abandonment of the copartnership business by both parties at the time, the copartnership was, by operation of law, dissolved.

6. That the evidence is convincing that since November, 1901, the copartnership has transacted no business whatever.

The action was not begun until May, 1912.

[2] Upon these facts we think it quite clear, as matter of law, that the copartnership was dissolved in November, 1901, when its last remaining asset was disposed of, and after plaintiff having disposed of all his interest in the business had retired from it. It is quite true, of course, as was said in Spears v. Willis, 151 N. Y. 449, 45 N. E. 849, referred to by the learned justice at Special Term, that a partnership at will continues until dissolved by the act of one or both of the parties, and that the mere retirement from active participation in the affairs of such a partnership is not of itself evidence of an

abandonment of the partnership and a dissolution thereof. The circumtances of that case were peculiar and fully justified the conclusion at which the court arrived that the copartnership had never been dissolved, and if there were no other fact in this case than that plaintiff in 1901 ceased to take any active part in the business, and withdrew himself from all participation in its affairs, there would be some analogy to the authority above cited. The controlling fact in this case is that, besides severing his active connection with the business, the plaintiff united with defendant in forming a corporation to take over the business of the copartnership and in transferring to that corporation all the assets and business of the copartnership, and for more than ten years after such transfer never once performed any act or made any claim indicating that he considered the copartnership to be still alive. These facts present convincing and unequivocal evidence that it was the understanding and intention of both plaintiff and defendant that the copartnership should cease to exist when it finally disposed of all its business and assets, to a corporation in which each partner acquired an equal interest. Francklyn v. Sprague, 121 U. S. 215, 7 Sup. Ct. 951, 30 L. Ed. 936; Coggswell & Boulter Co. v. Coggswell (N. J. Ch.) 40 Atl. 213.

[3] We are of opinion that, under the circumstances stated, the ten-year statute of limitation is a complete bar to the action. Gilmore v. Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554; Gray v. Green, 125 N. Y. 203, 26 N. E. 253. Since the corporation took over all the business and assets of the copartnership as a going concern, there was no occasion for a liquidation of the affairs of the copartnership, and no time need to have been allowed for such liquidation before plaintiff's right to demand an accounting accrued.

[4, 5] And even if the statute of limitation were not strictly applicable, we should be of the opinion that plaintiff by his long silence and acquiescence in all that was done by defendant upon the faith of the transfer and abandonment by plaintiff of all interest in the business would amount to laches sufficient to justify a court of equity in refusing to grant relief, for an action of this character is essentially one of equitable cognizance both in form and substance. Calhoun v. Millard, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248; Rayner v. Persall, 3 Johns. Ch. 578; Ray v. Bogart, 2 Johns. Cas. 432. The recent case of Pollitz v. Wabash R. Co., 207 N. Y. 113, 100 N. E. 721, holds nothing to the contrary. Although it was in form an equitable action, it was in fact and in substance an action to recover damages at law, and assumed the guise of an equity suit only because it was a representative action by a stockholder in the right of a corporation. In order to obtain a standing to sue, the plaintiff was obliged to resort to equity; but, once having obtained that standing, his rights were determinable by legal rules.

[6] The conclusion at which we have thus arrived necessitates not only a reversal of the judgment appealed from, but a dismissal of the complaint, since it is apparent that all the essential facts were developed at the trial, and there are no facts, beyond those now in the case, which would avail to meet the objection which we find to

a recovery by the plaintiff. Under the present practice it will be necessary to reverse some of the findings at the Special Term and to make new findings. What findings should be reversed and what new findings made can best be determined upon the settlement of the order.

Judgment appealed from reversed, and complaint dismissed, with costs to the appellant in all courts. Settle order on notice. All concur.

(158 App. Div. 623)

MAHONY v. MAHONY.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. ACCOUNT STATED (§ 5*)—INFORMAL AWARD OF ARBITRATORS AS ACCOUNT STATED.

Where a cotenant agreed to leave to arbitration a dispute concerning an adjustment of rents and to pay his share, but the award of the arbitrators was not binding as an arbitration under the statute because not sufficiently formal, the award in connection with the oral promise to pay could not be upheld as an account stated; there having been no promise to pay subsequent to the award.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 16–29; Dec. Dig. § 5.*]

2. ARBITRATION AND AWARD (§ 7*) — SETTLEMENT — CONSTRUCTION OF AGREEMENT.

One of two cotenants who owned considerable real estate in common and had been partners, but between whom a dispute had arisen concerning the rents of the houses occupied by each and which had been owned in common but which they had lately partitioned, agreed to leave the matter to arbitration and to pay his share. An agreement for arbitration was executed, which recited that differences existed as to "the amount of rentals to be charged against us in our partnership accounts." The arbitrators made a report showing the rental values of the respective parcels, without making any addition of the items, striking a balance, or allowing interest. The parties had not at that time partitioned all of the property owned in common. *Held*, that the oral agreement should not be construed as a promise to pay the difference in the rents without regard to the partnership affairs, but that it was intended that the rentals were to be charged in the partnership accounts.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 28; Dec. Dig. § 7.*]

3. CONTRACTS (§ 245*)—ARBITRATION AGREEMENTS—MERGER OF ORAL AGREEMENTS.

In case of a conflict between an oral agreement to arbitrate and the written arbitration agreement, the oral agreement would be deemed merged in the written agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1129, 1130; Dec. Dig. § 245.*]

4. APPEAL AND ERROR (§ 1175*)—DISPOSITION OF CAUSE—RENDERING FINAL JUDGMENT.

Under Code Civ. Proc. § 1317, authorizing the Appellate Division to render judgment of affirmance, judgment of reversal and final judgment, or judgment of modification, except where a new trial may be necessary or proper, when it may grant such new trial, and providing that where the trial has been before a jury the judgment must be rendered either upon special findings, the general verdict, or upon a motion to dismiss the complaint or to direct a verdict, where the trial court should have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

granted defendant's motion to dismiss the complaint at the close of the evidence, the appellate court will do what the trial court should have done and dismiss the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Appeal from Trial Term, New York County.

Action by Eugene P. Mahony against Michael J. Mahony. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed, and complaint dismissed.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

John H. Rogan, of New York City, for appellant.

A. Delos Kneeland, of New York City (John Whalen, of New York City, on the brief), for respondent.

LAUGHLIN, J. This is an action on an assigned account stated for the equalization of the rental values of two houses owned in common by plaintiff's assignor and the defendant.

The defendant and the plaintiff's assignor, Daniel F. Mahony, were brothers and became partners as carpenters and builders in the city of New York in 1873 under the name of Mahony Bros. The partnership continued until the year 1900. It is contended on the part of the defendant that the partnership was dissolved and the copartnership affairs settled by mutual adjustment on the 9th day of July, 1900, and, while it is conceded on behalf of the plaintiff that the partnership business terminated at that time and that the business was thereafter continued by the plaintiff's assignor under the same name which he caused to be registered as a trade-name, it is denied that there ever was an adjustment of the copartnership affairs. At that time the partners owned considerable real estate in common. One of the parcels of real estate which was owned in common was a house and lot known as 126 West Eighty-Seventh street, which was purchased in 1889 and was occupied by the defendant exclusively, and another was a house and lot known as 464 West Fifty-Second street, which was acquired in 1890 and occupied exclusively by plaintiff's assignor. The account stated is with reference to an equalization of the rental value of these respective parcels during the time they were respectively occupied by defendant and plaintiff's assignor.

On the 23d day of March, 1907, the defendant and plaintiff's assignor executed an agreement in writing for the partition of ten parcels of real estate which they owned in common, including the two parcels the rental values of which are in question, and pursuant thereto and on the 26th day of the same month defendant conveyed an undivided one-half interest in said premises occupied by plaintiff's assignor to him, and plaintiff's assignor conveyed an undivided one-half interest in the premises occupied by defendant to him. The partition agreement contained the following provision:

"The rents of the said premises, insurance premiums and interest on mortgage, shall be adjusted, apportioned and allowed up to the day of taking title."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At the time of exchanging conveyances, the parties were unable to agree concerning the adjustment of the rents of the two houses which they occupied as stated. Plaintiff's assignor claimed that the defendant had had the use of property the rental value of which was much more than that of the premises which he had occupied. The evidence on the part of the plaintiff tends to show that on March 23, 1907, the plaintiff's assignor refused to execute the partition agreement until the parties arrived at an agreement concerning these rentals, and that thereupon the defendant agreed as follows, "I will have it left to arbitration and I will pay my share," and that plaintiff's assignor accepted this proposition. On the 26th day of March, 1907, the day on which the conveyances pursuant to the partition agreement were executed—but whether before or after the execution of such conveyances does not appear—plaintiff's assignor received from defendant a letter stating, so far as material to a decision of the question at bar, that:

"The differences as to the rentals of the houses which we respectively occupy will be adjusted by arbitration if agreeable to you and I will sign the necessary papers and I now name as my appraiser Richard S. Tracey."

The parties thereafter executed an agreement in writing for the arbitration of the questions which had arisen between them concerning the rental values of the premises. That agreement is not dated, and the evidence is very indefinite with respect to when it was signed. The evidence tends to show that it was drawn some time in the year 1907, but probably was not signed until the year 1908. It required that the award be made in writing and that it be delivered to one of the parties on or before the 5th day of May, 1908, and provided that if they should be unable to agree by that day they should appoint an umpire, and that the award should then be made on or before the 15th day of the same month. The arbitrators made a report in writing to the parties on the 1st day of May, 1908, in which they set forth the rental values and rent per annum of the respective parcels for the periods they were occupied by the parties respectively, and therein stated that they appraised, fixed, and awarded "to you respectively the rental values of the premises" occupied by the copartners respectively; but the report did not show the addition of these rentals, nor did it purport to strike a balance nor show any award of interest. By computations based on the report, however, it appears that the rentals charged to the defendant aggregate $24,600 (erroneously shown by the complaint to be $200 more), and to the plaintiff's assignor aggregate $14,575.20, the difference between which is $10,024.80, one-half of which sum being $5,012.40 (erroneously alleged to be $5,112.40), together with interest thereon from the date of the award the plaintiff seeks to recover.

The action is not based on the arbitration agreement, and it is conceded that the arbitration was not sufficiently formal to render the award binding as an arbitration under the provisions of sections 2365–2386 of the Code of Civil Procedure. The plaintiff alleges the award of the arbitrators as constituting the account stated, and his counsel, to sustain the recovery, relies on the prior parol agreement on the part

of the defendant to pay the amount awarded, and on the award to show the amount, and also on evidence that the award was delivered by the arbitrators to the attorney for the plaintiff's assignor and by him delivered to the defendant, who has retained it without objection.

It is to be inferred that even after the partition of the 10 parcels of real estate the copartners remained tenants in common of other premises, for it appears that since that time they have partitioned other real estate of which they were tenants in common of the value of between $400,000 and $500,000, and at the time of the trial they still owned as tenants in common other real estate of about that value.

[1] The award supported by the parol agreement does not constitute an account stated. After the award there was no agreement on the part of the defendant to pay. The parol agreement therefore was merely a promise to pay an amount to be determined by arbitration, and, since the arbitration was not binding, it will not do to hold that there was an account stated on the theory that there was an implied promise to pay one-half of the rentals as the same might be found by the arbitrators.

[2] Moreover, it is quite clear that the parol agreement should not be construed as a promise on the part of the defendant to sever the rentals from the other copartnership matters and to pay the difference direct to the plaintiff's assignor in cash without regard to the copartnership affairs. At most it was intended by the agreement to have the amount, with which the defendant as a copartner was properly chargeable, determined by arbitration. This is made perfectly clear by a provision in the arbitration agreement which contains an express recital that "differences exist, and for a long time have existed," between the parties "as to the amount of rentals of the houses which we occupy to be charged against us in our partnership accounts."

[3] If the parol agreement and the arbitration agreement were not reconcilable, the former would be deemed merged in the latter; but we are of opinion that properly construed they are not in conflict. The evidence with respect to the dissolution of the copartnership in 1900 at most shows a division of the cash on hand at that time, and it is wholly insufficient to show a final settlement of the copartnership accounts; and, if it did, it at most relates to the carpentry and building business, and manifestly was not an adjustment of their copartnership or real estate adventures, as is evidenced by the making of the arbitration agreement. It is not necessary to decide whether the copartnership business to which reference is made in the arbitration agreement was the original carpentry and building business, or whether it relates to the real estate business. It is sufficient that the parties deemed that there were unsettled mutual accounts between them on which each of them was to be charged with the rental value of the house which he occupied. That, doubtless, accounts for the form in which the report of the arbitrators was made. Evidently they did not add interest or strike a balance for the reason that they supposed that these rentals were to be charged to the respective parties on the accounts

between them designated in the arbitration agreement as copartnership accounts.

[4] At the close of the evidence counsel for the defendant duly moved for the dismissal of the complaint on the ground, among others, that no account stated had been shown and that by the terms of the arbitration agreement the awards were to be charged to the accounts of the respective parties. In the view we take of the evidence the court should have granted that motion, and by virtue of section 1317 of the Code of Civil Procedure this court should now do what the trial court should have done.

It follows that the judgment and order should be reversed, with costs, and the complaint dismissed with costs. All concur.

(158 App. Div. 712.)

PEOPLE v. BARNES.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. CRIMINAL LAW (§ 878*)—APPEAL—REVIEW—PREJUDICE FROM ERROR.
Where a criminal case is submitted to the jury on two counts, a conviction cannot stand if the evidence is insufficient to sustain it on either count, as it cannot be known on which count the jury based its verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098–2101; Dec. Dig. § 878.*]

2. INDICTMENT AND INFORMATION (§ 128*)—JOINDER OF OFFENSES—ELECTION.
Counts in an indictment for common-law larceny and for statutory larceny or embezzlement were not necessarily inconsistent, as the same act might constitute either crime, and hence, where the evidence justified a submission, both counts were properly submitted to the jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 403–413; Dec. Dig. § 128.*]

3. LARCENY (§ 3*)—EMBEZZLEMENT (§ 20*)—ACTS CONSTITUTING TAKING.
The president of a corporation, by withdrawing its funds from the bank in which they were deposited and placing them as its money in a safe deposit box hired for the company in the name of himself and other officers, did not commit larceny, though the funds thereafter were wholly within his control; they having been for all practical purposes equally within his control when on deposit in the bank.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 3–10; Dec. Dig. § 3;* Embezzlement, Cent. Dig. §§ 22, 23; Dec. Dig. § 20.*]

4. LARCENY (§ 15*)—EMBEZZLEMENT (§ 20*)—SUFFICIENCY OF EVIDENCE.
Evidence, that the president of a corporation took its money from a safe deposit box in which it had been placed for safe-keeping with the intention of using it for his own purposes, and that he took it to a broker's office and purchased stocks therewith in his own name and for his own account, would support a conviction either for common-law larceny or for statutory larceny, consisting of an appropriation of the funds of another in control of the party appropriating them, and hence counts for both offenses were properly submitted to the jury, since, so far as the charge of common-law larceny was concerned, the evidence as to what the president did with the money indicated the felonious intent with which it was taken.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 39–42; Dec. Dig. § 15;* Embezzlement, Cent. Dig. §§ 22, 23; Dec. Dig. § 20.*]

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5. LARCENY (§ 3*)—EMBEZZLEMENT (§ 20*)—DEFENSES—TAKING UNDER CLAIM OF RIGHT.

Under Penal Law (Consol. Laws 1909, c. 40) § 1306, providing that upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable, the president of a corporation who took its funds for his own use was guilty of larceny, though the corporation was indebted to him in an amount approximately equal to the sum taken, where he did not take it as payment of the indebtedness; no intention to do so accompanying the act itself.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 3–10; Dec. Dig. § 3;* Embezzlement, Cent. Dig. §§ 22, 23; Dec. Dig. § 20.*]

6. CRIMINAL LAW (§ 1170*)—ERROR—CURE.

On a trial for larceny, the district attorney read parts of statements made by accused to the district attorney and to the grand jury. Accused's counsel undertook to read the rest of such statements, which the court of its own motion refused to permit, limiting him to the material parts thereof. Accused thereafter took the stand, and not only attacked the accuracy of such statements as reports of what he had said, but also denied everything therein unfavorable to him. *Held* that, if the court's ruling was improper, it was entirely obviated by accused's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

Appeal from Trial Term, New York County.

Noah E. Barnes was convicted of larceny in the first degree, and he appeals. Affirmed.

See, also, 155 App. Div. 896, 140 N. Y. Supp. 1135.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Henry A. Gildersleeve, of New York City, for appellant.

Robert C. Taylor, of New York City (George Z. Medalie, Deputy Asst. Dist. Atty., of New York City, on the brief), for the People.

SCOTT, J. The defendant was indicted, upon two counts, of the larceny of $30,000, property of the Cottonwood Creek Copper Company. The first count charged common-law larceny in the usual form; the second count charged what is known as statutory larceny, consisting of the conversion or embezzlement of said sum of $30,000, property of the Cottonwood Creek Copper Company. The company whose money is said to have been stolen was organized by defendant for the purpose of taking over certain mining claims or locations situated in Colorado. Nine of these claims were the property of defendant, and two had been his property, but had been abandoned by him in order that they might immediately be relocated by a young German named Von Hochberg, a transaction which in effect amounted to a gift from defendant to Von Hochberg. The history of the events leading up to the acts charged against the defendant as a larceny makes very interesting reading. Von Hochberg, a well-born and well-connected young German, had quarreled with his family over a romantic attachment to the lady who afterwards became his wife. A newspaper article dealing with his reasons for leaving Germany,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the difficulties he had found after his arrival in this country to earn a livelihood, attracted defendant's attention. He sought the young man out, attached him to his service by an attractive salary, gave him the two mining claims, made him an officer of the copper company when organized, and ultimately sent him to Germany to sell stock of the company. This he did so successfully that in a short time he had sold stock of the par value of $75,000, realizing, after payment of the expenses attending the sale, between $68,000 and $69,000, which were deposited to the credit of the company in the New Amsterdam Bank in the city of New York. At various times prior to October 24, 1907, about half of this sum had been withdrawn, presumably for the uses and business of the company, so that on said October 24, 1907, there stood in the bank to the credit of the company $33,857.49.

Upon the organization of the Cottonwood Creek Copper Company, defendant and Von Hochberg had assigned to that company their eleven mining claims in consideration of the delivery to them of the whole capital stock of the company ($300,000) except a few shares issued to the incorporators. They had then returned to the company $150,000 of the stock, upon the condition that the company should mortgage its property for that amount so that each purchaser of stock should receive as a bonus an equivalent amount in mortgage bonds, and upon the further consideration that when the stock should be sold the proceeds should be divided, one-half being retained by the company, and one-half paid to defendant and Von Hochberg in the proportion of nine-elevenths and two-elevenths. Up to the time of the acts charged as constituting the larceny, defendant had received no part of the proceeds of the stock which had then been sold, and there was due him from the company, as his share of said proceeds, either $30,681.81 or $28,155.94, depending upon the construction to be given to his contract with the company. There is evidence tending to show that at the time defendant himself so construed the contract that he believed himself to be entitled only to the smaller sum. This was the situation of affairs in October, 1907, at which time defendant evidently controlled the company absolutely. He was its president, his son was treasurer, and Von Hochberg, who by that time had assumed the name of Barnes, was the secretary.

Defendant became apprehensive as to the safety of the money on deposit in the New Amsterdam Bank, and on October 24th, with the knowledge and acquiescence of Von Hochberg, he caused his son, the treasurer of the company, to draw two checks upon the New Amsterdam Bank, one for $500, and one for $30,000, and upon them drew the amounts in cash from the bank. He then hired a safe deposit box in the same building in the name of himself, his son, and Von Hochberg (Barnes) and placed the $30,000 in cash therein. On the following day or the day after, still with the knowledge of the other officers of the company, he withdrew the money from the safe deposit box and took it downtown and purchased stocks with it in his own name and for his own account. These stocks he held for some time and subsequently sold at a profit. These facts are substantially un-

disputed. The defendant offered evidence in extenuation and explanation of his acts, and also evidence tending to show that after the purchase of the stocks he had, in form at least, returned the $30,000 to his own custody for the benefit of the company; but all this evidence the jury seem to have disbelieved or disregarded.

The court submitted the case to the jury upon both counts of the indictment, notwithstanding the defendant's frequent motions that the district attorney should be required to elect upon which count he would rely, and that the common-law count of the indictment should be withdrawn from the consideration of the jury. This the defendant assigns as error, and it is to this feature of the case that his argument is chiefly directed.

[1] He insists that, upon any view of the evidence, he could not legally have been convicted of common-law larceny, and says, truly enough, that the case having been submitted to the jury on both counts the conviction cannot stand if the evidence was insufficient to sustain it on either because it cannot be known on which count the jury based its verdict. People v. Sullivan, 173 N. Y. 122–126, 65 N. E. 989, 63 L. R. A. 353, 93 Am. St. Rep. 582.

[2] But the two counts are not necessarily inconsistent because the same act sometimes amounts to larceny at common law and also embezzlement under the statute. People v. Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546.

[3] There is ample evidence to justify the conclusion that, when defendant drew the money out of the New Amsterdam Bank and placed it in a safe deposit box, he did so, as he professed at the time, to safeguard it for the company, against the contingency of the bank's failure or suspension, a contingency at that time by no means improbable; that he hired the safe deposit box for the company, and placed the money in it as the money of the company. Up to this he had committed no offense against the company. He had simply taken its money out of one depository which he deemed unsafe, and had put it in another where it was entirely safe. It is true that in doing so he had placed it wholly within his own control; but it is manifest that it had been equally within his control, for all practical purposes, when it was on deposit in the bank, for his control over the other officers of the company was complete. That defendant deposited the money in the safe deposit box as the company's money is shown by a resolution he caused to be inserted in the minutes thanking him for his action in saving the money; by a note or memorandum placed upon the check by which the money was withdrawn from the bank, to the effect that the money was "drawn out of bank on account of money panic to be deposited in the safe deposit"; by a cablegram which he caused to be sent to the German stockholders reassuring them that their money had been protected against the bank panic; and by an entry which he caused to be made on the stubbook. All these acts and declarations are consistent only with the theory that defendant withdrew the money from the bank and put it in the safe deposit box as the company's money. His position then was that the

company's money had, by the action of its officers, been put in a safe place for the security of the company and the stockholders.

[4] It was when defendant, with the intention of using the money for his own purposes, took it out of the safe and carried it to a broker's office to be used in buying stocks, that he committed the larceny; a common-law larceny, because he took it from the possession of its true owner to use for his own benefit; a statutory larceny, because, having been put in a position as an officer of the company whereby he could control its funds, he appropriated the same to his own use. The evidence therefore justified a conviction upon either count of the indictment, and no error was committed in submitting the case to the jury on both counts. So far as the charge of common-law larceny is concerned, the evidence as to what defendant did with the money immediately after he had withdrawn it from the safe deposit box serves to indicate the felonious intent with which he withdrew it.

[5] It is also urged, as a reason for reversing the conviction, that the company was indebted to defendant, at the time of the alleged larceny, in an amount equal or approximate to the sum he took, and hence that he was merely paying himself. The quality of the act is determined by the intent with which it was committed. People ex rel. Perkins v. Moss, 187 N. Y. 410, 80 N. E. 383, 11 L. R. A. (N. S.) 528, 10 Ann. Cas. 309. If the defendant, when he took the money, had done so openly and avowedly as in payment of a debt due to him, and it had appeared that he had made such a claim to it in good faith, it would have been difficult to uphold a conviction, even if it should appear that he took more than was legally due. Penal Law, § 1306. But nothing of this kind appeared. The evidence is all to the contrary, and so the jury must have considered, for it was fully and fairly instructed on the subject. It is abundantly clear, however, that the pretense that defendant took the money as a payment of any amount due from the company is merely an afterthought, and that no such intention accompanied the act itself.

[6] Defendant had made a statement to the district attorney and to the grand jury, both of which had been taken down in shorthand and transcribed. The district attorney read into the testimony, as admissions, some parts of these statements. Defendant's counsel undertook to read all that had not been read by the district attorney. The prosecution made no objection to this, but the court of its own motion refused to permit it, calling upon the defense to read only what might under the circumstances be material. It may be that a question of some importance would be presented if it appeared that either statement contained anything of real consequence which was thus shut out. It does not so appear from the case on appeal. And even if any injustice had been done by this ruling, it was entirely obviated when the defendant himself took the stand and was afforded the opportunity, of which he availed himself, not only to attack the accuracy of the reports as to what he had said, but also to deny everything appearing therein which seemed to be unfavorable to him.

The charge was a long one covering every phase of the case. There were numerous requests to charge, and, of course, many exceptions

were taken to what was charged, as well as to what was not. We have examined them with care and find no exceptions that would justify us in concluding that full justice was not done to the defendant.

The judgment of conviction must be affirmed. All concur.

(158 App. Div. 601)

In re HERBST.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

ATTORNEY AND CLIENT (§ 44*)—ATTORNEY—SUSPENSION—MISUSE OF FUNDS.

Respondent, as attorney for an insolvent firm, received $550 from the wives of the members thereof with which to effect a settlement with the firm creditors. He did not apply the money to such purpose but appropriated it to his own use and, after an assignment for the benefit of creditors had been made, received $3,000, a part of which he mingled with his own funds and also converted. After charges had been preferred against him, he succeeded in obtaining the money he had misappropriated and opened a separate bank account as assignee and deposited the money therein. He subsequently filed an account as assignee, in which he credited the amount received from the members' wives as money received by him as assignee. *Held*, that he was guilty of misconduct justifying suspension, notwithstanding his youth and inexperience.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

In the matter of disbarment proceedings against Charles H. Herbst. Suspended.

See, also, 156 App. Div. 896, 140 N. Y. Supp. 1123.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Henry B. Barnes, of New York City, for petitioner.

A. S. Gilbert, of New York City, for respondent.

INGRAHAM, P. J. The association of the bar of the city of New York presented charges of professional misconduct against the respondent. These charges were referred to the official referee, who has filed his report sustaining the charges. The charges contained two specifications. The first related to the appropriation of $550 delivered to the respondent by the wives of the members of the firm of Groveman & Kahn to be held by him for the purpose of effecting a settlement with the creditors of that firm, which the respondent did not apply to that purpose and appropriated it to his own use; and, second, that the respondent received, as assignee of Groveman & Kahn, the sum of $3,000, a part of which he mingled with his own funds and converted to his own use. It appeared that the respondent had been for some time prior to September, 1911, attorney for the firm of Groveman & Kahn; on March 6, 1911, that firm made an assignment to the respondent for the benefit of their creditors; that under that assignment the respondent took possession of the premises occupied by the assignors and for some time seems to have continued the business car-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ried on by them; that in the meantime the creditors of the firm agreed to accept 15 per cent. of their claim in discharge of the assignors, and it was understood that the respondent should continue the business carried on by the assignors to the end that, when the assignee should have realized out of the conduct of such business sufficient to pay the creditors 15 per cent. of their claim in cash, such payment be made and the assignment proceedings terminated. After this proposition of compromise had been accepted, and on or about the 27th day of September, 1911, the wives of the partners of Groveman & Kahn paid to the respondent $600, $50 of which was invested in the purchase of merchandise necessary to complete the business carried on by the assignors, and $550 was to be held by the assignors to be applied in making this settlement. The referee found that the respondent did not keep the funds that he received as assignee separate but deposited the amount to his own credit in the bank, a part of which he misappropriated and applied to his own individual use. When the respondent received this $600 from the wives of the assignors, he gave a receipt which stated that the money was "to be held in trust for the purpose of settlement in the Groveman-Kahn matter." It is quite clear that the respondent violated this trust; that he deposited this money to his own bank account in his bank and personally used a part of it, as he also did with a certain portion of money that he received as assignee in the conduct of the business which was carried on after the assignment. After these charges were made against him, he succeeded in obtaining the money which he had misappropriated and opened a separate account as assignee, in which the money was deposited. He subsequently filed his account as assignee in which he credited the amount received from the assignors' wives as money received by him as assignee, but this itself was a use of the money which, upon the evidence, he was not justified in making.

We have therefore a clear case of misappropriation of money held by an attorney for his client. The referee states the facts in his report, and it is not necessary to discuss them. It is sufficient to say that we approve and adopt the report. The respondent is a young man, inexperienced in matters of this kind. He was admitted to practice in June, 1906, and his only excuse that can be considered is that of youth and inexperience. It is hardly conceivable that one who has received the education and training which are required to justify his admission to the bar should claim ignorance of the fundamental principles of honesty and good faith which are required, not only of a lawyer, but of every one intrusted with money or property for a specific purpose. Here a young man was intrusted with money of his clients to be used by him for the discharge of their obligations to others, and he proceeds to mix it with his money in his bank and to apply a portion of it to his own use; and when charged with this misappropriation he does not even attempt to justify it by becoming a witness on his own behalf before the referee. Charges of this kind are becoming so frequent that we feel that a breach of such an obligation must be considered serious professional misconduct requiring disbarment, and that the excuse of youth and inexperience will not be received for a breach by an attorney of the obligation to treat the money of his clients that has

come into his hands as a sacred trust, not to be applied or used for his own purposes. The referee reports that:

"After long delay and under extreme pressure, the respondent made a partial restitution to Mrs. Groveman and Mrs. Kahn which constitutes no defense; * * * that the conduct of the respondent was reprehensible and tends to impair and defeat the administration of justice."

Under the circumstances of this case, we have concluded that, instead of the extreme penalty of disbarment, we will suspend the respondent from practice for two years, with the distinct intimation, however, that the excuse of youth and inexperience will not be received in the future as an excuse for misappropriation of moneys received by an attorney to be held by him for the use of his client.

Respondent suspended from practice for two years, with leave to apply for reinstatement at the expiration thereof upon proof that he has actually abstained from practice during that period and has otherwise properly conducted himself. All concur.

(159 App. Div. 881)

ROBERT S. DENHAM CO., Inc., v. SALT.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

TRADE-MARKS AND TRADE-NAMES (§ 95*) — UNFAIR COMPETITION — ACTIONS — TEMPORARY INJUNCTION.

In an action against a former employé of plaintiff to enjoin the use of unfair means to attract business, where the chief contention was as to the employé's right to use certain business forms, and it was disputed whether such forms were devised by plaintiff's president or by such former employé, an injunction pendente lite should be denied.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

Appeal from Special Term, New York County.

Action by the Robert S. Denham Company, Incorporated, against Edwin E. Salt. From an order granting an injunction pendente lite, defendant appeals. Reversed, and motion for injunction denied.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Albert P. Massey, of New York City, for appellant.

George P. Breckenridge, of New York City, for respondent.

SCOTT, J. This is an action to restrain what is alleged to be unfair competition with plaintiff's business on the part of a former employé. In so far as the defendant is accused of using unfair means to attract business, we scarcely think that plaintiff has made out a case. The chief contention is as to defendant's right to use in the transaction of his business certain forms, consisting of sheets of paper ruled in a certain manner and designed for the ready tabulation of items of work in machine shops and like establishments. It is disputed whether these forms were devised by plaintiff's president or by defendant. That is a question of fact which, if important, can

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

best be determined on the trial. In any event plaintiff's grievance is rather that defendant has copied its methods of doing business than that he has used unfair means to attract business. We do not think that, upon the papers before us, plaintiff has made out a case for an injunction pendente lite. This has nothing to do with the question whether or not it may be entitled, upon the facts shown on the trial, to a permanent injunction.

The order appealed from must be reversed, with $10 costs and disbursements, and the motion for an injunction pendente lite denied, with $10 costs. All concur.

(158 App. Div. 726)

PANAMA REALTY CO. v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. NUISANCE (§ 25*)—CREATION.
   A right to maintain a nuisance by operating machinery so as to injure adjoining property by the jar, etc., is in the nature of an easement, since it permits an act, as to the property injured, which, if not authorized by grant or license, would be a nuisance or trespass, and hence such a right could only be acquired by grant or prescription, and was not acquired under a decree for damages in favor of a former owner in an action against the person maintaining the nuisance.
   [Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 5, 60–63; Dec. Dig. § 25.*]

2. EASEMENTS (§ 1*)—CREATION.
   An easement can only be created by grant or by a prescription, which presupposes a grant.
   [Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 1, 2, 5–7; Dec. Dig. § 1.*]

3. LICENSES (§ 44*)—TERMINATION—CONVEYANCE OF PROPERTY.
   A distinction between an easement acquired by grant and a similar right acquired by license from the landowner is that a conveyance of the land by the licensor, ipso facto, terminates the license.
   [Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 97–99; Dec. Dig. § 44.*]

Appeal from Trial Term, New York County.

Action by the Panama Realty Company against the City of New York. From a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Max L. Schallek, of New York City, for appellant.
William E. C. Mayer, of Brooklyn, for respondent.

SCOTT, J. Plaintiff is the owner of a lot of land, with a building thereon, known as No. 102 West Ninety-Eighth street in the city of New York. Adjacent thereto is a lot of land owned by the city of New York, which has erected thereon and used for a number of years a pumping station in connection with its water supply system. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff complains that said pumping plant is so constructed and operated as to cause constant and serious injury to its property by shaking, jarring, and noise—in short, that the said pumping plant constitutes a nuisance in so far as it affects plaintiff's property. Although the merits were not gone into upon the trial, it seems probable that plaintiff's complaint is well founded. Vide, Morton v. Mayor, etc., 65 Hun, 32, 19 N. Y. Supp. 603; s. c. 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241.

The defense upon which the plaintiff has thus far succeeded is based upon the recovery and satisfaction of a judgment against the city by one Sarah Levy, who at one time owned the property now owned by plaintiff. The judgment in question was entered in an action commenced by the said Sarah Levy in the year 1894. As originally drawn, her complaint alleged that defendants' pumping station constituted a nuisance and damaged her to the extent of $12,000. She asked a judgment for her damages and an abatement of the nuisance. At the trial the complaint was amended, by consent, by increasing the amount of damages claimed to $20,000; the same to be in full for all past and future damages in consequence of the wrongful acts of the defendant and their continuance, and in lieu of the injunctive relief demanded by the original complaint. The jury awarded $7,500 damages, and a judgment for that amount was entered in favor of the plaintiff. The judgment was subsequently amended by consent by the addition of the following clause:

"Adjudged, that upon the payment, satisfaction and discharge of said sum of $7,871.20, adjudged due as aforesaid to the plaintiff from the defendants, such payment shall be in full satisfaction and discharge of any and all claims or demands in said amended complaint set forth, and the said defendants, the mayor, aldermen and commonalty of the city of New York, shall be thereupon remised, released, and forever discharged of and from all manner of action and actions, cause and causes of action, suits, damages, judgments, claims and demands whatsoever, in law or in equity, which against the said defendants, the mayor, aldermen and commonalty of the city of New York, the said plaintiff, Sarah Levy, ever had, now has, or which she, *her heirs, executors, administrators, lessees, grantees or assigns hereafter* can, shall or may have for, upon, or by reason of the wrongful acts set forth in said complaint as amended, and the continuance thereof."

The judgment was thereafter paid and satisfied by the defendant. The defendant claims, and the claim has been sustained by the learned justice at the Trial Term, that the effect of this judgment and its satisfaction has been to grant to defendant a perpetual, irrevocable license, good as against all of Sarah Levy's successors in title, to continue to maintain and operate the nuisance in so far as it affects the property now owned by plaintiff. With this conclusion we are unable to agree.

[1] It would be profitless to indulge in an extended discussion of the nature of the right which defendant claims to have acquired to continuously work an injury upon the property owned by plaintiff. It certainly falls within the accepted definition of an easement, or is, as some of the authorities put it, a right in the nature of an easement, for it permits the dominant owner, the city, to do an act which, as to the plaintiff's property, would be, if not authorized by grant or license,

a nuisance or a trespass. 10 Am. & Eng. Encyclopedia of Law (2d Ed.) 405.

[2] An easement, however, can only be created by a grant, or by prescription which presumes a grant, and upon neither of these does the defendant rely. It is certain that the decree entered in the Levy action is not equivalent to a grant by the then owner. It was distinctly so held by this court in a case wherein a very similar judgment was entered against one of the elevated railways (Herman v. Manhattan R. Co., 58 App. Div. 369, 68 N. Y. Supp. 1020), and the same principle has been generally recognized by the form of judgment commonly entered in the Elevated Railway Cases. See Pappenheim v. Metropolitan El. R. Co., 128 N. Y. 436, 28 N. E. 518, 13 L. R. A. 401, 26 Am. St. Rep. 486. It is clear therefore that defendant cannot claim to have acquired an easement as to plaintiff's property. The most it can claim to have acquired by the decree in the Levy action was a license to continue the nuisance. We need not stop to consider whether, in view of the form of the complaint and of the order entered by consent, the city acquired a license, irrevocable as to Sarah Levy so long as she held the property. Very likely it did, or, speaking more accurately, that she would have been estopped from making a further claim for damages during her ownership.

[3] But an essential and recognized distinction between a right in the nature of an easement acquired by grant, and a similar right acquired by a license from the owner of the land, is that a conveyance of land by a grantor who has given a license to another to enjoy a right in the nature of an easement ipso facto terminates the license. Washburn on Easements (3d Ed.) p. 6.

Our conclusion therefore is that whatever right defendant acquired over plaintiff's property by virtue of the judgment in the Levy action was a license to maintain the nuisance complained of, which license, even if irrevocable during Sarah Levy's ownership of the property, terminated when she conveyed it. If the city had desired to acquire an easement or a right in the nature of an easement, it should have followed the procedure well established in the Elevated Railway Cases. The verdict in favor of defendant was therefore erroneously directed.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

(159 App. Div. 33)

In re HEINSHEIMER.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. ATTORNEY AND CLIENT (§ 181*)—STATUTES—"CHARGING LIEN"—"RETAINING LIEN."

An attorney's charging lien, conferred by Judiciary Law (Consol. Laws 1909, c. 30) § 475, on the cause of action or any judgment obtained therein, into whosoever hands it may come, for the value of the attorney's services, is independent of and in addition to the attorney's common-law or retaining lien on the property of his client which may come into his possession in the course of his employment; the "retaining lien" being a general one for the balance of account between attor-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ney and client, while the "charging lien" is a specific one covering only the services rendered in the action in which the judgment is obtained.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 394–398; Dec. Dig. § 181.*

For other definitions, see Words and Phrases, vol. 2, pp. 1072, 1073; vol. 7, p. 6197.]

2. ATTORNEY AND CLIENT (§ 187*)—ATTORNEY'S LIEN—CHARGING LIEN—ASSIGNMENT—EFFECT.

A client's assignment for the benefit of creditors does not affect the charging lien of his attorney recovered in litigation for the client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 407–417; Dec. Dig. § 187.*]

3. ATTORNEY AND CLIENT (§ 181*)—ATTORNEY'S FEES—CHARGING LIEN—RETAINER.

Where an attorney conducts a number of proceedings under a single contract and for a single fee, not apportionable among the various matters, he has a charging lien, conferred by Judiciary Law (Consol. Laws 1909, c. 30) § 475, on a judgment obtained in one of the cases for the amount of his fee.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 394–398; Dec. Dig. § 181.*]

Laughlin and Scott, JJ., dissenting.

Appeal from Special Term, New York County.

Petition by Norbert Heinsheimer to enforce an attorney's lien and for a reference as to the distribution of the proceeds of a judgment recovered in the case of Meyer v. Schulte. From an order granting the relief prayed, Anton H. Meyer, as assignee, etc., appeals. Affirmed.

See, also, 143 N. Y. Supp. 1121.

The opinion of Mr. Justice Page at Special Term is as follows:

On November 16, 1909, when the action of Meyer v. Schulte was commenced, the petitioner, Norbert Heinsheimer, Esq., was general counsel for the United States Restaurant & Realty Company under an annual retainer of $5,000, and prepared and conducted it together with various other matters under his contract as general counsel. On February 12, 1910, William F. McCombs, Esq., was made general counsel for the said company in his place, but the petitioner was thereafter retained as special counsel for the purpose of conducting the action, and he prosecuted it to judgment. The judgment for $4,176.64 which he obtained against the defendant was appealed to the Appellate Division and Court of Appeals and affirmed in both courts. On April 7, 1910, Anton H. Meyer qualified as assignee for the benefit of the creditors of the plaintiff, and later, while the appeal was pending in the Appellate Division, moved to be substituted as plaintiff and for the substitution of new counsel. The petitioner opposed the motions on the ground that he had a lien upon the papers and cause of action for a balance of $3,096.92 due and unpaid on account of the annual retainer of $5,000 up to February 12, 1910, and a further lien for his services subsequently rendered as special counsel in obtaining the judgment. The motion was granted, and William F. McCombs was substituted as attorney for the plaintiff, "all without prejudice to said Norbert Heinsheimer, Esq., taking steps which may be necessary to determine the existence of his lien herein, if any, and the value thereof." The defendant has paid the amount of the judgment into court, pursuant to an order herein, and this motion is made to determine the lien of the petitioner thereon.

[1] Under section 475 of the Judiciary Law, an attorney has a charging lien upon the cause of action or any judgment which may be obtained therein,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

into whosoever hands it may come, for the value of his services. This is independent of and in addition to his common-law or retaining lien upon any property of his client which may come into his possession in the course of his employment. The "retaining lien" is a general lien for the balance of account between attorney and client and covers services rendered in other matters not connected with the property which is in the attorney's possession. The "charging lien" which the attorney has by statute upon the cause of action and judgment is a specific lien and covers services rendered in the action in which the judgment is obtained. West v. Bacon, 13 App. Div. 371, 43 N. Y. Supp. 206; Williams v. Ingersoll, 89 N. Y. 508, at page 517; Goodrich v. McDonald, 112 N. Y. 157, at page 162, 19 N. E. 649.

[2] The assignment to Meyer for the benefit of creditors does not affect the lien of the attorney. Matter of Dunn, 205 N. Y. 398, 98 N. E. 914. There is no property of the plaintiff in the petitioner's possession upon which he can claim a retaining lien. His lien, if any, must therefore be a charging lien upon the judgment pursuant to section 475 of the Judiciary Law (Consol. Laws 1909, c. 30). There can be no doubt of his right to charge the judgment with the amount of the value of his services rendered in this action under his retainer as special counsel, but the petitioner seeks to go further and charge the judgment with the amount due and unpaid on account of his annual retainer as general counsel which covered the work done in this action and other matters as well.

[3] Were this balance regarded as a general balance of accounts between the plaintiff and his attorney, then the authorities are conclusive that no such lien exists in favor of the attorney (West v. Bacon, supra); but I find that the facts here shown present a novel question upon which no authorities have come to my attention, namely, whether an attorney who conducts a number of cases under a single contract for a single fee not apportionable among the various matters embraced within it has a lien upon a judgment obtained in any one of these cases for the amount of his fee. It is the well-settled law in the case of special liens other than attorneys' liens that the lien attaches to every piece of property embraced within a single contract. Wiles Laundry Co. v. Hahlo et al., 105 N. Y. 234, 11 N. E. 500, 59 Am. Rep. 496. Unless we apply the same rule to attorneys' liens, the result will be a complete loss of lien in the case of work done in conjunction with other work under a general retainer. There could be no lien for the reasonable value of each portion of work, because the contract governs the consideration to be paid the attorney, and he is not entitled to reasonable value except in the absence of special contract. There could be no lien for an apportionable part of the general retainer, because it is not apportionable among the various matters embraced within it. I am of the opinion that the Legislature never intended such a result, and that an attorney must be held in such a case to have a lien upon each judgment embraced within a single entire contract for the whole amount of his fee under his contract. To hold otherwise would allow the client to obtain the results of the valuable services of an attorney without compensating him. To prevent such a result this peculiar lien of the attorney has been devised. Goodrich v. McDonald, supra.

Under this ruling the petitioner is entitled to a lien upon the judgment in this action for the balance due him under his general retainer, and for the value of his later services as special counsel. The matter will be sent to a referee to determine the amount of the attorney's liens. Settle order on notice.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Alexander Gordon, of New York City, for appellant.
Henry K. Heyman, of New York City, for respondent.

PER CURIAM. Affirmed on opinion of Page, J., at Special Term.

SCOTT, J. (dissenting). I am constrained to dissent from the affirmance of the order appealed from because I can see no principle upon which the attorney can have a charging lien upon the judgment for the amount claimed to be due him upon his general retainer. That he is entitled to such a lien for the value of his services in procuring the judgment is not open to question, but as to the amount which had accrued under his annual employment before the appointment of the receiver he stands on the same footing as any other creditor. True, if when his general employment terminated he had had any of the bankrupt's papers in his hands, he might have claimed a possessory lien as to them and have held them until his claim was satisfied, but such a lien is incapable of foreclosure and never attached to anything not in actual possession of the attorney. In my opinion the order appealed from should be so modified as to provide only for the ascertainment of the value of the services of the petitioner in the action which resulted in the judgment.

LAUGHLIN, J., concurs.

(158 App. Div. 700)

NEW YORK ASSETS REALIZATION CO. v. PFORZHEIMER.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. DISCOVERY (§ 38*)—EXAMINATION OF PARTY BEFORE TRIAL.
   In an action on a note, defendant was entitled to examine plaintiff before trial concerning the making of the note and the circumstances under which it was made and which attended its delivery, in order to secure evidence to sustain his defense.
   [Ed. Note.—For other cases, see Discovery, Cent. Dig. § 51; Dec. Dig. § 38.*]

2. DISCOVERY (§ 49*)—EXAMINATION OF PARTY BEFORE TRIAL.
   In an action by a corporation on a note given in 1905, an examination of plaintiff before trial through an examination of its officers as such, concerning the making of the note and the circumstances under which it was made and which attended its delivery, would not be denied on the ground that plaintiff, not having been organized until 1911, could have had no knowledge of such matters at the time they arose, where it was not denied that such officers had such knowledge both when plaintiff acquired the note and when the examination was sought, as their knowledge was imputed to plaintiff, and defendant would therefore not be limited to an examination of such officers as witnesses.
   [Ed. Note.—For other cases, see Discovery, Cent. Dig. § 63; Dec. Dig. § 49.*]

3. DISCOVERY (§ 92*) — WRITINGS SUBJECT TO INSPECTION — POSSESSION OR CONTROL OF WRITING.
   An order for the examination of plaintiff before trial, so far as it required plaintiff or its officers to produce the books and papers of a firm who were not parties to the action, and over whose books and papers it did not appear that plaintiff had any control, was erroneous.
   [Ed. Note.—For other cases, see Discovery, Cent. Dig. § 118; Dec. Dig. § 92.*]

Appeal from Special Term, New York County.

Action by the New York Assets Realization Company against Carl H. Pforzheimer. From an order vacating an order for examination

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

before trial of the plaintiff through the examination of Arthur P. Heinze and Calvin O. Geer as its officers, defendant appeals. Modified so as to deny the motion to vacate in part.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Alexander B. Siegel, of New York City, for appellant.

Ferdinand E. M. Bullowa, of New York City, for respondent.

SCOTT, J. [1] The action is upon a promissory note made by the defendant in 1905, and given to the firm of J. S. Bache & Co., who, as it is said, delivered it to one Max H. Schultze on behalf of Arthur P. Heinze and the firm of Otto Heinze & Co., of which the said Arthur P. Heinze was a partner, and the said Calvin O. Geer was an employé. It is further alleged that the note was afterwards assigned to the Western Development Company, and by that company to plaintiff. It is alleged, and not denied, that both the Western Development Company and this plaintiff are corporations organized for the purpose of and confining themselves to the business of collecting claims which belonged to the said firm of Otto Heinze & Co. The note in suit is said to have been given in connection with transactions by defendant in copper stocks in which, as it is said, the firm of Otto Heinze & Co. had established a corner. Among other defenses, the defendant sets forth certain transactions of said firm which, as it is claimed, establish a complete answer to the suit. The sufficiency of the facts thus pleaded as a defense is not called in question upon this appeal, and we are not required to pass upon it, but shall assume that the facts so pleaded, if proven, would in fact constitute a sufficient defense. So assuming, it is clear that the defendant is entitled to examine the plaintiff in order to secure evidence to sustain his pleading.

[2] The ground upon which the order for examination was vacated at Special Term and the argument by which it is now sought to sustain the vacatur is that the matters sought to be inquired into are alleged to have occurred in 1905, whereas the plaintiff was not organized until 1911. Hence it is said that the plaintiff cannot be presumed to have knowledge of matters which arose before it came into being. The argument is that, if defendant wishes to examine Heinze and Geer as to occurrences in 1905, he must so examine them as witnesses and not as officers of the plaintiff. The authorities cited in support of this position are not controlling upon the question involved in this appeal under the circumstances disclosed by the papers. Jacobs v. Mexican Sugar Refining Co., 112 App. Div. 657, 98 N. Y. Supp. 542; Searle v. Halstead & Co., 139 App. Div. 134, 123 N. Y. Supp. 984; Shumaker v. Doubleday, Page & Co., 116 App. Div. 302, 101 N. Y. Supp. 587; Matter of Thompson, 95 App. Div. 542, 89 N. Y. Supp. 4. They are authority for the proposition that, under such an order as was vacated by the order appealed from, it is the corporation which is to be examined, and that an officer of a corporation will not be permitted to be examined touching matters concerning which he is shown to have no knowledge. This court, however, has repeatedly shown its disinclination to permit parties to

avoid legitimate examination by a narrow and technical construction and application of the statute. Chittenden v. San Domingo Co., 132 App. Div. 169, 116 N. Y. Supp. 829; Hill v. Bloomingdale, 136 App. Div. 651, 121 N. Y. Supp. 370.

It is apparent, of course, that the plaintiff corporation, as such, not having come into existence until 1911, could not have had knowledge, at the time of the occurrences, of the matters concerning which defendant seeks to examine it. We are not concerned, however, with the question as to what knowledge the corporation had at that time, but with the question as to what knowledge is imputable to it at the present time. The papers before us make it quite evident that the officers of plaintiff whom it is now sought to examine, to wit, its president and secretary, had personal knowledge, at the time they happened, of the facts which defendant seeks to prove. This knowledge they must be deemed to have carried with them when they became officers of the plaintiff, and upon well-settled rules their knowledge is imputable to plaintiff. The testimony sought to be elicited has to do with the making of the note in suit, and of the circumstances under which it was made, and which attended its delivery. The rule in England and in this country, as declared by the Supreme Court of the United States and our own Court of Appeals, is:

"That if the agent, at the time of effecting a purchase, has knowledge of any prior liens, trust, or *fraud* affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquires the knowledge when he effects the purchase, no question can arise as to his having it at the time. If he acquired it previous to the purchase, the presumption that he still retains it and has it present in his mind will depend upon facts and other circumstances." The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167; Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769.

In the present case there can be no question and it is not denied that Heinze and Geer, the plaintiff's president and secretary, had knowledge when plaintiff acquired the note in suit, and now have knowledge, of the matters concerning which defendant seeks to examine the plaintiff. Their knowledge is imputable to plaintiff. In a strict sense, therefore, it is competent to examine the plaintiff touching these matters by the interrogation of its officers named in the order.

[3] We can see no justification, however, for so much of the order for examination as required the plaintiff or its officers to produce the books and papers of the firm of J. S. Bache & Co., who are not parties to the action and over whose books and papers it does not appear that plaintiff has any control.

The order appealed from is therefore so modified as to deny the motion to vacate the order for examination in so far as it requires the plaintiff by Arthur P. Heinze and Calvin O. Geer, officers of said plaintiff, to appear for examination, and as to grant said motion to vacate the order for examination in so far as it requires the production of the books and other papers of the firm of J. S. Bache & Co., and as so modified is affirmed, without costs to either party in this court. All concur.

(158 App. Div. 654)

HYLAND v. WALDO, Police Com'r.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. MUNICIPAL CORPORATIONS (§ 185*)—POLICE DEPARTMENT—DISMISSAL AND REINSTATEMENT OF POLICEMAN.

Under Greater New York Charter, § 284,† providing that no person who shall have been a member of the police force and shall have been dismissed therefrom shall be reappointed, and section 1543a, added by Laws 1907, c. 723, providing that on written application to the mayor the police commissioner shall have power in his discretion to rehear the charges upon which a member of the police department has been dismissed, unless such dismissal was for conduct unbecoming an officer or member, the police commissioner after dismissing a patrolman from the service for conduct unbecoming an officer, after a trial of charges against him, could not review his own decision and reinstate such patrolman, especially as a police commissioner, upon a trial of members of the force, acts as a special and subordinate tribunal and is subject to the rule which forbids the reopening of a matter once judicially determined by a competent jurisdiction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492–509; Dec. Dig. § 185.*]

2. MUNICIPAL CORPORATIONS (§ 185*)—POLICE DEPARTMENT—REMOVAL OF PATROLMAN—REVIEW.

The method of reviewing a determination of a police commissioner finding a patrolman guilty of charges made against him, and dismissing him from the force, is by certiorari.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492–509; Dec. Dig. § 185.*]

3. MUNICIPAL CORPORATIONS (§ 185*)—POLICE DEPARTMENT—DISMISSAL AND REINSTATEMENT OF POLICEMAN.

Where a police commissioner who had removed a patrolman after a trial of charges against him unlawfully reinstated him, such patrolman was not legally a member of the force, and it was the commissioner's duty, when advised of this fact, to summarily dismiss him, and hence it was not necessary to comply with Greater New York Charter, §§ 300,† 302, relative to the formulation and service of written charges before dismissing a policeman.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492–509; Dec. Dig. § 185.*]

4. MANDAMUS (§ 10*)—NECESSITY OF CLEAR LEGAL RIGHT.

A writ of mandamus issues only when the petitioner has established a clear legal right to the relief prayed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. § 10.*]

Appeal from Special Term, New York County.

Application by William J. Hyland for a peremptory writ of mandamus requiring Rhinelander Waldo, as Police Commissioner of the Police Department of the City of New York, to reinstate the petitioner in the Police Department. From an order denying the writ, the petitioner appeals. Affirmed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Laws 1901, c. 466.

Hyacinthe Ringrose, of New York City, for appellant.
Archibald R. Watson, Corp. Counsel, of New York City (Harry Crone, of New York City, of counsel, and Terence Farley, of New York City, on the brief), for respondent.

CLARKE, J. On December 9, 1911, the petitioner, who was then a patrolman in the police department of the city of New York, had charges duly served upon him of conduct unbecoming an officer. Said charges were duly tried before a deputy commissioner who found him guilty as charged and recommended that he be dismissed. Said recommendation was on the 24th of February, 1912, duly approved by Commissioner Waldo, and on that day the petitioner was dismissed from the force.

Thereafter, and in the month of March, 1912, Hyland applied to the police commissioner for reinstatement. In support of his application, he submitted numerous letters of recommendation. An affidavit of the commissioner is in this record which states:

"Upon the receipt of these documents deponent again looked into the matter and, after a careful consideration, determined that he had reached an erroneous conclusion with regard to the petitioner's guilt, and that his dismissal from the force was an injustice to him and a wrong which ought to be righted, so far as was within deponent's power to do so. As a condition of reinstating the petitioner, deponent insisted upon a waiver of all back pay. This the petitioner executed."

Thereupon, on the 20th of March, 1912, an order was made by the commissioner as follows:

"William J. Hyland, formerly a patrolman in this department, was dismissed by me on February 24, 1912. I have reconsidered this case and find him not guilty of the charges and specifications upon which he was dismissed, and hereby reinstate him on the force, subject to the approval of the civil service commission."

And upon March 27, 1912, the following communication was addressed to the police commissioner:

"At a meeting of the municipal civil service commission held March 26th, your action rescinding the dismissal of William J. Hyland from the position of patrolman in your department on February 24, 1912, was approved."

From that time and down to December 22, 1912, Hyland performed the duties of said office. On the 20th of December, 1912, the president of the municipal civil service commission addressed a letter to the police commissioner calling his attention to the cases of seven officers, including the petitioner, all of whom were regularly dismissed on charges from the uniformed police force and were afterwards reinstated; that he had received an opinion from the corporation counsel that the reinstatements were illegal and requesting the police commissioner to terminate the employment of these persons. On December 23, 1912, the police commissioner, "in compliance with the directions of the civil service commission," made an order dropping the petitioner's name from the rolls of members of the department. The petitioner applied for a writ of mandamus to compel the police commissioner to reinstate him, which having been denied, this appeal is taken.

[1] The police commissioner, upon the trial of members of the force, acts as a special and subordinate tribunal.

"The rule which forbids the reopening of a matter once judicially determined by a competent jurisdiction applies as well to the decisions of special and subordinate tribunals as to decisions of courts exercising general judicial powers." Osterhoudt v. Rigney, 98 N. Y. 222, 234.

In People ex rel. Chase v. Wemple, 144 N. Y. 478, 481, 39 N. E. 397, 398, the State Comptroller refused to vacate an order on an application for the redemption of certain lands sold for unpaid taxes solely on the ground of want of power. The court said:

"I think he decided correctly in that respect. His action, so far as it was of a judicial character, was bounded and controlled by the strict and limited jurisdiction conferred by the statute. That gave him no right to review his own orders and annul or vacate them except in the single case of the cancellation of a tax sale. * * * But no such authority is given as to an order of redemption. * * * But it is said that, since that officer acts judicially in granting the redemption, he has an inherent power to vacate his own orders. I do not understand that he has any power except that which the statute gives him. It is the general rule that officers of special and limited jurisdiction cannot sit in review of their own orders or vacate or annul them. A justice of the peace cannot set aside or alter a judgment after he has entered it. Stephens v. Santee, 49 N. Y. 39."

In United States v. Burchard, 125 U. S. 176, 8 Sup. Ct. 832, 31 L. Ed. 662, Chief Justice Waite said:

"The law requires a record of the proceedings and decision of the retiring board to be made and transmitted to the Secretary of the Navy, and by him laid before the President for his approval or disapproval, or orders in the case. At first the findings in this case were approved, and orders made thereon, but afterwards the department became satisfied on re-examination that the findings were wrong, and that the incapacity was actually the result of causes incident to the service. Neither the department nor the President could then change the findings, as they had already been approved and were no longer open to review. The action of the President was equivalent to the judgment of an appropriate tribunal upon the facts as found."

In People ex rel. Cohen v. York, 43 App. Div. 138, 59 N. Y. Supp. 333, the relator had been dismissed from the police force upon a charge which had been preferred against him and upon which he was tried, and duly found guilty. Some time afterward he petitioned to have the investigation reopened. Mr. Justice Patterson said:

"The ostensible ground upon which he sought a retrial or reinvestigation was that of newly discovered evidence, not available to him on his trial in 1895, but he also seeks to review certain rulings made or had during his trial. His petition to reopen his case was supported by affidavits which certainly tend to show that the application was not without merit, and that upon a rehearing facts might be made to appear that would exonerate him from the charge upon which he was convicted and dismissed. But we fail to find anything in the powers conferred by law upon the police commissioners, or anything in their rules or regulations, which would authorize them to grant an application such as this. * * * The power of the commissioners respecting the dismissal and reinstatement of police officers is one conferred by law; trials are regulated by law and the rules of the department. * * * There was no duty or obligation upon the police board to open the relator's case and grant him a rehearing. No right to such a rehearing was given him by law."

In People ex rel. Padian v. McAdoo, 114 App. Div. 100, 99 N. Y. Supp. 600, Mr. Justice Ingraham, said:

"There is no provision of the charter cited by counsel, or that I am aware of, that gives a police commissioner power to reverse an action of his predecessor and restore an officer to the force after he has been dismissed."

Section 284 of the Greater New York Charter provides that:

"* * * No person who shall have been a member of the force and shall have been dismissed therefrom, shall be reappointed."

Section 1543a of the charter, added thereto by chapter 723 of the Laws of 1907, provides that:

"Upon written application to the mayor by the person aggrieved, setting forth the reasons for demanding such rehearing, the police commissioner, if the person aggrieved was a member of the police force, * * * shall have the power, in his discretion, to rehear the charges upon which a member of the uniformed police * * * department * * * has been dismissed, unless such dismissal was for * * * conduct unbecoming an officer or member: * * * Provided that such former member of such force * * * shall waive in writing all claim against the city of New York for back pay and provided further that the mayor shall, in writing, consent to such rehearing, stating the reasons why such charges should be reheard."

There are no facts set forth in the moving papers showing that relator had complied with any of these requirements. Further, as the petitioner was removed for "conduct unbecoming an officer," this new provision of the charter expressly excepts his case. So that, by express provision in section 284 and by express exception in section 1543a, a police officer dismissed for conduct unbecoming an officer cannot be reinstated by the police commissioner.

[2] The method of reviewing the determination of the commissioner is by certiorari. It follows that the commissioner had no power to review his own decision after final order entered, and his attempt to reverse his former ruling was a nullity.

[3] The appellant makes the further point that, the police commissioner having exercised jurisdiction over the appellant and restored him to his office, he could not again dismiss him except in the manner provided for in sections 300 and 302 of the charter. This contention is answered in People ex rel. Hannan v. Board of Health, 153 N. Y. 513, 519, 47 N. E. 785, 786:

"He was therefore an officer de facto only, and, while his acts were binding upon the public, he had no title to the position, and it was the duty of the defendants, upon learning the facts, to dispense with his services and appoint a person who possessed the qualifications required by law. * * * In People ex rel. Kopp v. French, 102 N. Y., 583, 585 [7 N. E. 913, 914], Judge Earl said: 'Kopp was not legally a member of the police force. He was ineligible; the police commissioners had no right under the statute to appoint him; and, when it came to their knowledge that he had been convicted of a crime and was therefore ineligible to the office, they had the right summarily to vacate his appointment, discharge him from the police force, and refuse longer to recognize him as a member thereof.' In People ex rel. Krushinsky v. Martin [91 Hun, 425, 428] 36 N. Y. Supp. 851, 853, the court said: 'The provisions of the law requiring the formulation of written charges and service of the same could only apply to one who had been legally constituted a member of the force. As against the relator such a course was unnecessary for the reason that the proceedings of the board of police were in the nature of an investigation to ascertain whether or not he was legally a member of the force. * * * The relator never was legally a member of the force because, being appointed in violation of the civil service laws, his appointment was void ab initio and conferred no rights upon the appointee.'"

In the matter at bar, relator, having been reinstated in violation of the express provisions of law, was not legally a member of the force. It was therefore the duty of the commissioner, when advised of this fact, to summarily dismiss him.

[4] The writ of mandamus issues only when the petitioner has established a clear legal right to the relief prayed.

The order appealed from should therefore be affirmed, with $10 costs and disbursements. All concur.

(158 App. Div. 608)

WHITNEY v. TERRY & TENCH CO.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. APPEAL AND ERROR (§ 694*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.
Where the record shows that at the close of plaintiff's case defendant moved for a nonsuit, which was denied with the suggestion that it be renewed at the close of the evidence, but fails to show any renewal of the motion at the close of the evidence, the question of the sufficiency of the evidence to take the case to the jury is not presented.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915; Dec. Dig. § 694.*]

2. NEGLIGENCE (§ 55*) — BUILDINGS AND OTHER STRUCTURES — CONTRACTOR — CARE AS TO LICENSEES.
A contractor, who was employed by the owner of a building, which had been wrecked by an explosion, to tear down and remove the débris, owed no duty of active diligence to the employé of a plumbing contractor who was merely licensed by the owner to come upon the premises to repair piping under it, but was only bound to use ordinary care in the prosecution of the work.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 68; Dec. Dig. § 55.*]

3. NEGLIGENCE (§ 134*)—ACTIONS—SUFFICIENCY OF EVIDENCE.
In an action by the employé of a plumbing contractor who, while repairing piping under a building which had been wrecked by an explosion and from which the débris was being removed by defendant, was injured by a piece of concrete falling upon him, evidence *held* insufficient to warrant a verdict attributing negligence to defendant for not anticipating and guarding against the injury.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267–270, 272, 273; Dec. Dig. § 134.*]

4. NEGLIGENCE (§ 139*)—INSTRUCTIONS.
Where plaintiff, a plumber, while repairing piping under a building which was being torn down by defendant under a contract with the owner, was injured when a piece of concrete fell striking an iron beam and was deflected 30 feet, it was error to refuse to charge that, if defendant would not in the exercise of ordinary care have anticipated the accident, it would not be liable.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 371–377; Dec. Dig. § 139.*]

Appeal from Trial Term, New York County.

Action by Frank Whitney against the Terry & Tench Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Charles Capron Marsh, of New York City, for appellant.
James F. Brady, of New York City, for respondent.

LAUGHLIN, J. This is an action to recover damages for personal injuries, alleged to have been sustained by the plaintiff through the negligence of the defendant on the 11th day of January, 1911.

The New York Central & Hudson River Railroad Company's Fiftieth Street power house, at the southwesterly corner of Lexington avenue and Fiftieth street, borough of Manhattan, was in part demolished and so badly shattered and wrecked by an explosion as to render it unsafe and to require its complete demolition. The John Pierce Company was the general contractor for the erection of the Grand Central Terminal Station, and it was given supervising authority over the execution of certain work by other contractors. The architects of the Grand Central Terminal Station gave the Pierce Company a verbal emergency order, confirmed in writing under date of January 3, 1911, to make repairs to piping necessitated by the explosion, and directed that all steam, air, and water lines be restored to their former condition, and that necessary repairs to the plumbing be made. The defendant had been previously employed by the railroad company after the explosion to remove the débris and to completely demolish the building. The order in writing to the Pierce Company contained the following:

"Parties making repairs to the lines underneath the Battery House must confer with Terry & Tench's representative in charge of removing the débris from the building, in order to minimize the danger of accident to workmen."

The firm of Baker, Smith & Co., by whom the plaintiff had been employed in the steam fitting business for 22 years, had the steam fitting and plumbing contract in connection with the erection of the new station, but were required to do their work under the supervision of the Pierce Company. The order was communicated by the receiver of the Pierce Company to Baker, Smith & Co. the next day and in the same form. No formal notice was given by the plaintiff's employer to the defendant, and the only evidence on the subject of conferring with the defendant, as directed in the order for the work, is the testimony of the foreman of Baker, Smith & Co. to the effect that he told one of the foremen of the defendant that he was coming in to repair the pipes, and where to remove the débris from to enable that work to be done, which was corroborated in part by the testimony of one of defendant's foremen and the testimony of Baker, Smith & Co.'s superintendent to the effect that he pointed out his men to a watchman and foreman in the employ of the defendant and directed them "to be careful of them."

The framework of the building was of steel construction, which was reinforced by hollow tile concrete and brick. The building was three stories in height above the level of the street and extended from Lexington avenue westerly about halfway to Park avenue, and rested

on concrete walls, six of which ran northerly and southerly between the easterly and westerly exterior walls, dividing it, at the track level, into seven parts of varying width opening toward the south. The open spaces between these walls are referred to by the plaintiff in his testimony as "bays." The evidence with respect to the width of the building north and south is conflicting. The plaintiff said it was about 18 feet wide, but the evidence adduced by the defendant shows that it was composed of two steel panels of about 18 feet in width each. The plaintiff's testimony is explained by the fact that the panel nearest Fiftieth street had been entirely demolished. Most of the roof had fallen in, but part of it remained standing; and the beams, girders, and columns were bent and twisted and the concrete still adhered to them in many places. The building was dangerous to pedestrians on the adjacent streets and to any one on the premises in or about it. It was therefore necessary to completely demolish and remove it as quickly as possible. A ground plan of the building shows that the 12 tracks ended, or were designed to end, with bumpers and the northerly ends, immediately to the south of the building. Three lines of pipe extended east and west through the walls near the southerly end of the building at the track level. The lower was the air line, and it was at the track level. The one immediately above it was the water line; and above that and about 2½ feet from the track level was the steam line.

The accident occurred on the fourth day the plaintiff was working there. The defendant's employés were engaged in clearing up the wreck and removing the material by wheeling some of it onto cars at the track level and by hoisting the rest with an engine and derrick onto Fiftieth street. The derrick stood on the southerly side of Fiftieth street just west of Lexington avenue. According to this testimony of the plaintiff, the work was prosecuted by the defendant from east to west, and he and a helper, in doing their work, followed the cleaning gang employed by the defendant. The plaintiff testified that on the day of the accident the defendant's employés had finished removing the débris from the three easterly bays, and the material from above them, and were working on and over the fifth bay, from 30 to 60 feet to the west. One gang of the defendant's employés were working on the second floor knocking cement off the iron girders and columns with sledges; and another gang of 35 or 40 men were engaged in filling buckets with material at the track level, and it was being hoisted and swung to the street. At the time of the accident the plaintiff had sent his helper upstairs for a piece of flange connection. A water line had fallen down where the plaintiff was working, and he lifted it into place and blocked it up over the air line with a piece of joist, and was walking out of the bay to the south on, or standing on, a plank runway constructed to enable the defendant's men to wheel earth out of the bays onto the cars, and passing over the lines of pipe and extending southerly toward the car track. While in this position, the plaintiff heard a noise as of something falling back of him toward Fiftieth street, and he was struck on the back of the leg and knocked off the runway by a piece of concrete, described as 12 or 13 inches long and wide and 6 inches thick, and weighing about 20 or 25 pounds. It fell in the bay

inside the line of pipe just northerly of the southerly end of the building. The plaintiff saw, and had observed during all the time he had been working there, the work which was being done by the employés of the defendant. He says that concrete was constantly falling about 25 or 30 feet from where he had been working, but that he considered it perfectly safe, because the men who were loosening the concrete were some 30 feet distant from where he was.

The uncontroverted evidence shows that the defendant caused wire screens about 5 feet square to be erected around the columns under the place where its employés were loosening and dropping cement, and that there was such a screen underneath where the pieces of cement in question were cut loose and dropped. There was no wire screen immediately over plaintiff at the time, but there were screens around the columns near him. There is a conflict in the evidence as to whether the derrick was moving material at the time, and as to whether the cement fell from the bucket of the derrick or was dropped by the men working above; but the uncontroverted evidence shows, and the court charged the jury:

"That from whatever source or place the piece of concrete which hit the plaintiff fell, it struck an iron beam and was in this way deflected from its course, so that it struck the plaintiff at a point between twenty-five and thirty-five feet to one side."

The evidence also shows that in the manner in which the work was being conducted by the defendant's employés the bucket of the derrick did not come nearer than 30 feet to a line perpendicular to the place where the plaintiff was working. The evidence on the part of the defendant, which was uncontroverted excepting by the testimony of one witness who thought the cement fell from the bucket of the derrick, and evidently, as counsel for plaintiff virtually concedes, was mistaken, shows that defendant's employés cut this cement loose with a view to letting it drop at a point where it would strike at least 30 feet distant from where plaintiff was. The evidence on the part of defendant also shows that it had two or more watchmen stationed to give warning when material was about to fall, and that such warning was given by shouting, "Look out below!" a minute before the cement dropped. The plaintiff testified that he did not hear the signal or any such signal that day. Evidence was adduced on the part of the defendant tending to show that it posted notices of warning of danger at different places about the premises, and in the vicinity of where the plaintiff was working, and that it was not aware that any employés of Baker, Smith & Co. were working on the premises, and supposed that the men working there were in the employ of the railroad company, and that it had protested to the railroad company against its permitting its employés to work there, owing to the danger involved. There is, however, evidence tending to show that one of the defendant's foremen knew that the plaintiff was working for Baker, Smith & Co., and that he had been given orders to do any laboring work required in the prosecution of the work which the defendant was doing.

[1] At the close of the plaintiff's case, a motion was made for a nonsuit, and denied with a suggestion that it be renewed at the close of

the evidence. At the close of the evidence given in rebuttal, counsel for the defendant started to renew his motion for a dismissal of the complaint, but there had been some question with respect to his having reserved the right to call another witness, and the court interrupted him with an inquiry concerning that, and he was permitted to call the witness; and the record fails to show that there was any attempt to renew the motion thereafter. In this state of the record we are without authority to grant final judgment for the dismissal of the complaint, and therefore the question as to whether the evidence was sufficient to take the case to the jury is not, strictly speaking, before us for a decision. The defendant's motion for a new trial, however, presents the question as to whether the verdict should be permitted to stand. We deem it extremely doubtful whether there was any evidence of negligence on the part of the defendant, and it is quite clear that a finding that it was negligence cannot be sustained.

[2, 3] The defendant was lawfully on the premises, engaged in the prosecution of contract work with the owner. The owner thereupon, at most, licensed the defendant's employés to go upon the premises and prosecute the work for which they were employed, subject, however, to the prosecution of the work by defendant. The defendant was not obliged to suspend its work. The defendant owed no duty of active vigilance to the plaintiff; at most, it was only obliged to exercise ordinary care in the prosecution of its work, and, if there was any risk of injury from the prosecution of the work in that manner, the plaintiff, in accepting employment and working where he did, took the risk of such injury upon himself. There is no evidence of any specific negligent act on the part of any employé of the defendant. It is true the cement was allowed to fall, but it cannot be said that that was not a reasonable manner in which to perform the work for which the defendant was employed. The evidence on the part of the plaintiff tends to show, as already stated, that there was no wire screen immediately over him; but, if so, he knew that as well as did the defendant, and whatever danger was involved, from the manner in which this accident happened, was as well known to him as to the employés of the defendant. The material was not falling where he was, and he considered it perfectly safe, because, as he put it, he was "30 feet from where these things were falling," and for that reason he testified "it was safe, as safe as I am here in the chair." Negligence should not be imputed to the employés of the defendant for not considering it dangerous and taking other measures to prevent the accident. If it is not for us to say now, as matter of law, that it should not have been foreseen by the defendant, in the exercise of reasonable care, that a piece of cement of this size and weight on being dropped from a height of 40 feet or less would, on striking an obstruction 10 or 11 feet below the point from which it was dropped, be deflected 30 feet and hit plaintiff, it is at least competent for us to say that a verdict attributing negligence to the defendant for failing to foresee such an accident is against the weight of the evidence.

[4] The verdict of the jury may be accounted for owing to certain errors in the charge. The learned court instructed the jury with respect

to the negligence of the defendant in general terms, stating that it was its duty to exercise ordinary care, and that that was such care as a reasonably prudent person would be expected to use and would use under the same conditions "and with the same dangers reasonably to be apprehended, to look for and to guard against." The court was requested, in effect, to instruct the jury that if they believed that the defendant would not, in the exercise of ordinary care, have anticipated that such an accident would occur, then the plaintiff could not recover, and that, if the defendant "took all reasonable precautions to prevent any accident that might reasonably be anticipated, the plaintiff cannot recover." These requests should have been granted, for they presented the vital question, if there was a question for the jury, pointedly, and that was whether the defendant should have anticipated and guarded against such an accident.

It follows therefore that the judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

(158 App. Div. 568)

In re SWAN et al.

Appeal of BURDEN et al.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 122*) — TEMPORARY ADMINISTRATOR — CONTROL BY COURT.

Under Code Civ. Proc. § 2678, requiring temporary administrators within 10 days after receiving any money belonging to the estate to deposit it with a depositary designated by the surrogate, section 2679, providing that if he neglects to do so the surrogate must, upon the application of a creditor or person interested, direct him to deposit the money or show cause why an attachment should not issue against him, and section 2680, providing that money deposited by a temporary administrator cannot be withdrawn except upon an order of the surrogate, a certified copy of which must be presented to the depositary, a temporary administrator is a mere custodian of the funds held by him, and holds them solely and exclusively subject to the orders of the surrogate, and is not bound to pay claims against the estate, nor can he legally do so unless authorized by the surrogate, and hence an order of the Supreme Court requiring a temporary administrator to pay a debt due from the estate was made without jurisdiction and was void, especially as the temporary administrator could not comply therewith, since no depositary would pay the money, even though he should order it, without an order from the surrogate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 494–495½; Dec. Dig. § 122.*]

2. COSTS (§ 58*)—POWER TO ALLOW.

In a proceeding by attorneys to compel payment of a claim for services rendered and disbursements made to the committee of an incompetent person, which incompetent died pending the proceeding, the Supreme Court had power to allow costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 28, 29; Dec. Dig. § 58.*]

Appeal from Special Term, New York County.

Proceeding by Joseph R. Swan and others, attorneys at law, to compel payment of a claim for services and disbursements against the com-

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mittee of Augusta Hyatt, an incompetent person, pending which proceeding the incompetent died. From so much of an order confirming the Referee's report and ordering I. Townsend Burden, Jr., as temporary administrator of the incompetent, to pay the sum adjudged to be due, together with the costs, as directed such payment, the temporary administrator appeals. Modified and affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Le Roy D. Ball, of New York City, for appellants.
John Ewen, of New York City, for respondents.

McLAUGHLIN, J. The respondents, attorneys at law, had a claim for services rendered and disbursements made to the committee of the property of Augusta Hyatt, an incompetent person, and this proceeding was instituted to compel payment thereof. During the pendency of the proceeding the incompetent died, and thereafter one of the appellants, I. Townsend Burden, Jr., was appointed temporary administrator of her estate. The matter was sent to a referee, who reported that the respondents were entitled to recover the sum of $3,566.47. His report was subsequently confirmed by an order of the Supreme Court, and the temporary administrator was directed to pay said sum, together with the costs of the proceeding, to be taxed, including the fees of the referee and stenographer. The appeal is from that part of the order which directs the temporary administrator to pay. By stipulation the sole question sought to be raised by the appeal is:

"Whether the Supreme Court has power or jurisdiction to direct the temporary administrator of the deceased incompetent's estate to pay the amount awarded by the referee in his report, and to grant the petitioner's costs in this proceeding."

[1] The temporary administrator was appointed by an order of the surrogate, and his right to make such appointment is unquestioned. He is subject to the control of the surrogate with reference to all matters connected with the estate he represents. Upon his appointment he takes into his custody and under his control all the assets. This, however, is merely to preserve the same until an executor or administrator, as the case may be, is appointed, when his duties will cease and he must then turn over to such person whatever may have come into his hands. The statute requires him, within ten days after any money belonging to the estate comes into his hands, to deposit it with a depositary designated by the surrogate (Code of Civil Procedure, § 2678); if he fails or neglects to make such deposit within the time stated, then the surrogate *must,* upon the application of a creditor or person interested in the estate, make an order directing him to do so forthwith, or show cause why a warrant of attachment should not issue against him (Id. § 2679); when he makes the deposit he cannot thereafter withdraw it except upon the order of the surrogate, a certified copy of which must be presented to the depositary (Id., § 2680); and if the depositary should pay out the money thus deposited without an order directing the payment to be

made, it, as well as the temporary administrator, would become personally liable. He is not bound to pay claims against the estate represented by him, nor can he legally do so unless authorized by the surrogate. Since as to the funds held by him he is a mere custodian, and as to the disposition of the same solely and exclusively subject to the orders of the surrogate, he cannot comply with that part of the order appealed from, and, if he did, it would be in violation of the statute and subject him to personal liability. No depositary would pay out the money, even though he should order it, in the absence of an order of the surrogate.

The provisions of the statute safeguarding the funds held by a temporary administrator are clear and specific. The Supreme Court has no power to override such statutes, and, if it attempts to do so, it acts without jurisdiction. The attorneys for the respondents seem to recognize this fact, because in the brief presented it is suggested that, when the order appealed from was made, it thereupon became the duty of the temporary administrator to apply to the surrogate under section 2680 of the Code of Civil Procedure for an order authorizing the withdrawal of the amount directed to be paid; and, if the surrogate refused to make such an order, then the temporary administrator should apply for a mandamus to compel him to do so. Obviously, the enforcement of a valid order of the Supreme Court does not depend upon any such contingency. Once made it must be obeyed, otherwise the party directed to pay is liable to be punished for contempt. The law is not so unreasonable as to punish one for contempt for not doing an act which it makes impossible.

[2] As to the allowance of costs, the court had the power to make the same, and under the circumstances I see no reason to interfere with it.

My conclusion is that the court was without jurisdiction to direct the payments, and to that extent the order appealed from is modified by striking out such provisions, and, as thus modified, affirmed, with $10 costs and disbursements to the appellants. All concur.

(82 Misc. Rep. 525)

PEOPLE ex rel. RAYMOND v. WARDEN OF CITY PRISON.

(Supreme Court, Special Term, New York County. November 7, 1913.)

1. DISORDERLY HOUSE (§ 6*)—KEEPING—LIABILITY OF OWNER OR AGENT.

Penal Law (Consol. Laws 1909, c. 40) § 1146, provides that whoever, as owner, agent, or lessor, shall agree to lease any building or part thereof, knowing or with good reason to know that it is intended to be used for immoral purposes, or whoever, as owner, agent, or lessor, permits a house or any part of a building of which he may be the owner, agent, or lessor to be so used, shall be guilty of a misdemeanor. *Held*, that where relator was sought to be charged with violation of such act, but the record failed to disclose that he was either the owner or agent of the premises complained of, it was insufficient to justify his being held for trial.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 6, 9–13; Dec. Dig. § 6.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CONSTITUTIONAL LAW (§ 266*)—DISORDERLY HOUSE (§ 6*)—DUE PROCESS—ABATEMENT OF DISORDERLY HOUSE.

Penal Law (Consol. Laws 1909, c. 40) § 1146, provides that whoever, as owner, agent, or lessor, agrees to lease any building or part thereof, knowing that it is intended to use the same for immoral purposes, or whoever, as owner, agent, or lessor, knowingly or with good reason to know, permits a house or any part of a building of which he may be the owner, agent, or lessor to be so used, shall be guilty of a misdemeanor. Tenement House Act (Consol. Laws 1909, c. 61) § 153, as amended by Laws 1913, c. 598, provides that a tenement house shall be deemed to have been used for immoral purposes with the permission of the owner if there shall have been two or more convictions from the same tenement house within six months, either for violation of section 150 of the chapter, relating to disorderly houses, or of Penal Law, § 1146. *Held*, that such provision, attempting to make two convictions from the same house conclusive evidence of knowledge on the part of the owner, agent, or lessor for the purpose of sustaining a conviction against him for violating section 1146, was unconstitutional, as depriving him of the right to a fair trial, and as amounting to a confiscation of his property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 756; Dec. Dig. § 266;* Disorderly House, Cent. Dig. §§ 6, 9–13; Dec. Dig. § 6.*]

Habeas corpus by the People, on the relation of Max Raymond, against the Warden of the City Prison, to secure relator's discharge from imprisonment for alleged violation of Penal Law, § 1146, prohibiting the maintenance of disorderly houses. Writ sustained, and relator discharged.

Nathan Burkan, of New York City, for relator.

Charles S. Whitman, Dist. Atty., Stanley L. Richter, Deputy Asst. Dist. Atty., Archibald R. Watson, Corp. Counsel, and John P. O'Brien, Asst. Corp. Counsel, all of New York City, for respondent.

NEWBURGER, J. Relator was held by a city magistrate for trial in the Court of Special Sessions, as the minutes show, for a violation of subdivisions 1 and 2 of section 153 of the Tenement House Act. Chapter 598 of the Laws of 1913, amending section 109 of chapter 99 of the Laws of 1909, entitled "An act in relation to tenement houses, constituting chapter sixty-one of the Consolidated Laws," provided as follows:

"Sec. 109. 2. No tenement house or any part thereof shall be used for the purpose of prostitution or assignation of any description."

"Sec. 4. Section one hundred and fifty-three of such chapter is hereby amended to read as follows: 'Sec. 153. Permission of Owner.—A tenement house shall be deemed to have been used for the purpose specified in the last two sections with the permission of the owner, agent and lessee thereof in the following cases: 1. If summary proceedings for the removal of the tenants of said tenement house, or of so much thereof as is unlawfully used, shall not have been commenced within five days after notice of such unlawful use, served by the department charged with the enforcement of this chapter in the manner prescribed by law for the service of notices and orders in relation to tenement houses; or having been commenced are not in good faith diligently prosecuted to final determination. 2. If there be two or more convictions in the same tenement house within a period of six months either under section one hundred and fifty of this chapter or under section eleven hundred and forty-six of the Penal Law.'"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A careful reading of the Consolidation Act having reference to prostitution in tenement houses discloses that all the provisions seeking to punish landlords or agents of such property provide for a civil remedy, with the exception of section 1146 of the Penal Law (Consol. Laws 1909, c. 40), as amended by Laws 1910, c. 619, and Laws 1913, c. 591, in effect May 17, 1913, which reads:

"Whosoever shall keep or maintain a house of ill-fame or assignation of any description or a place for the encouragement or practice by persons of lewdness, fornication, unlawful sexual intercourse or for any other indecent or disorderly act or obscene purpose therein, or any place of public resort at which the decency, peace or comfort of a neighborhood is disturbed, shall be guilty of a misdemeanor. When the lessee, proprietor or keeper of a disorderly house or other building or any other person is convicted under this section, the lease or contract for letting the premises or the part thereof in which such violation occurred shall, at the option of the owner, agent or lessor, become void and the owner, agent or lessor may have the like remedy to recover the possession as against a tenant holding over after the expiration of his term. Whosoever as owner, agent or lessor shall agree to lease or rent or contract for letting any building or part thereof knowing, or with good reason to know, that it is intended to be used for any of the uses or purposes herein prohibited or whosoever as owner, agent or lessor knowingly or with good reason to know permits any house or room or other part of any building or premises of which he may be the owner, agent or lessor to be used in whole or in part for any of the uses or purposes herein prohibited, shall be guilty of a misdemeanor. Upon conviction of any person for a violation of the provisions of this section, the court before whom such conviction shall have been had, or the clerk of such court if there be a clerk, shall forthwith make and file in the office of the clerk of the county, in which said conviction shall have been had, a certified statement of said conviction and sentence, if any; and the clerk of said county shall immediately enter in the judgment docket book in said office the amount of the penalty or fine imposed, as a judgment against the person so convicted or sentenced. All persons convicted under this section in all places to which chapter six hundred and fifty-nine of the Laws of Nineteen Hundred and Ten applies shall be identified as provided for in section seventy-eight of that chapter."

[1] The record fails to disclose that the relator was either the owner or agent of the premises complained of. The magistrate, after taking proof that there had been several convictions of the tenants within six months, held the relator for trial. It is contended by the prosecution that under subdivision 2, there being two or more convictions in the same tenement house within a period of six months, the relator was guilty of violating section 1146 of the Penal Law. The learned corporation counsel, who is associated in the prosecution, in his brief contends that the relator violated the Tenement House Law because he was the owner of a tenement house in which prostitution was committed. This seems to have been the theory upon which this relator was held. To adopt such a ruling would, in my judgment, be a violation of the rights of the relator. The mere fact that tenants have violated the law cannot be construed to hold that the landlord is responsible. The act does not provide that it shall be prima facie evidence. As was said by Mr. Justice Peckham in People v. Cannon, 139 N. Y. 43, 34 N. E. 762, 36 Am. St. Rep. 668:

"It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecutions the Legislature may with some limitations enact that when certain facts have been proved they

shall be prima facie evidence of the existence of the main fact in question. See cases cited in Board of Excise Com'rs of Auburn v. Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705, supra. The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt."

And in Howard v. Moot, 64 N. Y. 268, it was held:

"The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are at all times subject to modification and control by the Legislature. The changes which are enacted from time to time may be made applicable to existing causes of action, as the law thus changed would only prescribe the rule for future controversies. It may be conceded, for all the purposes of this appeal, that a law that should make evidence conclusive which was not so necessarily in and of itself, and thus preclude the adverse party from showing the truth, would be void, as indirectly working a confiscation of property, or a destruction of vested rights."

In People ex rel. Nechamcus v. Warden, etc., 144 N. Y. 535, 39 N. E. 687, 27 L. R. A. 718, Mr. Justice Gray said:

"It seems to me that the constitutionality of this act is to be tested by its effect upon the citizen's right to pursue a lawful employment. If it imposes an arbitrary restriction, and if it has no reference to the welfare and health of the people, it must be condemned. I am not unwilling to concede that the act skirts pretty closely that border line, beyond which legislation ceases to be within the powers conferred by the people of the state, through the Constitution, upon its legislative body. When the Legislature passes an act which plainly transcends the limits of the police power of the state, it is the duty of the judiciary to pronounce its invalidity, and to nullify the legislative attempt to invade the citizen's rights. The court should never hesitate to interpose the barrier of its judgment against the operation of laws, which distinctly contravene constitutional rights."

[2] The act sought to be enforced is unconstitutional in that it deprives a defendant of a proper trial. It imposes unusual and unnecessary restrictions upon owners of realty. It sweeps away the right of a class of citizens who are entitled to the equal protection of the laws with all other persons. It invades the rights of liberty, because it arbitrarily and unnecessarily denies the right of a specified class of citizens to have their day in court. It provides that the guilt of tenants shall operate to convict the landlord without any evidence of knowledge or intent on the part of such landlord. It gives him no opportunity of showing that the tenants had violated the law without his knowledge, or of showing that he had used every means to keep the premises clean. In a community like ours, where we have apartments and tenements in which there are many tenants, unless the owner or lessee is given an opportunity to show by proper evidence that he had used every means to rid the premises of prostitutes and undesirable tenants, he would, in effect, be deprived of his constitutional rights to a fair trial, and a convic-

tion under such a law might result in a confiscation of his property. This may not be a literal taking of property without due process of law, but it is an annihilation of its value and a destruction of its attributes, so that, while the owner is permitted to retain his property in name, he is deprived of its essence and substance. Wynehamer v. People, 13 N. Y. 378–398; Wright v. Hart, 182 N. Y. 335, 75 N. E. 404, 2 L. R. A. (N. S.) 338, 3 Ann. Cas. 263.

Therefore the relator is entitled to his discharge for the reasons: (1) That there was no evidence before the magistrate to show that he was the owner or lessee of the premises complained of. (2) That the amendment to the Tenement House Act, known as chapter 598 of the Laws of 1913, is unconstitutional.

Writ sustained, and relator discharged.

(158 App. Div. 616)

STEVENSON v. DEVINS et al.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. PLEADING (§ 345*)—ANSWER—JUDGMENT.

Where, in a suit to cancel a contract for the purchase of capital stock of a corporation, defendant put in issue the material allegations of the complaint charging fraud, and the personal representatives of decedent, with whom the contract was made, alleged as a counterclaim that certain sums were due thereunder, and demanded a dismissal of the complaint and an affirmative judgment on the counterclaim, a motion for judgment on the pleadings was properly denied, regardless of whether the counterclaim was authorized.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055–1059; Dec. Dig. § 345.*]

2. SET-OFF AND COUNTERCLAIM (§ 29*)—CLAIMS SUBJECT OF COUNTERCLAIM—SUIT TO CANCEL CONTRACT—INSTALLMENTS DUE.

Code Civ. Proc. § 501, provides that a counterclaim must tend in some way to diminish or defeat plaintiff's recovery, and must be a cause of action against him in favor of defendant arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, and, in an action on contract, any other cause of action on contract existing at the commencement of the action. *Held*, in a suit to cancel for fraud, a contract for the purchase of corporate stock, a claim for installments due under the contract was available as a counterclaim.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 49–51; Dec. Dig. § 29.*]

Appeal from Special Term, New York County.

Action by Andrew Stevenson against Charlotte E. Devins and Thornton B. Penfield, as executors of the estate of John Bancroft, deceased, and Thornton B. Penfield individually. From an order denying plaintiff's motion for judgment on the counterclaim interposed by Devins and Penfield, as executors, on the ground that the same was not of the character permitted by Code Civ. Proc. § 501, plaintiff appeals. Affirmed.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Archibald Ewing Stevenson, of New York City, for appellant.
William P. Chapman, Jr., of New York City, for respondents.

LAUGHLIN, J. This is a suit in equity to cancel a contract made by the plaintiff with the decedent, John Bancroft Devins, on the 3d day of April, 1911, for the purchase of the entire capital stock of the New York Observer, a weekly newspaper devoted to the interests of the Presbyterian religious denomination, of which said Devins was president, general manager, and editor, and he owned a majority of its capital stock, and another contract made by the plaintiff with the executrix and executor of said Devins on the 4th day of October, 1911, modifying the former contract, and for an accounting and restoration by the personal representatives of said Devins, and by the defendant Penfield individually, of the moneys paid by the plaintiff pursuant to said contract. The ground upon which the relief is demanded is that the execution of each of said contracts by the plaintiff was induced by false and fraudulent representations of the decedent, and of his executor, who was his stepson and the son of the defendant executrix, respectively, with respect to the value of the capital stock of said corporation and its business, assets, and financial condition.

The material allegations of the complaint charging fraud were put in issue, and the personal representatives of the decedent alleged, as a counterclaim, that under the contract as modified an installment of money became due from the plaintiff to them in their representative capacities on the 4th day of April, 1912, and they demand the dismissal of the complaint and an affirmative judgment on the counterclaim.

[1] We are of opinion that the motion was properly denied, regardless of the question as to whether the counterclaim is authorized; for, since the material allegations of the complaint are put in issue, the plaintiff was not entitled to judgment on the pleadings. Code of Civil Procedure, § 547. In such case plaintiff's remedy was by demurrer or by motion on the trial.

[2] The question, however, upon which a decision of the appeal is desired, is whether, in an action to annul a contract on the ground of fraud, a defendant may properly interpose a counterclaim for moneys due under the contract, and since the question has been fully argued we deem it proper to express an opinion thereon. The fact that the cause of action and the counterclaim are not triable by the same branch of the court is of no importance on the question. The courts appear to have had considerable difficulty in determining when a counterclaim is authorized under the provisions of sections 500 and 501 of the Code of Civil Procedure, and thus far no plain rule, on which all questions arising may readily be determined, has been devised. It would, therefore, serve no useful purpose to review the decisions on this point.

Said section 500, in so far as it relates to a counterclaim, provides that the answer "must contain * * * a statement of any new matter constituting a * * * counterclaim, in ordinary and concise language without repetition"; and said section 501, so far as material to the question presented for decision, provides that the counterclaim

"must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be" a cause of action against the plaintiff in favor of the defendant "arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action," and "in an action on contract, any other cause of action on contract, existing at the commencement of the action." It is manifest that the case does not fall within the last provision quoted, for the action is not on contract. It is quite clear, I think, however, that the contracts sought to be canceled and annulled are the subject of the action. The plaintiff's cause of action is for the annulment and cancellation of the contracts, and the defendants' counterclaim is for the enforcement of the contracts.

In People of State of N. Y. v. Dennison et al., 84 N. Y. 272, which was an action to recover public moneys, the payment of which to contractors had been induced and obtained by fraud and collusion with state officers, and which the Court of Appeals had previously held sounded in tort and could not be sustained on the theory of liability founded on contract (80 N. Y. 656), it was held that a counterclaim for a balance due to the contractors for work done under the contract was not a proper counterclaim under section 150 of the Code of Procedure. That decision, however, was placed upon the ground that the action was for a tort. The action at bar, however, is not one in tort. The relief demanded is of an equitable nature, and the fraud is alleged merely as ground for the relief sought.

Subsequent, however, to the decision in People v. Dennison et al., supra, it was held in Ter Kuile v. Marsland, 81 Hun, 420, 31 N. Y. Supp. 5, that a counterclaim for moneys due under a contract of agency was properly interposed in an action against the agent for conversion of moneys collected by him. In Thomson v. Sanders, 118 N. Y. 252, 23 N. E. 372, which was an action to enforce liability on a bond, it was held that a counterclaim for damages sustained by the defendant through the fraudulent representations of the plaintiff in inducing him to execute the bond was proper. In Xenia Branch Bank v. Lee, 7 Abb. Prac. 372, which was an action for conversion of notes, a counterclaim against the plaintiff as indorser on the notes was held to be authorized. In Carpenter v. Manhattan Life Ins. Co., 93 N. Y. 552, which was an action by a first mortgagee against a second mortgagee in possession, to recover for the conversion of wood, a counterclaim for unlawfully cutting the timber, and thus impairing the security of the defendant's mortgage, was sustained on the theory that the *wood* was the subject of the action.

Some of the authorities hold that these provisions of the Code of Civil Procedure and the corresponding provisions of the Code of Procedure were designed to prescribe a *reciprocal* rule, and that, where a counterclaim is properly pleaded, the cause of action to which it is pleaded might be pleaded as a counterclaim, if the defendant had brought the action. Adams v. Schwartz, 137 App. Div. 230, at page 235, 122 N. Y. Supp. 41, and cases cited. Applying that rule here presents the point more clearly, for it would seem evident that, in an action to recover moneys due on a contract, the defendant might inter-

pose a counterclaim for the cancellation and annulment of the contract on the ground of fraud, and should not be relegated to a separate action, and to obtaining a stay of the action to enforce the contract, in the meantime.

It follows, therefore, that the order should be affirmed, with $10 costs and disbursements. All concur.

(158 App. Div. 660)

PEOPLE v. KOPPMAN.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. CRIMINAL LAW (§ 776*)—GOOD CHARACTER OF ACCUSED—INSTRUCTIONS.
Defendant, who had introduced evidence of his good character, being entitled to an instruction that good reputation of itself may create a reasonable doubt where otherwise no doubt would exist, refusal of such an instruction, "further than I have already charged on that subject," where the jury have only been instructed to give that evidence "its just and proper weight and no more," is error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838–1845; Dec. Dig. § 776.*]

2. CRIMINAL LAW (§ 1186*)—HARMLESS ERROR—INSTRUCTIONS.
Error in refusing an instruction, to which defendant is entitled, that good character of itself may create a reasonable doubt where otherwise no doubt would exist is not technical, but substantial, and may not be disregarded, no matter how guilty defendant may appear on the record; the determination of his guilt or innocence being for the jury in the first instance after being properly instructed in the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215–3219, 3221, 3230; Dec. Dig. § 1186.*]

Appeal from Court of General Sessions, New York County.

Meyer Koppman was convicted of receiving stolen property, and appeals. Reversed, and new trial ordered.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Samuel Wechsler, of New York City, for appellant.

Charles S. Whitman, Dist. Atty., of New York City (Robert C. Taylor, of New York City, of counsel, and Stanley L. Richter, of New York City, on the brief), for respondent.

CLARKE, J. [1] There is but one question we feel called upon to discuss upon this appeal. The defendant, upon his trial, produced three witnesses who testified to his good character. In its charge the learned court instructed the jury as follows:

"On the part of the defendant you will consider the testimony of the defendant himself, consider the testimony of Harry Stone, Nicholas Grunfast, and Max Coldman, called here as character witnesses. * * * On the subject of the character evidence, I ought to say to you that such testimony is always received in criminal trials. It is relevant to the issue, and the jury must consider it in connection with all the evidence in the case. It is to be given by the jury its just and proper weight and no more. The question involved here is not whether Meyer Koppman is a man of good reputation or of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

good character. The question is whether he committed this crime, and upon that subject you may consider the evidence of his previous reputation. A man may have a good reputation and the good favor of the community as to his integrity and honesty and yet commit a crime. If he does commit a crime, the fact that he has a good character and the favor of the community does not absolve him from the consequences of his act. Consider the testimony of good character, therefore, in its proper light, give it its proper relation upon the subject whether the defendant committed this offense which is laid at his door."

Thereupon counsel for the defendant stated:

"I ask your honor to charge the jury that good reputation of itself may create a reasonable doubt where otherwise no doubt would exist. The Court: I decline to charge further than I have already charged upon that subject"—

to which an exception was taken.

The learned court had charged nothing upon that subject. He had stated:

"It is to be given by the jury its just and proper weight and no more."

The request by the defendant's counsel was propounded for the purpose of having the jury instructed what, under the law, that just and proper weight was which they were instructed to give to it, and this the court declined to do. People v. Bonier, 179 N. Y. 315, 72 N. E. 226, 103 Am. St. Rep. 880, was a murder case. Judge Vann said:

"A careful review of the testimony has led us to the conclusion that the verdict was not against the weight of evidence, and that it should not be disturbed, unless some error, duly raised by exception, was committed during the trial of such a nature as to give rise to the presumption that the defendant suffered prejudice therefrom. Evidence was given by witnesses called in behalf of the defendant tending to show that his general reputation from the speech of people, in the community where he had lived for many years, was good and that they had never heard anything against him. No evidence was given in behalf of the people in relation to his reputation or character. In charging the jury upon this subject, the court said: 'You will take into account the evidence of these two witnesses who testified in behalf of the defendant with reference to his character. They said they had known him, one of them eight months or nine months, and made an investigation of his character and standing, or his reputation perhaps would be better, and so far as he learned it was good and he so reported. The other gentleman had known him some time, and, so far as he knew, his reputation was good. You have a right to take that into account. He was at liberty to swear six witnesses. He was under no obligation to do so, but he might have done so. It is proper for you to take into account the fact that these witnesses have testified that he was a person of good reputation in the community where he lived, for the purpose of discrediting the weight and probability of the circumstances sought to be established, and in addition to create a probability of innocence. No matter what his standing might have been in the community where he lived in the past, he might yet be guilty. So you will observe it is proper to be taken into account by you as bearing upon the probability as to whether or not he is guilty of the crime charged in the indictment.' * * * The following extract from the record sets forth three consecutive requests to charge presented by the counsel for defendant, the action of the court thereon, and an exception taken to the final ruling: 'Mr. Murphy: I ask your honor to charge that, in the absence of any testimony upon the subject of character, the presumption is that the defendant's character is good. The Court: That is true. Mr. Murphy: I ask your honor to charge that there is testimony in this case, and that if the jury believe it, believe the testimony of these witnesses upon the subject of the defendant's character, that that is proof conclusive of good character. The Court: Yes, on that subject I should think so. I will charge it. Mr. Murphy: Now, I ask your honor to charge the jury that

the presumption which arises as to the defendant's good character, both from the failure to attack it and from the testimony given, may of itself be sufficient to raise a reasonable doubt as to the defendant's guilt. The Court: That I deny. The jury should consider the evidence of good character for the purposes mentioned. Mr. Murphy: I except.' "

After reviewing Cancemi v. People, 16 N. Y. 501, 506, Remsen v. People, 43 N. Y. 6, and People v. Elliott, 163 N. Y. 11, 57 N. E. 103, Judge Vann continued:

"It is therefore the law that evidence of good character may of itself create a reasonable doubt, when without it none would exist, and that upon the request of the accused the jury should be told that such evidence, in the exercise of their sound judgment, may be sufficient to warrant an acquittal, even if the rest of the evidence should otherwise appear conclusive. * * * The instruction asked was of great moment to the defendant, confronted, as he was, with a strong case against him. Whether his character was good was for the jury to decide, but they were not permitted to give the full effect to that fact, if they found it, which the law authorizes. An innocent man may be so surrounded by adverse circumstances that his only reliance is his naked denial, which ordinarily has but little weight, and proof of good character, which may have great weight. We think that the charge, as a whole, tended to mislead the jury as to the effect which they might give to such evidence. The body of the charge did not cover the point, as the jury were there told that they might consider good character for two purposes: First, to discredit the weight and probability of the circumstances sought to be established; and, second, to create a probability of innocence. In response to a distinct request for an instruction that good character may of itself be sufficient to raise a reasonable doubt, the court denied the proposition of law embraced in the request but charged that the jury should consider the evidence for the purposes mentioned, apparently meaning the two distinct purposes mentioned eo nomine in the body of the charge. No attempt was made to instruct the jury as to the weight which good character may have, independent of any other evidence, and this was the main chance of the defendant. * * * What the defendant asked and should have had was an instruction that such evidence of itself might raise a reasonable doubt. He did not get it. The jury decided the case without knowing the law. The effort to have them told what the law was upon a vital point met with a denial. They went to the jury room not only uninformed but, as they may have understood the words of the court, misinformed as to their power. We cannot say judicially that they would have found as they did if they had been properly instructed, and hence we cannot overlook the error under section 542 of the Code of Criminal Procedure. * * * However clear the guilt of the defendant may appear to be, it is our duty to reverse the judgment of conviction and order a new trial, not in the exercise of our discretionary power, but in obedience to the command of law."

In People v. Conrow, 200 N. Y. 356, 362, 93 N. E. 943, 945, the Court of Appeals again reviewed the cases on this subject and said:

"The defendant was entitled to have the jury charged substantially as requested by his counsel, that in the exercise of sound judgment they might give the defendant the benefit of the presumption of innocence that arises from good character, no matter how conclusive the other testimony appeared to be."

It is not necessary to cite further because under the established law of this state the defendant was absolutely entitled to have the jury instructed as requested by his counsel. When they were told that they were to give that evidence "its just and proper weight and no more," and when the court was asked to define what that just and proper weight was, to wit, "that good reputation of itself may create a reason-

able doubt where otherwise no doubt would exist," and the court declined to so charge, the jury was in effect charged that good reputation of itself would not create a reasonable doubt where otherwise no doubt would exist.

[2] The error was not technical but substantial; it was one we are not warranted in overlooking. No matter how guilty a defendant may appear to be upon a record presented to a reviewing court, the determination of his guilt or innocence is for the jury in the first instance, after having been properly instructed in the law. If the trial court falls into such obvious and substantial error, violates a rule so carefully and clearly and frequently laid down by the appellate courts, the verdict so illegally obtained cannot be permitted to stand.

The judgment appealed from must be reversed, and a new trial ordered. All concur.

(158 App. Div. 824)

MORALES v. KLOPSCH.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 437*)—ACTIONS—LIMITATION OF ACTIONS AGAINST EXECUTOR.

Under Code Civ. Proc. § 383, subd. 4, limiting actions against an executor for conversion by himself or his testator to three years, a suit against an executor for converting bonds, which, believing they were his testator's, he sold and applied the proceeds as part of his testator's estate, was barred after three years, though the executor was sued individually.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1729–1761, 1764; Dec. Dig. § 437.*]

2. LIMITATION OF ACTIONS (§ 66*)—TROVER—DEMAND.

While, so long as they were in his possession, a demand would have been necessary to charge an executor with conversion of bonds claimed by plaintiff, which came into the executor's possession lawfully, where he sold the bonds and applied the proceeds as a part of his testator's estate, such action constituted a conversion, and the statute of limitations began to run without any demand.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 353–375; Dec. Dig. § 66.*]

Appeal from Trial Term, New York County.

Action by Miguel Morales against Louis Klopsch, which after his death was revived against Mary M. Klopsch as his executrix. From an order vacating a judgment for defendant and granting a new trial, defendant appeals. Order reversed, and judgment reinstated.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, and DOWLING, JJ.

Joseph M. Hartfield, of New York City, for appellant.

Sterling Pierson, of Brooklyn, for respondent.

SCOTT, J. This action is for damages for the conversion of personal property, to wit, two Cuban bonds, and the coupons attached thereto. The original defendant was one Louis Klopsch, and the action has been revived against his executrix, the present defendant.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The action was commenced on September 28, 1909. The amended complaint contains four causes of action all based upon the alleged conversion of two bonds and their coupons; said conversion being alleged as having taken place on March 25, 1904, April 20, 1904, June 14, 1905, and September 29, 1905. From the evidence it appeared that Klopsch had been appointed executor of one J. F. J. Xiques, who died October 12, 1903. Among the effects of said Xiques which came into the hands of his executor were two Cuban bonds payable to bearer, with coupons attached. These bonds were included in the inventory of the estate of Xiques, and were appraised as a part of his estate, and were ultimately disposed of by the executor as part of the estate. From the accounts of the executor filed with and approved by the surrogate, it appears that the coupons were collected at various dates prior to September 29, 1905, and that on said last-mentioned date the bonds themselves were sold, and the entire proceeds both of bonds and coupons ultimately expended for necessary expenses of administration or paid over to the legatees entitled to share in the estate. The executor made several accountings in the Surrogate's Court, and on August 5, 1909, a final decree was made settling his accounts and directing distribution of the estate. In 1904 a letter came into the hands of Klopsch, written by the plaintiff to Xiques, referring to the bonds. Klopsch at once replied to this letter asking for particulars of the plaintiff's claim to the bonds, but never received any reply. From January and July, 1904, Klopsch as executor published the usual six months' notice to creditors to present claims against the decedent, but no claim was presented by or in behalf of plaintiff.

In February or March, 1908, a letter from plaintiff was delivered to Klopsch, which recited the circumstances under which the bonds came into the hands of Mr. Xiques and amounted to a demand for the delivery of the bonds or their proceeds. To this letter Klopsch, through his attorney, replied rejecting the claim. Defendant pleads the three-year statute of limitation, and also the six-month statute. The trial court dismissed the complaint upon the ground that the action had been barred by the three-year statute of limitation. Upon a reargument of the motion to dismiss, however, the court concluded that the conversion did not take place, and consequently the cause of action did not accrue until demand was made and rejected in 1908, and consequently that the cause of action had not been barred by the statute of limitation. The result was the order appealed from.

[1] We are of the opinion that the court was right in its first disposition of the case and that the order appealed from was erroneous. Section 383 of the Code of Civil Procedure (subdivision 4) provides as follows:

"An action against an executor, administrator, or receiver, or against the trustee of an insolvent debtor, appointed, as prescribed by law, in a special proceeding instituted in a court or before a judge, brought to recover a chattel, or damages for taking, detaining, or injuring personal property, by the defendant, or the person whom he represents," must be commenced within three years.

The action is one for conversion of chattels by Klopsch, the executor, and not an action brought upon any contract made by Xiques or his executor. Consequently the action was of necessity brought against Klopsch, individually, and not against the estate of Xiques. The conversion, however, was an act committed by Klopsch in the course of his administration of the estate and in pursuance of what he deemed to be his duty as executor. The question is, when did the conversion take place, for it was then that this cause of action accrued. The complaint fixes the dates of the conversions as those on which Klopsch collected the coupons and disposed of the bonds. In this we think the pleader was right. The rule is that in a case like the present, wherein one in a representative or official capacity, acting within the assumed scope of his authority, commits an act which is equivalent to a conversion, although he is liable to suit individually, still he is entitled to the benefit of the three-year statute of limitations. Lathrop v. Twelfth Ward Bank, 16 App. Div. 567, 131 N. Y. Supp. 314.

[2] The order appealed from was evidently made upon the theory, now strongly urged by respondent, that a demand upon Klopsch was necessary in order to fasten upon him liability as for a conversion. We do not so understand the law. A similar question was discussed in MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 N. E. 801, wherein the court said:

"The plaintiff asserts that there was no conversion until the 26th day of August, 1895, when his predecessor in title made a demand upon the defendant for the return of the bonds or the payment of their value, and this is upon the theory that the defendant's original possession of the bonds was lawful, so that no cause of action for conversion could have arisen until after a demand by the plaintiff and a refusal by the defendant. We think the plaintiff's contention is not tenable. The rule that one who comes lawfully into possession of the property cannot be charged with conversion thereof until after a demand and refusal is too well established to justify extended discussion. * * * But it has no application in a case where the lawful custodian of the property commits an overt and positive act of conversion by unlawful sale or disposition of the same. Pease v. Smith, 61 N. Y. 480. So long as the defendant was in possession of the bonds, under circumstances which might have made that possession lawful or unlawful at its will, a demand and refusal were necessary to put it in the wrong; but when it assumed to transfer the bonds to the German American Bank it committed an act which was in hostility to the right and title of the plaintiff. This was a distinct and unequivocal conversion. It was a wrongful taking, which at once created a cause of action in favor of the owner of the bonds. No demand was necessary. The sole object of a demand is to convert an otherwise lawful possession into an unlawful one. In such case the refusal furnishes the only evidence of a conversion."

The facts of the present case fit exactly with those presented in the case last above cited, and those cases which it relies upon, like Pease v. Smith, 61 N. Y. 480. Klopsch, the executor of Xiques, came lawfully into the possession of the bonds and coupons. So long as he held them unconverted a demand would unquestionably have been necessary to charge him with conversion. But when he sold them and distributed the proceeds he acted in hostility to the right and title of the defendant. That act constituted a conversion, and a cause of action at once accrued in plaintiff's favor, and from that moment the

statute of limitations began to run in favor of Klopsch. As the action was not begun within three years thereafter, the defense founded upon the statute was a complete defense to the action.

The order appealed from must be reversed, with costs to the appellant, and the judgment reinstated. All concur.

(82 Misc. Rep. 515)

MERRITT v. ARCHER.

(Supreme Court, Trial Term, Orange County. November 12, 1913.)

1. AUCTIONS AND AUCTIONEERS (§ 9*)—LIABILITY OF AUCTIONEERS.
A purchaser of land at an auction could not recover the down payment from the auctioneer who had accounted therefor to his principal, though the principal was unable to convey a good title, where the principal was disclosed in the advertisements and at the sale and the purchaser knew that the auctioneer was acting only as agent.
[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. §§ 41–43; Dec. Dig. § 9.*]

2. AUCTIONS AND AUCTIONEERS (§ 9*)—LIABILITY OF AUCTIONEERS.
Where an auctioneer sells in his own name without disclosing the name of his principal, he is personally liable for the down payment where title to the land fails.
[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. §§ 41–43; Dec. Dig. § 9.*]

Action by Thomas Merritt against Theodore F. Archer. On motion by both parties for a directed verdict. Verdict directed for defendant.

Frank Lybolt, of Port Jervis, for plaintiff.
Leander B. Faber, of Jamaica, for defendant.

TOMPKINS, J. [1] The defendant was the auctioneer at a public sale of lots and plots of land belonging to the Engelhardt Construction Company, and as such auctioneer, on July 4, 1907, struck down to the plaintiff certain lots for the sum of $12,125, which was the amount of the plaintiff's bid therefor. Plaintiff thereupon paid to the defendant, as such auctioneer, the sum of $1,212.50, being 10 per cent. of said bid, and the further sum of $50, being the auctioneer's fee, which, by the terms of sale, was payable by the purchaser. In July, 1913, nearly six years later, and long after the defendant had accounted to his principal for the proceeds of the auction sale, the plaintiff brought this action against the auctioneer to recover the amount paid to him as aforesaid, alleging that at the time fixed for closing the sale the Engelhardt Construction Company was unable to deliver a good title, free from incumbrances, restrictions, etc., and plaintiff thereupon demanded a return of his money from the vendor, the Engelhardt Construction Company. It appears that thereafter, the construction company brought an action against the plaintiff to compel specific performance, in which the plaintiff set up a counterclaim for the amount paid by him to the auctioneer and now sought to be recovered in this action, which action is pending and undetermined. The plaintiff acknowledges that at the time

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the sale he knew that the Engelhardt Construction Company was the owner of and was selling the property, and that the defendant was only acting as auctioneer, and as its agent. There is no claim that there was any deceit practiced upon the plaintiff, or any concealment of the principal. On the contrary, it is admitted that the principal was disclosed in the advertisements and at the sale, and the plaintiff knew that the defendant was acting only as the agent of the owner. It is not denied that the defendant paid the amount received from the plaintiff to his principal soon after the sale, and years before this action was commenced.

Under these circumstances, it seems quite clear to me that the plaintiff has no cause of action.

[2] It is the law that where an auctioneer sells in his own name, without disclosing the name of his principal, he is personally liable. Meyer v. Redmond, 205 N. Y. 478, 98 N. E. 906, 41 L. R. A. (N. S.) 675. In this case the court said:

"Of course, had the defendants sold, as auctioneers, upon notice that they were acting as agents for a disclosed principal, and the plaintiff had made his bid for the stock under such a notice, then the agents, in the absence of an express written contract to be bound, would not be liable, and the plaintiff's remedy would be against the principal; but the purchaser has the right to know with whom he is dealing."

While the Meyer Case dealt with the sale of personal property only, I can see no good reason for a different rule applying to the sale of real estate.

I do not regard the case of Cockcroft v. Muller, 71 N. Y. 367, as authority for the plaintiff's contention. The question here involved was not squarely presented in that case. The only question there at issue was whether the plaintiff could recover from the auctioneers interest on the amount of his deposit, after he had sued and recovered from the vendor the principal sum paid by him to the auctioneers; and the court held that the plaintiff's satisfaction of his judgment against the vendor was a bar to his subsequent action against the auctioneers for the interest, and the court incidentally and as pure obiter intimated that the original action might have been against either the auctioneers or the vendor. I think, however, all the court meant was that the auctioneer would be liable for the deposit, so long as it was in his hands; but, where the auctioneer and agent has paid over the money to the disclosed principal long before any claim is made against him as in this case, there can be no principle of law that would make the agent liable.

Counsel for both sides at the trial requested the court to direct a verdict, and stipulated that such verdict might be directed after the submission of briefs, and the expiration of the term, and that such direction, when made, should be entered upon the minutes as of the date of the trial.

In accordance with such stipulation, I direct a verdict in favor of the defendant.

(158 App. Div. 595)

In re ABRAHAMS.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT—PROCEEDINGS.
In a proceeding to discipline an attorney for professional misconduct, evidence *held* insufficient to justify a finding that an offer was made with the knowledge or approval of respondent that criminal proceedings he had instituted against a judgment debtor would be dropped, if the debtor would satisfy a judgment without prosecuting a motion for a new trial.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

2. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT—EVIDENCE.
In a proceeding for the disciplining of an attorney for professional misconduct, evidence *held* sufficient to support a finding that criminal charges were instituted by the respondent to influence civil actions.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

3. ATTORNEY AND CLIENT (§ 38*)—MISCONDUCT—DISBARMENT.
In view of Penal Law (Consol. Laws 1909, c. 40) § 570, making the compounding of crime a felony, an attorney, who institutes criminal proceedings with the view of compelling parties to a civil action to make a settlement on condition that the proceedings be dismissed, is guilty of grave professional misconduct, even though there be some basis in fact for the institution of the proceedings.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61; Dec. Dig. § 38.*]

4. ATTORNEY AND CLIENT (§ 58*)—DISBARMENT—DEFENSES—PUNISHMENT.
In a proceeding to discipline an attorney for professional misconduct, consisting of instituting criminal proceedings with intent to influence civil actions by abandoning the criminal prosecutions upon the other party meeting his demands, a claim that the attorney did not know that that was unprofessional is no defense, and he will be suspended, though on account of youth and inexperience he is not disbarred.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 76–78; Dec. Dig. § 58.*]

Application to discipline Paul Abrahams, an attorney, for professional misconduct. Respondent suspended.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, and SCOTT, JJ.

Joseph M. Proskauer, of New York City, for petitioner.
L. K. Schlechter, of New York City, for respondent.

INGRAHAM, P. J. The Association of the Bar of the City of New York presented two charges against respondent, which were referred to a referee, who has filed his report. Both charges involved the preferment of criminal charges by the respondent for the purpose of influencing the decision of civil cases in which either the respondent or his client was interested.

The facts as to the first charge were: That the respondent as plaintiff had instituted an action against one Carl Spilka, which case had been tried and verdict rendered in favor of the respondent and against Spilka; that Spilka had moved to set aside the verdict and for a new trial,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and, while that motion was undetermined, the respondent preferred a criminal charge against Spilka of forgery in the alteration of the books of a corporation in which both the respondent and Spilka were interested. A warrant was issued, Spilka was arrested and brought before a magistrate, and on the hearing before the magistrate Spilka was discharged. There was testimony by the attorney for Spilka that, at the hearing before the magistrate, the respondent's counsel, who represented him, suggested that Spilka and the respondent could settle their differences and allow the proceedings to drop. That was denied by the respondent and by his counsel, and the referee has reported that the fact that any such offer was made with the knowledge or instigation of the respondent was not proved. The record conclusively establishes that, while the motion to set aside the verdict in favor of the respondent individually and against Spilka and for a new trial was pending, the respondent obtained on his own affidavit a warrant for the arrest of Spilka, and caused him to be taken before a magistrate, charged with a felony, with manifestly no foundation for the charge.

[1] We adopt the conclusion of the referee that the evidence would not justify a finding that a request was made, with the knowledge or approval of the respondent, that the criminal proceedings be dropped if Spilka would settle his controversy with the respondent.

[2] But we have the fact that a warrant was obtained upon a baseless charge of forgery against Spilka, and that he was arrested on that charge while a civil action was pending between the respondent and Spilka, and the inference is justified that, if there had not been a civil controversy between the respondent and Spilka, the respondent would not have presented such a charge against Spilka and would not have obtained a warrant for his arrest. The respondent concedes that all the facts upon which he based the charge were known to him before June, 1907, yet he preferred no charge nor intimated to any one that a crime had been committed until January, 1908, after he had obtained his verdict and when a motion to set it aside and grant a new trial was pending.

The respondent having adopted this process of enforcing a civil obligation, there was presented to him a second opportunity of using the same means in another civil controversy. It appears that the respondent was attorney for one Joseph Friedman, and in June, 1910, one Michael Bernstein recovered two judgments in the Municipal Court against Friedman; the respondent appearing as attorney for the latter in the litigation resulting in the two judgments. A discharged clerk of Bernstein subsequently made a statement to Friedman, or to the respondent, that Bernstein had testified falsely on the trial of the actions in which the judgments had been recovered. Friedman took Bernstein's discharged clerk into his employ, and the clerk made an affidavit stating that Bernstein's testimony on the trial was false. Armed with this affidavit, the respondent went to an assistant district attorney to induce the district attorney to prosecute Bernstein for perjury. The assistant district attorney, after an investigation, held that the evidence before him would not justify the district attorney in prosecuting Bernstein; but, as the assistant district attorney was about to

leave for his vacation, he referred the matter to another assistant district attorney, who also investigated the matter, and, after consulting with his superior, he also decided the evidence was insufficient to justify a criminal prosecution. While this proceeding was pending before an assistant district attorney, the respondent suggested to Bernstein and his attorney that, if Bernstein would satisfy the two judgments against Friedman and pay Friedman $250, his expenses in defending the action, the criminal proceedings would be withdrawn. This matter was taken into consideration by Bernstein's attorney, who submitted it to his client, who refused it, and then the respondent said he would not insist upon the payment of the $250 if Bernstein would satisfy the judgments. The assistant district attorney seems to have been aware that some negotiations for a compromise between Friedman and Bernstein were being considered, and then he insisted that respondent proceed with the charge at once; but, in consequence of the assistant district attorney's contemplated absence, the charges were referred to another assistant district attorney, as before indicated. The respondent had been advised by two assistant district attorneys that the evidence would not even justify a criminal prosecution. His efforts to use the criminal charges before the district attorney had failed. It appeared quite plainly that more pressure than a suggestion that the district attorney prosecute Bernstein was necessary, and the respondent again resorted to a proceeding before a magistrate. In his testimony before the referee, the respondent expressly states that the object of the charge was for the purpose of compelling Bernstein to satisfy the two judgments, and he further added that the criminal charge would not have been brought before the magistrate if Bernstein had satisfied the two judgments. However, after the district attorney refused to have anything to do with the prosecution, the respondent went before a magistrate, preferred the same criminal charge of perjury against Bernstein; that charge was heard by the magistrate and dismissed.

In the second charge the referee has convicted the respondent of unprofessional conduct. In relation to the second charge, it is perfectly apparent that the respondent was not justified in bringing the criminal charge against Bernstein solely upon the uncorroborated affidavit of the discharged clerk, and that the respondent at no time had in his possession the slightest evidence in corroboration of the unsupported affidavit.

I think the evidence clearly establishes the fact that both these criminal charges were instituted by the respondent, in one case to get the defendant against whom he had obtained a verdict to discontinue the proceedings to review it, and, in the other case, to get the person who has recovered two judgments against his client to satisfy the judgments and pay a sum of money to secure the discontinuance of the criminal proceedings.

[3] The respondent boldly claims that this was not professional misconduct; that a lawyer, having a claim against a third party, either for himself or for a third party, has the right to institute criminal proceedings against the third party to force him to pay the claim.

To establish that proposition the counsel for the respondent cites Continental National Bank v. National Bank of the Commonwealth, 50 N. Y. 575, and ends up his brief by saying:

"He instituted the proceedings against Bernstein, pressed on by his client, and on his client's behalf. He had no personal interest therein. He honestly believed that he could do as he did. We submit that not alone have the petitioners failed to establish any vice by respondent or malpractice on his part, but there is not a fact in the record which puts the slightest taint on respondent's character."

A reference to the case of the Continental National Bank v. National Bank of the Commonwealth, supra, shows that it was a case where a thief had obtained from a broker $50,000 in gold, by delivering to the broker a check with a forged certification of the plaintiff bank, and it was sought to stop plaintiff bank from denying the validity of the certification upon the ground that the certification had been presented to the teller of the bank and he had pronounced the certification valid before the thief had been able to get away with the money, and, relying upon the certification, the defendant had not pursued the thief to recover the money in his possession. The Court of Appeals held that the plaintiff bank was estopped from denying the genuineness upon that ground, and, in delivering the opinion, the Court of Appeals held that an arrest of the thief under those circumstances was a perfectly justifiable means of obtaining the property that had been stolen. Certainly that is a very different proposition from saying that making a criminal charge based upon false accusations against a debtor is a proper method of forcing the payment of a claim or the discharge of an indebtedness.

In our opinion a lawyer is never justified in using a criminal proceeding to collect a civil debt or enforce a civil right, and certainly not when it clearly appears that the facts upon which the criminal charge is made do not justify the charge. Much less is he justified in instituting a proceeding for punishment for a felony and then suggesting that the prosecution should be abandoned on receiving an advantage therefor, either for himself or for his client. Section 570 of the Penal Law provides:

"A person who takes money or other property, gratuity or reward, or an engagement or promise thereof, upon an agreement or understanding, express or implied, to compound or conceal a crime, or a violation of statute, or to abstain from or discontinue, or delay, a prosecution therefor, or to withhold any evidence thereof, except in a case where a compromise is allowed by law, is guilty: 1. Of a felony, punishable by imprisonment in a state prison for not more than three years, where the agreement or understanding relates to a felony," not punishable by death or imprisonment in a state prison for life.

Upon the respondent's own testimony in the Bernstein Case, he was very close to an attempt to commit this crime of compounding a felony. We therefore adopt the report of the referee.

[4] In extenuation, the respondent claims that he was entirely frank before the referee, that he was a young man without experience in criminal law, that he had no thought that he was guilty of any misconduct in what he did, that he was convinced the judgment in

favor of Bernstein and against his client was obtained by perjury, and that he acted in entire good faith and without any intention of committing any misconduct. That such an explanation should be made by any member of the profession—by an attorney and counselor at law—is an example of the absence of the high ideals that formerly existed and which controlled the members of the profession. If the bar is to regain the respect in which it has been held, it is essential that practices of this kind shall be condemned in the strongest terms by the courts and those guilty of such practices disciplined. If this respondent had been a more experienced practitioner, or if we thought his conduct was the result of anything more than the absence of a knowledge of the impropriety of his conduct, we should feel it our duty to disbar him. But considering the fact of his youth and inexperience, and that he did not intend to violate the law, we have concluded to suspend him from practice for one year, with leave to apply for reinstatement at the expiration thereof, upon proof that he has actually abstained from practice during that period and has otherwise properly conducted himself. All concur.

(158 App. Div. 760)

YOUNG v. WHITE.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. PLEADING (§ 364*)—IRRELEVANT ALLEGATIONS—REMEDY.
   Irrelevant allegations of the complaint should be stricken out on motion; such allegations being more serious and prejudicial in complaint than in an answer, since by statute defendant is required to make a general or specific denial of each material allegation controverted, and a failure to deny is an admission of the truth of the allegation.
   [Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156–1162; Dec. Dig. § 364.*]

2. PLEADING (§ 129*)—FAILURE TO DENY.
   Failure to deny an allegation of the complaint admits its truth if it be material.
   [Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270–275; Dec. Dig. § 129.*]

3. PLEADING (§ 11*)—COMPLAINT—ALLEGATIONS OF FACT.
   The Code contemplates that the complaint shall allege statements of fact and not merely evidence.
   [Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

Appeal from Special Term, New York County.

Action by John A. Young against Archibald S. White. From an order denying a motion to strike out certain allegations of the complaint and to make other allegations more definite, defendant appeals. Order modified as stated.

See, also, 143 N. Y. Supp. 934, 935.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles E. Thorn, of New York City, for appellant.

John C. Tomlinson, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

McLAUGHLIN, J. This is an appeal from an order denying a motion to strike out certain allegations of the complaint, and to make other allegations more definite and certain. The action is at law to recover $600,000 and interest thereon, one-third of the profits alleged to have been made in a joint venture between the parties to this action.

The complaint alleges that in the fall of 1906 the plaintiff and defendant entered into an agreement, the object of which was to acquire control of the Cleveland Gaslight & Coke Company, the People's Gaslight Company, the Cincinnati, Newport & Covington Electric Light Company, and the Union Gas & Electric Company, corporations supplying gas and electricity in some of the cities in Ohio and Kentucky; also, to obtain control of certain natural gas fields in West Virginia and Kentucky, and certain contracts in connection therewith; also, to build a gas pipe line between the natural gas fields and the city of Cincinnati; and, finally, to vest all the control of the properties thus acquired in a holding company, thereafter to be organized.

The complaint further alleged that under the agreement the plaintiff obligated himself to obtain the money necessary to finance the project, while the defendant was to acquire the properties referred to, organize the necessary corporations, construct the pipe line, and act as general manager; that all profits arising out of the transaction were to be divided between the plaintiff and the defendant in the proportion of one-third to the former and two-thirds to the latter; that a new holding corporation, viz., Columbia Gas & Electric Company, was organized under the statutes of West Virginia, and to it was transferred substantially the entire stock of the Cleveland Gaslight & Coke Company, the People's Gaslight Company, the control of the Union Gas & Electric Company, the natural gas fields, and the contracts relating thereto; that a lease was taken by the holding company of all the property of the Cincinnati, Newport & Covington Electric Light Company, the pipe line was constructed as contemplated, and its control turned over to the holding company; that a slight deviation from the original agreement was made, in that Cleveland and People's Companies consolidated with an outside corporation, the East Ohio Gas Company, and the holding company thereby lost about three-fourths of its interest in the Cleveland and People's Companies, but acquired a one-fourth interest in the East Ohio Gas Company; that all of the properties were transferred to the holding company; that the defendant held in such company 26,000,000 of the capital stock, which constituted the profits of the joint venture; that he thereafter sold such stock to a firm of bankers in the city of New York for $1,800,000, one-third of which, or $600,000, belonged to the plaintiff, which the defendant has refused and neglected to pay over, and judgment is demanded for that sum, together with interest thereon from a date stated.

[1, 2] The complaint is long, covering approximately 20-odd printed pages, and contains numerous allegations which are unnecessary to a statement of the cause of action attempted to be alleged. The

only purpose which such allegations can have in the complaint is to make the real issue obscure, and the effect of which might, and probably would, divert the minds of the jury from the question to be determined by it. Such allegations are irrelevant and redundant, and should be stricken out. It has many times been pointed out by this court that allegations of the character referred to have no place in a pleading, and especially in a complaint; that they are more serious in a complaint than in an answer, because, under the Code of Civil Procedure, the defendant is required to make a general or specific denial of each material allegation controverted by him, or any knowledge or information sufficient to form a belief (Code of Civil Procedure, § 500, subd. 1); that the failure to deny admits the truth of an allegation if it be material; and that it is unfair to the defendant to require him to determine, at his peril, what particular allegation in the mass of irrelevant matter may be held upon the trial to be material. Hamilton v. Hamilton, 124 App. Div. 619, 109 N. Y. Supp. 221; Cleminshaw v. Coon, 136 App. Div. 160, 120 N. Y. Supp. 181.

[3] I am of the opinion that the motion should have been granted in so far as it asks to strike out all of that part of the complaint designated first, second, third, eighth, and tenth, and all that portion of paragraphs twelfth, fifteenth, eighteenth, nineteenth, twentieth, and twenty-fifth, designated in the notice of motion under the numerals I and II, respectively. These allegations are not the statement of facts as contemplated by the Code to be incorporated in a pleading, but at most are mere evidence which may or may not be material to the cause of action attempted to be alleged. They are entirely improper to be inserted in a complaint, either in an action at law or in equity.

As to the twenty-third paragraph, much of the matter there set forth is irrelevant; but it is so coupled with other allegations therein incorporated, to the effect that there was a modification of the original agreement with reference to the consolidation of the Cleveland and People's Companies with the East Ohio Company, that I am inclined to think those allegations should remain.

The defendant also asks that certain other paragraphs of the complaint be made more definite and certain. I am of the opinion that the motion, so far as it relates to these paragraphs, was properly denied. The facts here sought to be ascertained ought not to be set forth in a pleading, as such, but might very properly be considered in an application for a bill of particulars.

My conclusion, therefore, is that the order appealed from should be modified as indicated in this opinion, with $10 costs and disbursements. The matters stricken out leave the complaint in such condition that the plaintiff should be permitted to serve an amended complaint in conformity with this opinion, without costs, and the defendant should have the usual time to serve an answer thereto. All concur.

(158 App. Div. 763)

YOUNG v. WHITE.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. PLEADING (§ 85*)—ORDERS—RESETTLEMENT—EFFECT.
An order entered on June 17th directing defendant to answer prior to June 24th, which was resettled by an order, dated June 24th, extending defendant's time to answer upon certain conditions, was eliminated by the order of resettlement, so that the answer when filed is deemed to have been served subject to the conditions imposed by the order of June 24th.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172–178; Dec. Dig. § 85.*]

2. PLEADING (§ 85*)—ORDERS—CONDITIONS.
Defendant moved to strike certain allegations of the complaint and make others more definite, and appealed from the order denying the motion, entered on June 12, 1913, and then moved for time to answer until the determination of the appeal, which motion was denied, and an order was entered on June 17th directing him to answer prior to June 24th, which order was resettled on June 24th by an order extending the time to answer upon condition that defendant serve no pleading but an answer, and should make no motion for a bill of particulars, or an examination before trial, or upon the pleadings, but before the entry of such order defendant on June 23d served an answer. The Appellate Division modified the order denying defendant's motion to strike and gave plaintiff leave to serve a new complaint. *Held* that, since the former answer must be deemed to have been served subject to the conditions imposed in the order of June 24th, defendant should be relieved from the conditions thereby imposed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172–178; Dec. Dig. § 85.*]

Appeal from Special Term, New York County.

Action by John Alvin Young against Archibald S. White. From an order resettling a prior order and granting an extension of time to answer upon conditions, defendant appealed and also appealed from the order which was resettled. First order modified, and appeal from second mentioned order dismissed.

See, also, 143 N. Y. Supp. 931, 935.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles E. Thorn, of New York City, for appellant.

John C. Tomlinson, of New York City, for respondent.

McLAUGHLIN, J. Defendant made a motion to strike out certain allegations of the complaint and to make other allegations more definite and certain. Pending the motion his time to answer was extended by stipulation to June 18, 1913. An order denying the motion to strike out and to make more definite and certain was entered as resettled on June 12, 1913, from which defendant appealed. He then moved, upon notice, to have his time to answer extended until after the determination of the appeal, which motion the court denied, and an order was entered on June 17th directing the defendant to answer prior to June 24th. Defendant thereafter tried to have the order resettled, so as to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

extend his time to answer beyond June 24th. After argument, the court at Special Term entered the order from which this appeal is taken. This order was dated June 24th, and it resettled the order of June 17th, and extended defendant's time to answer, upon condition that he serve no pleading but an answer, make no motion for a bill of particulars, for an examination before trial, or upon the pleadings. Prior to the entry of this order the defendant, on June 23d, served an answer, and within the time provided in the order prior to the resettlement.

[1] The order of resettlement wiped out the order of June 17th, and therefore defendant's answer must have been deemed served subject to the conditions imposed in the order of June 24th.

[2] This court has, in a decision handed down herewith, modified the order denying the motion to strike out, and given the plaintiff leave to serve a new complaint, to which a new answer will have to be served. But since the former answer must be deemed to have been served subject to the conditions imposed in the order of June 24th, it is proper that the defendant should be relieved from the conditions therein imposed.

The order appealed from, therefore, is modified by striking out the conditions imposed upon defendant for answering. Order modified accordingly, with $10 costs and disbursements to the appellant.

The defendant also appealed from the order of June 17th, which was resettled by the order of June 24th. When the order of June 17th was resettled by the order of June 24th, the former order became a nullity.

The appeal, therefore, in so far as it relates to the order of June 17th, is dismissed. All concur.

(159 App. Div. 883)

YOUNG v. WHITE.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

Appeal from Special Term, New York County.

Action by John Alvin Young against Archibald S. White. From an order denying a motion to vacate a prior order, defendant appeals. Appeal dismissed.

See, also, 143 N. Y. Supp. 931, 934.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles E. Thorn, of New York City, for appellant.

John C. Tomlinson, of New York City, for respondent.

McLAUGHLIN, J. This appeal is from an order denying a motion to vacate a prior order. An appeal was also taken from the prior order, and this court has, in a decision handed down herewith, modified such prior order by striking out the conditions therein imposed for answering.

This appeal is therefore dismissed, without costs to either party. All concur.

(159 App. Div. 884)

YOUNG v. WHITE.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

PLEADING (§ 364*)—STRIKING PLEADINGS.

The rule as to striking out immaterial matter in the complaint is somewhat different in an equitable action than it is an action at law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156–1162; Dec. Dig. § 364.*]

Appeal from Special Term, New York County.

Action by John Alvin Young against Archibald S. White. From an order denying a motion to strike certain allegations of the complaint and to make other allegations more definite, defendant appeals. Order modified.

See, also, 143 N. Y. Supp. 937.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Nathaniel A. Elsberg, of New York City, for appellant.

John C. Tomlinson, of New York City, for respondent.

McLAUGHLIN, J. This action is in equity to compel the defendant to account for certain profits alleged to have been made by him and the plaintiff under a joint venture. The facts upon which a recovery is sought are substantially the same as those set forth in the opinion on the appeal from an order denying a motion to strike out certain allegations of the complaint in the action between the same parties, designated as action No. 1 (143 N. Y. Supp. 931). A similar motion was made in this action as in the other one, viz., to strike out certain allegations of the complaint as irrelevant and redundant, and to make other allegations more definite and certain. The complaint is somewhat longer than the one in action No. 1, and covers approximately 35 printed pages, but the essential facts are practically the same.

Notwithstanding the fact that the rule as to striking out is somewhat different in an action in equity than it is at law, nevertheless I am of the opinion that the defendant's motion to strike out as irrelevant and redundant all the paragraphs numbered first, fifth, sixth, seventh, eighth, ninth, tenth, thirteenth, fourteenth, fifteenth, and seventeenth should have been granted, and also so much of paragraphs numbered second, third, fourth, eleventh, nineteenth, twenty-sixth, thirtieth, thirty-first, and thirty-third, designated in the notice of motion under numerals I and II, respectively.

The defendant also asks in his notice of motion that the complaint be made more definite and certain as to other paragraphs or allegations, but in this respect I think the motion was properly denied. The information here sought to be obtained might properly be considered on a motion for a bill of particulars, but it would serve no useful purpose in the complaint and ought not to be incorporated therein.

My opinion, therefore, is that the order appealed from should be modified as indicated in this respect, with $10 costs and disbursements,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the appellant. The matters stricken out leave the complaint in such condition that the plaintiff should be permitted to serve an amended complaint, in conformity with this opinion, without costs, and the defendant should have the usual time to serve an answer thereto. All concur.

(159 App. Div. 885)

YOUNG v. WHITE.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

Appeal from Special Term, New York County.

Action by John Alvin Young against Archibald S. White. From an order resettling a prior order and granting an extension of time to answer upon conditions, defendant appeals and also appeals from the order which was resettled. Appeal from first order affirmed as modified, and appeal from last-mentioned order dismissed.

See, also, 143 N. Y. Supp. 936, 937.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Nathaniel A. Elsberg, of New York City, for appellant.
John C. Tomlinson, of New York City, for respondent.

McLAUGHLIN, J. This appeal is from an order dated June 24, 1913, resettling an order of June 17, 1913, granting an extension of time to answer upon certain conditions and from such prior order.

The facts in regard to the orders appealed from are the same as those in regard to similar orders in action No. 1, and for the reasons stated in the opinion on that appeal the order of June 24, 1913, must be modified by striking therefrom the conditions imposed upon the defendant for answering, and as thus modified affirmed, with $10 costs and disbursements to the appellant, and the appeal, in so far as it relates to the order of June 17, 1913, is dismissed, without costs to either party. All concur.

(159 App. Div. 885)

YOUNG v. WHITE.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

Appeal from Special Term, New York County.

Action by John Alvin Young against Archibald S. White. From an order denying a motion to vacate a prior order, defendant appeals. Appeal dismissed.

See, also, 143 N. Y. Supp. 936, 937.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Nathaniel A. Elsberg, of New York City, for appellant.
John C. Tomlinson, of New York City, for respondent.

McLAUGHLIN, J. This appeal is from an order denying a motion to vacate a prior order. Such prior order has been modified by this court in a decision handed down herewith.

This appeal, therefore, is dismissed, without costs to either party. All concur.

BALL v. ELLIOTT.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

PAYMENT (§ 67*)—PRESUMPTIONS—PAYMENT BY CHECK.

Where a person individually indebted to another delivered to him checks signed by the debtor as executor of an estate, no presumption of payment of his individual debt arose therefrom, whatever presumption might have arisen, had he given his individual checks under the same circumstances.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 162, 189–194, 198; Dec. Dig. § 67.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Barclay Ball against Sarah E. Elliott, as administratrix of William J. Elliott, deceased. From a judgment for defendant, after a trial before the court without a jury, plaintiff appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Hirschman & Drucker, of New York City (Edward W. Drucker, of New York City, of counsel), for appellant.

Bennett E. Siegelstein, of New York City, for respondent.

BIJUR, J. Plaintiff's assignors were proprietors of a hotel, from whom defendant's decedent had purchased articles and borrowed money in the aggregate of $281.95, for which this action is brought. The answer, in addition to general denials, sets up as a defense and counterclaim the payment by decedent, on the same day on which the foregoing indebtedness was incurred, of over $500.

After plaintiff had proved his case, the defendant merely put in evidence two checks, aggregating $500, to the order of plaintiff's assignors, and indorsed by them, but signed by defendant's decedent *as executor of a named estate.* Whatever presumption of fact might have arisen from the giving of his individual checks by defendant's decedent under the circumstances (see 30 Cyc. 1271–1273), it can hardly be claimed, I think, that any presumption of payment of his individual debt arises from the giving by defendant's decedent of checks of an estate of which he was a trustee.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(158 App. Div. 620)

HANNAHS v. HAMMOND TYPEWRITER CO.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. CORPORATIONS (§ 133*)—STOCK—TRANSFER—ACTIONS—ADMISSION OF EVIDENCE.

In an action to compel defendant corporation to transfer to plaintiff on its books stock represented by a certificate which was issued to H. and assigned to G., who assigned it, indorsed in blank, with a power of attorney to make the necessary transfer, evidence by H. that he did not transfer the certificate to G. or any one else was admissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 513–520; Dec. Dig. § 133.*]

2. CORPORATIONS (§ 126*)—STOCK.

It is presumed, subject to rebuttal, that a stock certificate came into defendant's possession in due course of business and that he was its owner, where it bore an assignment by the person to whom it was originally issued and a subsequent assignment with power of attorney indorsed thereon in blank to make the necessary transfer on the company's books.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 474, 475; Dec. Dig. § 126.*]

3. CORPORATIONS (§ 147*)—STOCK—BONA FIDE PURCHASER.

Even a purchaser for value would not obtain good title to a stolen stock certificate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 462; Dec. Dig. § 147.*]

Appeal from Special Term, New York County.

Action by George C. Hannahs, as administrator with the will annexed of the goods, etc., of John Jay Hannahs, deceased, against the Hammond Typewriter Company. From a judgment requiring defendant to transfer certain shares of stock to plaintiff's name and granting other relief, defendant appeals. Reversed, and new trial granted.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles E. Kelley, of New York City, for appellant.

Dana T. Ackerly, of New York City (Edward A. Craighill, Jr., of New York City, on the brief), for respondent.

LAUGHLIN, J. On the 8th day of October, 1884, the defendant duly issued and delivered to James B. Hammond certificate No. 160 for three shares of its capital stock. The certificate, with an assignment thereof by James B. Hammond to E. E. Garvin & Co. indorsed thereon, under date of October 14, 1884, and with another assignment thereof and power of attorney to make the necessary transfer on the books of the company and to surrender the certificate by E. E. Garvin & Co. in blank indorsed thereon, under date of June 10, 1889, was delivered to the *present* plaintiff's predecessor, as administrator with the will annexed of John J. Hannahs, deceased, who originally brought the action, by the Mohawk Valley Bank on payment of a loan to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

decedent, for which it was held as security. The certificate stood on the books of the defendant in the name of Hammond and had never been transferred on its books to either of the assignees. The plaintiff's said predecessor on two different occasions caused the certificate to be presented to the defendant with a request that the stock be transferred to his name, as administrator, and that it issue to him, as such administrator, a new certificate therefor. Each request was refused. Thereafter he brought this action, alleging that the certificate was duly issued to Hammond, and by him duly sold, assigned, transferred, and delivered to E. E. Garvin & Co., and by that firm duly assigned, transferred, and delivered to the decedent. The defendant admitted that the certificate was duly issued to Hammond but put in issue the allegations concerning the assignments and delivery thereof.

The original plaintiff proved that the signatures of Hammond and of E. E. Garvin & Co., and of the witnesses thereto, on the assignments were genuine and that, after he received the certificate from the Mohawk Bank, the president of the Mercantile Safe Deposit Company, which company held it as security for a loan, filled in the name of the decedent in the blank assignment and power of attorney but offered no proof of delivery by Hammond to E. E. Garvin & Co. or by E. E. Garvin & Co. to the decedent.

[1] The defendant alleged as a separate defense that Hammond claimed to be the owner of the stock and had served upon it written notice to that effect and forbidding it to accept a surrender of the certificate and to issue a new certificate therefor; and on the trial it called Hammond as a witness and attempted to show the transaction between him and E. E. Garvin & Co., and that he neither sold nor transferred the certificate to that firm or to any one else. This evidence was excluded under an objection that the evidence offered was incompetent, irrelevant, and immaterial. I am of opinion that the court erred in excluding this evidence.

[2, 3] On the evidence adduced by the plaintiff, the law presumes that the certificate was assigned and delivered by Hammond and by E. E. Garvin & Co. and came into the possession of the decedent in due course of business, and that he was the owner thereof notwithstanding the fact that the assignment was in blank (Holbrook v. N. J. Zinc Co., 57 N. Y. 616; Story v. Bishop, 4 E. D. Smith, 423; Williamson v. Continental Filter Co., 34 App. Div. 630, 53 N. Y. Supp. 1118; Ward v. Lewis, 4 Pick. [Mass.] 518; Jones v. N. Y. Life Ins. Co., 168 Mass. 245, 47 N. E. 92; Abbott's Trial Evidence [2d Ed.] p. 7; McNeil v. Tenth Natl. Bk., 46 N. Y. 325, 7 Am. Rep. 341; Esmond v. Apgar, 76 N. Y. 359; and Leavitt v. Fisher, 11 N. Y. Super. Ct. 1); but this is not a *conclusive* presumption, and it was open to the defendant, under the denials contained in its answer, to overcome the presumption by evidence showing that the certificate was not delivered, or not delivered with intent to pass title, for, if the certificate was stolen, the decedent, even though a purchaser for value, would not obtain good title (Knox v. Eden Musee, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; McNeil v. Tenth Natl. Bank, supra), and if it was delivered as security, and the pledgee transferred it without authority,

the decedent did not obtain good title, unless he purchased it for value without notice.

It follows, therefore, that the judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

(82 Misc. Rep. 433)

PROVIDENCE WASHINGTON INS. CO. OF PROVIDENCE, R. I., v. YOUMANS.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. INSURANCE (§ 606*)—SUBROGATION.
Under a tourist fire insurance policy providing that, if the insured acquired a right of action for damage to the property covered, he should assign or transfer it to the insurer upon payment of loss, the insurer, who did not show that payment to insured by a hotel was for loss by fire, was not entitled to subrogation.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504–1511, 1514–1516; Dec. Dig. § 606.*]

2. NEW TRIAL (§ 76*)—JUDGMENT—EXCESSIVE DAMAGES—SUBROGATION.
Where insured, defending an action by the insurer for subrogation to an amount received by him from a hotel for loss by fire, offered to pay over $150, the difference between the total amount received and the amount of his total claim, and also offered evidence to show a loss larger than the total claim, he was entitled to a new trial upon judgment for $280, unless the excess over $150 was remitted.
[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153–156; Dec. Dig. § 76.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Providence Washington Insurance Company of Providence, Rhode Island, against Ephriam M. Youmans. From a judgment for plaintiff after trial by the court without a jury, defendant appeals. Reversed, and new trial granted, unless plaintiff agreed to reduce the amount of the judgment to $150.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Chester H. Lane, of New York City, for appellant.

James J. Macklin, of New York City (Henry M. Dater, of New York City, of counsel), for respondent.

BIJUR, J. [1] The defendant received from the plaintiff a tourist fire insurance policy for $1,000, covering loss to defendant's personal effects while traveling. These effects were damaged by the fire in the Carleton Hotel in London in August, 1911. Defendant, who was just then leaving for the Continent, hastily prepared a statement of his loss, in reasonable detail, aggregating $430, of which he sent substantial duplicates to the Carleton Hotel and to plaintiff. Upon his return to this country, an adjuster of plaintiff agreed upon and made to him a payment of $280, explaining to him at the time (apart from other adjustments) that since plaintiff's policy did not cover loss by pilfering,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and that evidently a part of his loss had been so caused, plaintiff could not recognize the entire claim. Subsequently, defendant received, without explanation, from the Carleton Hotel, its check for $300. The policy contains a clause:

"* * * If the assured acquires the right of action against any * * * corporation for damage to above described property, he shall assign or transfer such claims" to the plaintiff upon receiving payment for said loss, etc.

It is not contended but that this right of subrogation inures to plaintiff only to the extent that the claim upon the hotel is for the same character of loss as that covered by the policy. As plaintiff presented no proof that the payment of the Carleton Hotel was for loss by fire, i. e., the character of loss covered by the policy, it was not entitled to subrogation, and therefore not entitled to recover damages against the defendant by reason of the receipt of the Carleton Hotel check.

[2] There was evidence that defendant had offered to pay plaintiff $150; that being the difference between the total amount which he had received and the face amount of his total claim. This offer might perhaps have been construed as an admission on his part that one-half of the check of the Carleton Hotel was for fire loss. Had the judgment been for $150 instead of $280, it might have been sustained on that theory. But some evidence has been introduced by the defendant to the effect that since his return he had ascertained that his loss was larger than the amount originally stated, $430. In view of this, I think he is entitled to a new trial unless the plaintiff will agree to reduce the amount of this judgment to $150, with appropriate costs in the court below and without costs of this appeal.

Unless a stipulation to that effect is filed, the judgment must be reversed and a new trial granted, with costs to appellant to abide the event. All concur.

HURWITZ v DUZIN.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. BROKERS (§ 64*)—COMPENSATION—FAILURE TO COMPLETE CONTRACT.
Where a contract for the sale of a business provided that a certain broker brought about the sale, and that the seller thereby agreed to pay the broker a specified commission, the broker's right to such commission was not contingent upon the purchaser paying the balance due under the contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 67, 97; Dec. Dig. § 64.*]

2. BROKERS (§ 64*)—COMPENSATION—FAILURE TO COMPLETE CONTRACT.
Where one who entered into a contract to purchase a business refused to complete the purchase, because the seller's guaranty as to the profits of the business was untrue, his refusal did not preclude the broker, who brought about the sale, from recovering his commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 67, 97; Dec. Dig. § 64.*]

Appeal from Muncipal Court, Borough of Manhattan, Second District.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by David Hurwitz against Adam Duzin. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Louis J. Finkelstein, of New York City (Adolph Cohen, of New York City, of counsel), for appellant.

Joseph Sapinsky, of New York City (Alvin T. Sapinsky, of New York City, of counsel), for respondent.

SEABURY, J. [1] Plaintiff sues to recover a brokerage commission alleged to have been earned in procuring a proposed purchaser for defendant's newspaper route. The defendant and the proposed purchaser, whom the plaintiff procured, signed a contract which provided that:

"David Hurwitz [plaintiff] is the broker who brought about this sale, and the said Adam Duzin [defendant] does hereby agree to pay the said David Hurwitz the sum of $62.50 as commissions, in lawful money of the United States of America."

Upon the trial the defendant claimed that this agreement to pay the plaintiff was contingent upon Shoerman, the proposed purchaser, paying the balance stated to be due under the contract. This claim is contrary to the unconditional promise of the defendant to pay the plaintiff, which is expressed in the contract which the defendant signed.

[2] The contract contained a guaranty by the defendant that the newspaper route earned—

"a weekly clear profit of not less than $40 a week, less delivery 75 cents."

It was because the proposed purchaser claimed that this representation was untrue that he refused to purchase the route. The act of the proposed purchaser in refusing to complete the purchase did not, under the circumstances disclosed, preclude the plaintiff from recovering his commission.

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

(158 App. Div. 587)

In re FOURTEENTH ST. IN CITY OF NEW YORK.

Appeal of DICKERSON.

(Supreme Court, Appellate Division, Second Department. October 24, 1913.)

1. ATTORNEY AND CLIENT (§ 182*)—LIEN—SUBJECT-MATTER.

An attorney, who was retained in proceedings to ascertain the damages to property caused by a change of grade in a street, which is heard before the board of assessors under Greater New York Charter, §§ 951–953 (Laws 1901, c. 466), is not entitled to a lien for his fee upon an award of damages to the same property caused by the opening of a new street which, under Greater New York Charter, §§ 979, 980, as amended by Laws 1906, c. 658, and Laws 1909, c. 394, §§ 2, 3, is heard before the commissioners of estimate and assessment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 315, 399–406; Dec. Dig. § 182.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ATTORNEY AND CLIENT (§ 182*)—LIEN—PERSONS ENTITLED.

An attorney, who is retained by a lot owner to appear in proceedings for the taking or damaging of his property, is not entitled to a lien upon the award, where the owner deeded the property back to his vendor in satisfaction of a purchase-money mortgage, prior to the award, and another attorney represented the new owner thereafter, since Judiciary Law (Laws 1909, c. 35; Consol. Laws 1909, c. 30) § 475, giving the attorney a lien upon his client's claim, does not allow a lien against the claim of another.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 315, 399–406; Dec. Dig. § 182.*]

Appeal from Special Term, Queens County.

In the matter of the application of the City of New York for the opening of Fourteenth Street in the Borough of Queens. Motion by Frank Dickerson for an order to compel payment of an award to which Joseph A. Flannery claimed an attorney's lien for services rendered. Motion denied, and Dickerson appeals. Reversed, and motion granted.

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

Philip B. La Roche, Jr., of New York City, for appellant.

Benjamin Trapnell, of New York City, for respondent.

STAPLETON, J. The appellant moved, under section 1001 of the Greater New York Charter, for an order directing the Comptroller of the City of New York to pay an award of $500 made to him in the above-entitled proceeding. The respondent intervened and claimed an attorney's lien attaching to the award. The respondent obtained the order from which the appeal is taken, the effect of which order was to postpone the payment of the award, concededly the property of the appellant, until the reasonable value of the respondent's services should be ascertained. The order determines that the respondent has a lien upon the award, for services as an attorney, in an amount to be thus ascertained.

The respondent procured from one Ellen Fenton the following written retainer:

Matter of Change of Grade of 14th Street, Flushing.

New York, July 23, 1908.

I hereby retain Joseph A. Flannery attorney to represent me in the above proceedings. For his services I agree to pay and assign to said Flannery, 25 per cent. of whatever award and interest may be recovered for my said damages.

Block 262	Name	Ellen Fenton.
Lot 9–10	Address	89 14th St.
	Property	Flushing, L. I.
	Witness	Ernest M. Fenton.

The appellant in his brief gives the following chronological summary, which correctly shows the various facts established by the affidavits with relation to the time of their occurrence:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

January 12, 1906.	During appellant's ownership of the premises, publication of notice of application for commissioners of estimate and assessment.
January 24, 1906.	Commissioners appointed.
May 29, 1906.	Order appointing commissioners entered.
July 19, 1906.	First meeting of commissioners.
September 14, 1906.	Commissioners adjourned sine die.
March 1, 1907.	Appellant conveyed premises to Fenton, taking back a purchase-money mortgage for $4,500.
July 23, 1908.	Fenton signed above-written retainer.
December 21, 1908.	Respondent filed a notice of appearance for Fenton.
January 11, 1909.	Commissioners reconvened.
January 14, 1909.	Respondent "received a written report from William M. Dean, real estate broker and appraiser, in respect of the damages sustained by" Fenton.
January 18, 1909.	The attention of the commissioners having been called to the fact that the city intended to modify the grade adopted for this street by conforming the same to the natural surface grade thereof, the commissioners adjourned sine die to await establishment of the new grade by the municipal authorities.
June 25, 1909.	Reference ordered in proceedings to disbar respondent.
April 11, 1910.	Appellant's attorney writes letter.
March 1911.	Fenton defaulted on payment of interest on appellant's mortgage.
April 10, 1911.	Fenton made, acknowledged, and delivered to appellant, to avoid foreclosure, a full covenant and warranty deed.
May 1, 1911.	Appellant's attorney leaves employ of respondent.
June, 1911 (early part).	Appellant requested his attorney to take charge of his interests in the street opening proceeding.
June 2, 1911.	Amended grade map received by commissioners.
June 15, 1911.	Commissioners reconvened. Respondent appeared before the commissioners by one Doran, an attorney employed by him, and William M. Dean testified to damages of $1,500 on Fenton's claim.
June 23, 1911.	Appellant signs formal authorization for his attorney to appear for him in the street opening proceeding. Deed Fenton to appellant recorded. Clerk of commission reports receipt of notice of appearance by appellant's attorney for appellant.
June 30, 1911.	Appellant's attorney cross-examines city's witness Allen. Examines witness Henry Rath.
July 11, 1911.	Appellant's attorney cross-examines Allen.
July 17, 1911.	Appellant's attorney proves appellant's title and date of erection of building.
July 20, 1911.	Cross-examination of Allen by appellant's attorney continued.
July 26, 1911.	Appellant's attorney submits memo. and argues in support of appellant's claim before commissioners.
May 17, 1912.	Decision handed down against respondent in disbarment proceedings, and report of referee therein confirmed.
June 25, 1912.	Order disbarring respondent entered.
June 26, 1912.	Preliminary report of commissioners advertised for objections. Thereafter commissioners hear objections, go into executive session and prepare their final report.
November 26, 1912.	Final report of commissioners confirmed.
December 11, 1912.	Respondent files notice of lien with comptroller.
January 13, 1913.	Comptroller ready to pay award to appellant, but refuses because of respondent's notice of lien.

[1] Analysis of the facts shows: (1) That the retainer was in a proceeding other than the one in which the award was made and the order granted, and cognizable in a different tribunal. Sections 951–953, 979, 980, c. 17, tit. 4, Greater New York Charter; chapter 658, Laws of 1906, as amended by Laws of 1909, c. 394, §§ 2, 3.

[2] (2) That the relation of attorney and client did not exist between appellant and respondent. None except an attorney can assert a lien. The statute so reads. The relationship is the foundation of the right. An attorney can assert a lien against his client's claim but not against the claim of another. Section 475, Judiciary Law (chapter 35, Laws of 1909; Consol. Laws 1909, c. 30). See Matter of Niagara, L. & O. Power Co., 203 N. Y. 493, 97 N. E. 33, 38 L. R. A. (N. S.) 207, Ann. Cas. 1913B, 234.

As the order cannot survive these objections to its validity, we refrain from adverting to other fatal difficulties in the way of its affirmance which occur to us but which we do not deem it necessary to discuss.

The order should be reversed, with $10 costs and disbursements, and the motion granted, with $10 costs. All concur, except JENKS, P. J., not voting.

JACOBSON et al. v. KAPLAN et al.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

APPEAL AND ERROR (§ 1151*)—JUDGMENT—ERRORS IN COMPUTATION.

Where it was evident that, in deducting the conceded counterclaim from the amount of plaintiffs' gross claim, an error of $10 had been made in subtraction, the error would be corrected on appeal, and the judgment modified and affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4506; Dec. Dig. § 1151.*]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Ferdinand Jacobson and another against Isaac Kaplan and others. From a Municipal Court judgment in favor of plaintiffs, after trial by the court without a jury, defendants appeal. Modified and affirmed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Kleiner & Kleiner, of New York City (Jacob M. Cohen, of New York City, of counsel), for appellants.

Bogart & Bogart, of New York City (John Bogart and Isidore Weckstein, both of New York City, of counsel), for respondents.

PER CURIAM. It is evident that, in deducting the conceded counterclaim of $65.60 from the amount of plaintiffs' gross claim of $231, by an error in subtraction the damages were calculated at $175.40, instead of $165.40.

The judgment in favor of plaintiffs will therefore be reduced to the sum of $184.71, and, as modified, affirmed, with costs.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SILVERMAN v. KOGUT.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. PARTNERSHIP (§ 311*)—DISSOLUTION—RIGHT OF LIQUIDATING PARTNER TO CONTRIBUTION.

Plaintiff and defendant, by an agreement dissolving a partnership between them, provided that plaintiff should assume certain liabilities and collect all outstanding accounts, that defendant should pay one-half of any loss or deficiency sustained on the collection of such accounts, but that he should not be liable on the S. & M. account beyond the sum of $100. A suit was then pending on that account, in which S. & M. had interposed a counterclaim, on which they subsequently recovered judgment for $550. *Held*, that defendant was not liable to plaintiff for his proportionate share of the judgment and expenses of the litigation beyond the sum of $100.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 718–725; Dec. Dig. § 311.*]

2. PARTNERSHIP (§ 311*)—RIGHT OF ACTION BETWEEN PARTNERS.

Where a partnership has been dissolved, and the dissolution agreement, in addition to containing an account stated, provides for specific contributions or for liquidated damages as to certain matters, either partner may sue the other thereon, provided no question of partnership accounting is involved.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 718–725; Dec. Dig. § 311.*]

3. PARTNERSHIP (§ 311*)—DISSOLUTION—DIVISION OF ASSETS AND CONTRIBUTION TO LOSSES.

On a dissolution, partners may, as between themselves, limit their liability to contribute to firm losses, as well as their right to profit by firm collections.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 718–725; Dec. Dig. § 311.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Louis Silverman against Alexander Kogut. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Henry Kuntz, of New York City (Abraham P. Wilkes, of New York City, of counsel), for appellant.

Joseph Wilkenfeld, of New York City, for respondent.

GUY, J. [1] The action was brought to recover money paid, laid out, and expended on behalf of defendant. The parties had been partners from March, 1910, to October 18, 1912, when they dissolved partnership. The dissolution agreement constituted plaintiff the liquidating partner. All interest in the business was assigned to plaintiff. He agreed to assume and pay certain scheduled partnership liabilities without contribution by the defendant. Plaintiff also agreed to collect the outstanding accounts, and defendant agreed to pay one-half of any loss or deficiency sustained on the collection of the out-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

standing accounts or any part thereof. By a separate clause defendant was not to be liable on the Schneider & Maletsky account beyond the sum of $100. At the time of the dissolution there was a firm action pending against Schneider & Maletsky to recover $100, in which the latter had interposed a counterclaim for $500. After the dissolution the action of Silverman & Kogut v. Schneider & Maletsky was tried, resulting in judgments in Schneider & Maletsky's favor for $555, whch plaintiff satisfied. Plaintiff, in addition, paid counsel fees, stenographer's fees, marshal's fees, and surety company fees. He now seeks to compel defendant to pay his proportionate share of said moneys expended by him. Defendant claims that plaintiff conducted said action negligently, but the proof on the issue of negligence is insufficient to support a finding either way.

[2] Where a partnership has been dissolved, and the dissolution agreement, in addition to containing an account stated, provides in effect for specific contributions or for liquidated damages as to certain matters, either partner may sue the other thereon, provided no question of partnership accounting is involved. Brown v. Spohr, 180 N. Y. 202, 213, 214, 73 N. E. 14; Ferguson v. Baker, 116 N. Y. 257, 261, 22 N. E. 400.

[3] On a dissolution, partners may, as between themselves, limit their liability to contribute to firm losses as well as to profit by firm collections. This was done herein as to the Schneider & Maletsky account, to which defendant's liability to contribute was limited to $100.

Judgment reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

(158 App. Div. 718)

DILG v. STRAUSS.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

LIMITATION OF ACTIONS (§ 104½, New, vol. 6 Key-No. Series)—RUNNING OF LIMITATION—TOLLING OF STATUTE.

Where defendant agreed with plaintiff to diligently prosecute plaintiff's application for a patent and to deposit in a bank to plaintiff's credit a sum of money by January 1, 1906, or within 30 days from the time a final court shall have sustained such patent, and defendant failed to diligently prosecute the application, the patent being denied for that reason before 1906, plaintiff's cause of action was for damages for the failure to diligently prosecute the application, so that the money never became due to plaintiff, and not for failure to pay the money, so that limitations are not tolled by an agreement between the parties to extend the time for the deposit of money.

Clarke and Dowling, JJ., dissenting.

Appeal from Special Term, New York County.

Action by Christian F. Dilg against Gustavus Emil Strauss. From an order overruling a demurrer to the reply, defendant appeals. Order reversed.

See, also, 152 App. Div. 943, 137 N. Y. Supp. 1118.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Herbert R. Limburg, of New York City, for appellant.
Howard A. Sperry, of New York City, for respondent.

SCOTT, J. The action is for damages for defendant's failure to promptly and diligently prosecute the application of plaintiff for a patent, pursuant to the terms of a written contract annexed to the complaint. One of the defenses (the fifth) is to the effect that the plaintiff's cause of action, if any, is barred by the statute of limitations. The reply, which has been demurred to, sets up facts which, as the plaintiff insists, render the defense above stated unavailable.

The question involved is important to the parties because upon its answer may depend the outcome of the litigation.

The complaint, although we refused on a former appeal to strike out parts as irrelevant and redundant and to require other parts to be made more definite and certain, is by no means a model pleading and is not distinguished for its clarity. It is not impossible, however, with some study to ascertain the cause of action which it sets forth.

The contract, for the breach of which the plaintiff seeks damages, recites that plaintiff is the owner of a certain invention and applications for letters patent, pending in the Patent Office, as to which certain specified interferences had been filed. The plaintiff thereupon agreed to execute and deposit in escrow, with the Twenty-Third Ward Bank of the city of New York, assignments of said applications and of the patents to be obtained therein, said assignments to be delivered to the defendant when he should deposit the sum of $5,500 in the said bank to the credit of the plaintiff, together with an agreement to pay plaintiff $2,500 out of the profits to be derived from the use of said patents. The defendant on his part agreed to prosecute said applications promptly and to contest said interference and to pay and bear all the expenses thereof. He further agreed to deposit the sum of $5,500 in cash in the said Twenty-Third Ward Bank to the credit of the plaintiff "on or before the 1st day of January, 1906, and within 30 days from the time that a final court decision shall have been obtained sustaining said patent or patents," and in addition to deposit in said bank an agreement to pay the plaintiff the further sum of $2,500 out of the moneys received from the use of said patents. There is a further promise that if, on account of any unforeseen occurrence or causes beyond the control of the parties, the court decision shall not have been obtained on or before the 1st day of January, 1906, the plaintiff would extend the time limit for the deposit of the $5,500, and the agreement as to further earnings for a further period of time to be mutually agreed upon.

The complaint alleges that defendant has never deposited the $5,500 as he agreed to do and has not prosecuted plaintiff's application faithfully and diligently but on the contrary abetted, assisted, and joined with one Kahn in filing and prosecuting application for patents embodying the invention of plaintiff, with the result that plaintiff has been put to many years of delay and great expense in endeavoring to

get his application properly allowed over the false claims presented with the knowledge and collaboration of defendant. The defense replied to sets forth that the rejection of certain of plaintiff's applications by the examiner in charge thereof, and the affirmance of the decision of said examiner by the Board of Examiners of the Patent Office, and the affirmance of the decision of said Board of Examiners by the Commissioner of Patents alleged in the thirteenth paragraph of the complaint all occurred prior to the 7th day of February, 1905; that the decision or judgment of the Court of Appeals of the District of Columbia affirming the decision of the Commissioner of Patents was rendered on or about the 7th day of February, 1905; and that the alleged failure of defendant to prosecute plaintiff's application promptly before the Patent Office and the alleged negligence, carelessness, and delay of defendant in proceeding with reference to said application for patents all occurred prior to the 7th day of February, 1906, whence, as defendant avers, this action, which was commenced on February 16, 1912, was not commenced within six years after the cause of action alleged in the complaint arose. The reply to which defendant demurs alleges that the time limit for the deposit by defendant of the sum of $5,500 in the bank was extended by mutual consent to February 23, 1906, which was within six years before the commencement of the action. The question whether or not this reply sufficiently answers the plea of the statute of limitation depends upon the nature of the cause of action alleged. If it is for damages for breach of defendant's agreement to promptly and diligently prosecute the application for the patents, the breach, if any, had been committed when the applications were finally rejected. But, if the action is for the $5,500 agreed to be deposited in the bank, the alleged agreement to extend the time for making the deposit postponed the establishment of a cause of action until the agreed time had expired.

I think it is clear that the only cause of action alleged in the complaint, and the only cause of action plaintiff could have, under the circumstances detailed in his complaint, was for defendant's negligence and bad faith in prosecuting plaintiff's application so as to put plaintiff in a position to be entitled to receive the $5,500 down payment and the $2,500 to be paid out of earnings. Hence the plaintiff puts his damages at $8,000, the amount he would have been entitled to receive under his contract if his application had been allowed and the patents issued thereon. The provisions of the contract are perfectly clear that the $5,500 was to be deposited to plaintiff's credit and the agreement for a percentage of future earnings to be executed if and when the applications were granted. If defendant failed by wrongful neglect or fraud to obtain the approval of the applications, the time would never arrive for the payment of the $5,500 and the $2,500, but for such wrongful neglect and fraud he would be liable to respond to the plaintiff in damages, and the measure of those damages would be the amount the plaintiff would have been enabled to earn if the defendant had acted diligently and in good faith. If, as the answer alleges, the defendant's failure to act diligently and in good faith all occurred prior to February 7, 1905, the cause of action then accrued

against him, and, if it is not the failure to deposit the $5,500 which constitutes the gravamen of the complaint, it is immaterial whether or not the time for making that deposit had been extended.

For these reasons I am of opinion that the demurrer to the reply was well taken and should have been sustained. Consequently the order appealed from should be reversed, with $10 costs and disbursements to appellant, and the demurrer to the reply to the fifth separate defense sustained, with $10 costs.

INGRAHAM, P. J., and HOTCHKISS, J., concur.

CLARKE, J. (dissenting). In brief the complaint alleges the sale of rights belonging to the plaintiff, under pending applications for a patent, upon an agreement by defendant to promptly prosecute interference proceedings before the Patent Office. The defendant was to pay $5,500 on or before the 1st day of January, 1906, and within 30 days from the time that a final court decision shall have been obtained sustaining said patent or patents, and in addition to deposit an agreement for the payment of 10 per cent. royalty up to the sum of $2,500. There was a provision that if, on account of any unforeseen occurrences or causes beyond the control of the parties, the said court decision should not have been obtained on or before the 1st day of January, 1906, then and in that event the party of the first part would extend the time limit within which the party of the second part must comply with the said requirements for a further period of time to be mutually agreed upon. It was alleged that the time limit was mutually agreed to be extended to and including the 23d day of February, 1906; that the defendant wholly failed and refused to either deposit the sum of $5,500 in cash or said agreement on or before January 1, 1906, or at any time thereafter; that the defendant did not prosecute said applications promptly but proceeded so negligently and carelessly and with so much delay that said prosecution resulted in the rejection of said applications, which rejection was affirmed by the Court of Appeals of the District of Columbia, and then the defendant neglected, omitted, and refused to proceed further to endeavor to procure a final court decision in the above-named litigation and to obtain patents which might have been granted on the application for more than a year before the 21st of February, 1906, when the contract between plantiff and defendant expired.

It seems to me the action is to recover damages for the nonpayment by the defendant of the amounts agreed to be paid by him within the time extended by agreement, caused by the negligence and fraudulent conduct of the defendant in not prosecuting the proceedings with due diligence and in not taking the further and necessary steps which he ought to have taken to procure the favorable decision upon which the amount agreed upon was to come due. It is a fair reading of all the allegations of the complaint, the contract, and the reply that the time in which the defendant was to do what he had agreed to do was extended to the 23d of February, 1906, and that the cause of action did not accrue until the expiration of the extended time given to per-

form. This action, having been commenced within six years after the expiration of said time and the accruing of said cause of action, is not barred by the statute of limitations. Therefore the order appealed from, overruling the demurrer to these paragraphs of the reply, should be affirmed, with costs and disbursements to the respondent.

DOWLING, J., concurs.

(158 App. Div. 729)

BURNS v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. MUNICIPAL CORPORATIONS (§ 722*)—LEASE—COVENANTS FOR RENEWAL—VALIDITY.

In 1827 the city of New York leased real estate owned by it in its corporate capacity for 21 years by a lease containing a covenant for renewal; the renewal lease to contain a like covenant for future renewals. The lease was renewed in 1848, 1869, and 1890; the renewal leases containing similar covenants for renewals. A city ordinance adopted in 1844 and ratified and confirmed by Laws 1845, c. 225, prohibited leases of public lands for more than one year without the consent of the commissioners of the sinking fund or for more than five years with such consent. Laws 1853, c. 217, § 7, Laws 1857, c. 446, § 41, Laws 1869, c. 876, § 8, and Laws 1882, c. 410, § 170, authorized leases of city property for not exceeding ten years; Greater New York Charter (Laws 1901, c. 466) § 205, authorizes the board of sinking fund commissioners to lease any city property except parks, etc., but provides that no such lease shall run for longer than ten years nor a renewal for longer than ten years. *Held*, that the covenant for a renewal in the lease of 1890 was unauthorized and void, since the covenant in the lease of 1827 would not be construed so as to create a perpetuity and was satisfied by the renewals of 1848 and 1869, if not by that of 1848 alone, and the city officers after 1844 had no power to bind the city by a covenant for a renewal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1528; Dec. Dig. § 722.*]

2. MUNICIPAL CORPORATIONS (§ 230*)—OFFICERS—POWERS.

Persons dealing with public officers respecting public property are chargeable with knowledge of the limitation of power imposed upon such officers and can gain no advantage against a municipal or other public corporation by reliance upon acts of such officers in excess of their powers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 654–656; Dec. Dig. § 230.*]

3. FIXTURES (§ 14*)—TIME FOR REMOVAL.

As a general rule, a building erected by a tenant becomes the property of the landlord if not removed before the expiration of the lease.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 22, 25; Dec. Dig. § 14.*]

4. FIXTURES (§ 33*)—FAILURE TO REMOVE—EFFECT.

Under a lease giving the tenant ten days after the expiration of the lease within which to remove buildings and providing that she might not do so at any time thereafter, where the lessee failed to remove a building within the ten days, she forfeited her right to do so, and it became the landlord's property, and she had no claim for payment of its value.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 64, 65; Dec. Dig. § 33.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Submission of controversy between John N. Burns, as administrator de bonis non of Rebecca C. Waybe, deceased, and the City of New York upon an agreed statement of facts. Judgment for defendant.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

James A. Donnelly, of New York City, for plaintiff.
Charles J. Nehrbas, of New York City, for defendant.

SCOTT, J. This controversy relates to the plaintiff's claim to be entitled to a renewal for the term of 21 years of the premises No. 103 Park Row in the city of New York, the ownership of which is vested in the city of New York, apparently in its corporate capacity, as it is not held and occupied for any public use.

[1] The property was originally leased to John Dixey on October 1, 1911, for a term of 21 years from May 1, 1806. Dixey improved it by the erection of a building which, with some additions and alterations, still stands upon the property. The lease was renewed in 1827, and again in 1848, 1869, and 1890. Each lease was for the term of 21 years, and each contained a covenant for renewal in the following words:

"And the said mayor, aldermen and commonalty of the city of New York, for themselves, their successors and assigns, do covenant, grant and agree to and with the said John Dixey, his executors, administrators and assigns, that they, the said mayor, aldermen and commonalty of the city of New York, their successors and assigns, shall and will, at the expiration of the term hereby demised, again demise and to farm let the above premises in pursuance of the present lease unto the said John Dixey, his executors, administrators or assigns for and during the term of twenty-one years thereafter, *with a like covenant for future renewals of the lease*, as is contained in this present indenture, and upon such rents and other terms and conditions as shall be agreed upon between the parties, or as shall be determined by two sworn appraisers, one of whom to be chosen by each of the said parties."

Upon the expiration in 1911 of the lease made in 1890, the defendant refused to execute a new lease in accordance with the terms of the above-quoted covenant, and plaintiff, who has succeeded to all the rights of the last lessee, seeks to compel such a lease to be made. The question, as we think, resolves itself into one of power in the city of New York to make such a covenant in the lease executed in 1890.

Prior to 1844 there appears to have been no limitation upon the term for which real property belonging to the city of New York could lawfully be leased. In that year, however, the common council adopted the now well-known ordinance which established "the sinking fund of the city of New York for the redemption of the city debt" and created the commissioners of the sinking fund. This ordinance was ratified and confirmed by the Legislature. Laws 1845, c. 225. By this ordinance no lease of public lands for more than one year was permitted except with the consent of the commissioners of the sinking fund, and, with such consent, no lease was permitted to be made for more than five years. In 1853 an act was passed (chapter 217 of the Laws of 1853, § 7) providing that all leases of city property be made

after public advertisement and by public letting for a term not to exceed ten years. Chapter 446 of the Laws of 1857, § 41, contains a similar provision.

Under section 8 of chapter 876 of the Laws of 1869 the commissioners of the sinking fund were given power to lease city property at public letting for a term not to exceed ten years.

Under the Consolidation Act (chapter 410 of the Laws of 1882, § 170) the sinking fund commissioners were given similar power to make leases at public auction or under sealed bids for a term not exceeding ten years.

The present charter of the city of New York in section 205 (Laws 1901, c. 466) provides:

"Powers of Commissioners of Sinking Fund. Sec. 205. The said board shall, except as in this act otherwise specifically provided, have power to sell or lease for the highest marketable price or rental at public auction or by sealed bids, and always after public advertisement for a period of at least fifteen days in the city record, and after appraisal under the direction of said board made within three months of the date of sale, any city property except parks, wharves and piers and land under water," except as hereinafter provided, "but no such lease shall run for a term longer than ten years nor a renewal for a longer period than ten years."

[2] It thus appears that since 1844 no officer or officers of the city government have had authority to lease city property for a longer period than ten years, and it is well settled that persons dealing with public officers respecting public property are chargeable with knowledge of the limitation of power imposed upon such officers and can gain no advantage as against a municipal or other public corporation by reason of having relied upon acts of such officers in excess of their lawful powers. It is conceded by the defendant that, notwithstanding the ordinance of 1844, the city was bound to give, and its officers were justified in executing, a lease for 21 years in 1848, because it had contracted so to do by the lease of 1827 made at a time when such a contract was legal. But the insertion of the renewal clause, with a specific covenant for a further renewal, in the lease of 1848, was equivalent to making a lease in that year for 42 years, if not, as the plaintiff insists, for perpetuity. Such a lease was forbidden by the ordinance of 1844 and by several acts of the Legislature passed before 1869, when the lease of 1848 expired.

We are clearly of the opinion that it was incompetent and illegal to include, if not in the lease of 1848, certainly in the leases of 1869 and 1890, the specific covenant for a further renewal for 21 years. The lease executed in 1811 and its renewals should not be construed so as to create a perpetuity, and the covenant in the lease of 1827 would have been wholly satisfied by giving the lessee two renewals, to wit, those of 1848 and 1869. A similar covenant to that now under consideration was so construed by the Court of Appeals in Syms v. Mayor, 105 N. Y. 153, 11 N. E. 369. As therefore the city was not bound by the covenant in the lease of 1827 to give more than two renewals, and as its officers had no legal authority to insert in the lease of 1848 or that of 1869 a covenant for a further renewal, their attempt to make such a covenant on the part of the city must be held

to be inoperative and void. Consequently upon the expiration of the lease of 1869, if not upon the expiration of the lease of 1848, the lessee had no right, by virtue of any covenant in his lease, to a further renewal. It follows necessarily that the lessee at the expiration of the lease executed in 1890 had no such right.

[3, 4] A question is also submitted respecting the right of the lessee to remove the buildings upon the property or to be compensated therefor. The general rule is that buildings erected by a tenant become the property of the landlord if not removed before the expiration of the lease. Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173; Talbot v. Cruger, 151 N. Y. 117, 45 N. E. 364. In the lease held by plaintiff the tenant is given ten days after the expiration of the lease within which to remove the buildings, but it is provided that he may not do so "at any time thereafter." Plaintiff has allowed the ten days to elapse and has not removed the building. She has thus forfeited the right to do so. It has become the property of the landlord by operation of law, and plaintiff has no valid claim to be paid its value.

The defendant is entitled to judgment in accordance with the foregoing opinion, but under the terms of the submission, without costs. Settle order on notice. All concur.

(159 App. Div. 899)

WENTWORTH v. RIGGS.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. BAILMENT (§ 1*)—WHAT CONSTITUTES—POSSESSION.

A "bailment" consists of the holding of a chattel by one person under an obligation to return or deliver it to another after some special purpose is accomplished. It may be actual or constructive. An actual bailment exists when there is an actual delivery of the property to the bailee or his agents, or a constructive delivery comprehending all those acts which, not truly comprising real possession, have been held by legal construction equivalent to acts of real delivery which includes symbolical or substituted delivery. A constructive bailment arises when the person having possession holds it under such circumstances that the law imposes an obligation to deliver to another.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 1–12; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 1, pp. 673–676.]

2. INNKEEPERS (§ 11*)—RESTAURANT—CLOTHING OF GUEST—POSSESSION BY RESTAURATEUR.

Defendant operated a restaurant, providing hooks near the tables for the outer garments of guests, and also a checkroom where such garments might be left in the custody of one of his servants. Plaintiff, having knowledge of these facilities, was assigned a seat at a table and hung his overcoat on a hook within two feet of where he was sitting, and during his meal it was removed or stolen. There was no evidence that defendant or any of his servants ever saw the coat or received it into their possession. *Held*, that there was no bailment, and that, in the absence of proof of negligence, defendant was not liable for the loss.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 3, 17–40; Dec. Dig. § 11.*]

Scott, J., dissenting.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Appellate Term, First Department.

Action by Reginald de M. Wentworth against Leon C. Riggs. From a Municipal Court judgment in favor of plaintiff, affirmed at the Appellate Term (79 Misc. Rep. 400, 139 N. Y. Supp. 1082), defendant appeals. Reversed, and complaint dismissed, with costs, on the following dissenting opinion of Seabury, J., at the Appellate Term:

I am unable to agree with the views expressed in the prevailing opinion. In view of the precautions taken by the defendant to police and care for the property of his patrons, I think it is evident that he cannot be held liable for the loss of the overcoat upon any theory of negligence unless there was a bailment. If the defendant is to be held liable at all, it can only be upon this latter theory. Confusion has been engendered by certain cases, which seem to discuss constructive bailment as if it were identical with constructive delivery. The two things are distinct. Formerly, delivery was regarded as the essence of a bailment. As this branch of the law has developed, cases of constructive bailment have been recognized covering cases where there had been no delivery either actual or constructive, as where one held the possession of a chattel under such circumstances that the law placed upon the person having the possession of the chattel the obligation to deliver it to another. The typical instance of such a constructive bailment is where one sells a chattel to another, who pays the price thereof, and the vendor refuses to deliver it to the vendee. Here the law implies the contract of bailment, and holds the vendor answerable as bailee. In such a case it is apparent that there has been no delivery by the bailor to the bailee, and yet the bailment exists constructively. All the other examples of constructive bailment which are given in the books, as in the case of a finder, of a captor or salvor, of an attaching officer, are cases where the person having possession of the chattel is held to be a bailee, although there has never been either an actual or a constructive delivery of the chattels to the bailee by the bailor. In other words, the essential fact of legal significance in all these cases is possession. It certainly is not delivery, for, in none of these cases of constructive bailment, is there either an actual or a constructive delivery.

[1] The older definitions of the term "bailment" seem to accentuate merely the necessity for the delivery. Chief Justice Holt, in his celebrated opinion in Coggs v. Bernard, 2 Ld. Raym., 909, 1 Smith, Lead. Cas. 354, which is supposed to have laid the foundations of the English law of bailment, divides bailment into six different sorts or classes and defines each. Delivery is in every case the essential element in Lord Holt's definition.

So, also, Sir William Jones Blackstone, Mr. Justice Story, and Chancellor Kent all give definitions of the term "bailment," which state that there must be a delivery. Jones on Bailment, 1, 117; 2 Black. Comm. 451; 2 Kent's Com. Lect. 40, p. 558 (4th Ed.); Story on Bailment, p. 5. Mr. Schouler, in his American notes to Coggs v. Bernard, in the ninth American Edition of Smith's Leading Cases (volume 1, p. 400), quotes the following definition of the term "bailment" from Bouvier's Dictionary:

"A delivery of some chattel by one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when that special purpose is accomplished."

After commenting upon the conciseness of this definition, and admitting that it conforms fairly to the term "bailment" itself, Mr. Schouler says:

"But this writer finds such a scope too narrow to meet a number of instances which are properly referred to in this branch of the law, as where there is no strict delivery, as in the case of a finder, of a captor or salvor, of an attaching officer, of a person selling goods and retaining possession for the new owner, and the like; for, while bailment imports literally delivery, the rights and duties fasten rather upon a possession acquired by the person in question than upon any contract or delivery. Hence we may essay this new definition of our own, that bailment consists in the holding of a chattel by some party under an obligation to return or deliver it over after some special purpose is accomplished."

This definition includes within its scope constructive bailment, whereas the

earlier definitions of Holt, Jones, Blackstone, Story, and Kent cover only cases of actual bailment.

I. In an actual bailment there must be a delivery of the chattels to the bailee or his agent. The delivery may be either actual or constructive. (a) An actual delivery consists in giving to the bailee or his agents the real possession of the chattel. Shindler v. Houston, 1 Denio (N. Y.) 48. (b) Constructive delivery comprehends all of those acts which, although not truly comprising real possession of the goods transferred, have been held constructione juris equivalent to acts of real delivery, and in this sense includes symbolical or substituted delivery. Shindler v. Houston, supra; Bolin v. Huffnagle, 1 Rawle (Pa.) 9; 35 Cyc. 189.

In 5 Cyc. 165, in discussing the sufficiency of the delivery in order to constitute an actual bailment, it is said:

"Such a full delivery of the subject-matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner, as will make him liable as its sole custodian to the latter in the event of his neglect or fault in discharging his trust with respect to the subject-matter, and as to require a redelivery of it by him to the owner or other person entitled to receive it after the trusts of the bailment have been discharged. Where the delivery can be constructive only, there must be an intention to transfer the possession of the property."

In Fletcher v. Ingram, 46 Wis. 202, 50 N. W. 425, the court said:

"To constitute a person a bailee of property, he must have such full and complete possession of it as to exclude, for the time of the bailment, the possession of the owner (Benjamin on Sales, § 174), and he should have so far assumed the charge and control of the property as the sole custodian of it, as to be liable to the owner for any losses or damages occasioned by his neglect or fault in the manner in which he discharges his trusts in respect to it."

II. A constructive bailment arises where the person having possession of a chattel holds it under such circumstances that the law imposes upon him the obligation of delivering it to another.

[2] From the definition of the two subdivisions of actual bailment, and from the definition of a constructive bailment, there ought to be no difficulty in determining whether there was in the case at bar a bailment of the plaintiff's overcoat. Neither the defendant nor his agents ever had the real possession of the overcoat, and therefore there was not an actual delivery of the coat. The facts proved are inconsistent with the hypothesis that the plaintiff intended to transfer to the defendant or his servants such a possession of the coat as would exclude, for the time of the bailment, the possession of the owner. The overcoat hung upon a hook within two feet of where the plaintiff was sitting during the meal, and it does not seem to be capable of dispute that during that time the defendant did not have such a possession of it as to exclude the possession of the plaintiff. If the plaintiff had wished to reach his overcoat at any time during the meal, either to take something from one of the pockets of the coat or for any other purpose, he was entirely free to do so. without requiring any act on the part of the defendant or his servants. The presence of the hooks may be construed into an invitation to the patron to hang his coat upon them, but hanging the coat upon the hook cannot be reasonably held to constitute a delivery of the coat to the exclusive possession of the defendant. The hooks were obviously placed there for the convenience of the patron, provided he wished to retain possession of his coat. If he wished to deposit the coat in the exclusive possession of the defendant, he should have availed himself of the accommodations which the defendant provided for that purpose. If he had done this, the defendant would have been liable. Buttman v. Dennett, 9 Misc. Rep. 462, 30 N. Y. Supp. 247. The frequency with which the plaintiff was accustomed to visit the defendant's restaurant leaves no room for doubt that he knew of the accommodations provided by the defendant for caring for the hats, coats, and other articles of his patrons.

In the case at bar, it does not appear that the defendant or any of his servants ever saw, much less received, the overcoat. How the defendant, under all the circumstances disclosed, can be held to have had exclusive possession of the overcoat, is not clear to me. Bunnell v. Stern, 122 N. Y. 539,

25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519, Bird v. Everard, 4 Misc. Rep. 104, 23 N. Y. Supp. 1008, Buttman v. Dennett, 9 Misc. Rep. 462, 30 N. Y. Supp. 247, and Delmour v. Forsythe, 128 N. Y. Supp. 649, were decided upon the ground that the special circumstances disclosed warranted the inference that the bailee assumed the temporary custody of the chattel. Even though the decision in Bunnell v. Stern, supra, was placed upon this ground, I think that that case extended the rule applicable to this subject very far, and the decision of the Court of Appeals in Wamser v. Browning, King & Co., 187 N. Y. 87, 79 N. E. 861, 10 L. R. A. (N. S.) 314, I interpret to mean that the rule declared in Bunnell v. Stern will not be extended to cover cases not identical with it. In Pattison v. Hammerstein, 17 Misc. Rep. 375, 39 N. Y. Supp. 1039, it was held that the manager of a theater, in the absence of special agreement, was not liable for his patrons' property, though it consisted of apparel which is usually laid aside by them while attending the play, and is not responsible for the loss thereof while it is hung on a hook in the box occupied by the patrons, unless he or his servants have been guilty of negligence or wrongful act. In that case Mr. Justice Bischoff said:

"A bailment implies the delivery of a chattel; and to subject one to liability as a bailee it is a constitutent that he had voluntarily assumed or retained the custody of the chattel alleged to have been bailed. * * * There was no invitation to the plaintiff, express or implied, held out by the defendant, that the former should yield his personal vigilance even for a moment. The hooks provided by the defendant were a means of enabling the occupants of a box to care for their apparel with greater ease and comfort to themselves, but an effort to imply from the mere presence of such hooks an assumption by the defendant of the custody of whatever the occupants of the box might place thereon tortures reason."

I think that the views herein expressed are further fortified by Wamser v. Browning, King & Co., 187 N. Y. 87, 79 N. E. 861, 10 L. R. A. (N. S.) 314; Harris v. Child's Unique Dairy Co., 84 N. Y. Supp. 260; Montgomery v. Ladjing. 30 Misc. Rep. 92, 61 N. Y. Supp. 840; and Duckworth v. Codington Co., 136 N. Y. Supp. 68.

The facts of this case, viewed in the light of the foregoing authorities, seem to me to establish that there was no actual bailment, because there was neither an actual or constructive delivery of the coat. That this is not a case of constructive bailment is apparent from the fact that the defendant never had the actual possession of the coat.

It follows that there was neither an actual nor constructive bailment, and, as there is no other ground under the facts in this case upon which the defendant's liability can be predicated, the judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

H. Wintner, of New York City, for appellant.

F. P. Woglom, of New York City, for respondent.

PER CURIAM. Determination reversed, and complaint dismissed, with costs, on dissenting opinion of Seabury, J., at the Appellate Term. Settle order on notice.

SCOTT, J., dissenting.

(158 App. Div. 546)

RAYMOND CONCRETE PILE CO. v. JOHN THATCHER & SON.

(Supreme Court, Appellate Division, Second Department. October 24, 1913.)

CONTRACTS (§ 198*)—CONSTRUCTION.

Plaintiff agreed to drive a specified number of 20-foot piles for defendant by a contract which provided that the pile core should in each case be driven until "not more than 10 blows" of a certain power hammer were required to secure one inch penetration; and, should obstructions be encountered which prevented further penetration, the driving should cease and the pile be considered a completed pile, unless such obstructions were removed to permit further driving. The contract further provided that the length of the pile to be paid for should be the length of shell actually driven into the ground, unless the shell was filled to a point above the surface of the ground, in which case the length to be paid for should be the length from the lower point of the shell to the top of the concrete in the shell. The contract also contemplated that there might be required additional piles, additional lengths of piling, and some shorter piles, if found sufficient, and provided for payment at so much a foot for additional piling and deductions for shorter lengths. Defendant claimed that, though a pile was driven beneath the surface, other piles should be placed thereon so as to continue to drive it until 10 blows of the hammer would not cause one inch of penetration. Plaintiff claimed that, when a pile was driven its full length in the ground without meeting the required resistance, it should be paid for; it being for the defendant to say whether another pile should be driven, and where. *Held* that, in the absence of evidence as to the understanding of the parties and the practice in the business, defendant's contention as to the construction of the contract would not be adopted.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861–877, 879–883; Dec. Dig. § 198.*]

Appeal from Trial Term, Kings County.

Action by the Raymond Concrete Pile Company against John Thatcher & Son. From a judgment for plaintiff and an order denying a motion for a new trial, it appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, STAPLETON, and PUTNAM, JJ.

Martin Conboy, of New York City, for appellant.

Hugo Hirsh, of Brooklyn, for respondent.

THOMAS, J. The defendant, undertaking to build a vault in a cemetery, contracted with the plaintiff to drive piles for the foundation. The contract indicates that it was estimated that 181 piles, each 20 feet in length, would be required, for which a gross payment of $5,460 was stipulated. But it was also considered that there might be required, (1) some additional piles; (2) additional lengths of piling; (3) shorter piles, should they be "found sufficient;" and it was stipulated that additional piles or additional lengths of piling should be paid for at $1.30 per lineal foot, and that for piles shorter than 20 feet deduction from that length should be made at the rate of 60 cents per lineal foot. But how would it be determined whether the 181 piles each of 20 feet length, or longer or shorter piling, would be required?

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Assume that the several lengths were on the ground; how would the plaintiff know what lengths to drive? Was it contemplated that the plaintiff should first try a pile 20 feet in length and, if the required resistance was not obtained when its upper end had been driven, that the plaintiff should keep driving such pile still below the surface? It seems to one unskilled in that trade that in such case it would be necessary to place another pile on the upper end of the one inserted, and drive the two thus connected until the required resistance was reached. Alternatively a longer pile or, as the contract says, "additional lengths of piling," could be used, if earlier driving or discretion showed the necessity for it. But if it was understood that upon a 20-foot pile below the surface of the ground another should be driven, the one pursuing the other, why was provision made for different lengths? The operation was this: A cone-shaped core, pointed at one end, was driven by blows from a steam hammer delivered at its upper end. This core carried with it a sheet metal encircling shell. When the driving had been completed, the collapsible core was withdrawn, and the concrete poured into the shell, and a concrete pile thus formed. Now it happened that of the piles driven a number, in length 30, 35, or 40 feet, were driven somewhat below the surface. But the defendant says that they were not driven far enough to obtain the required resistance, and it predicates that contention upon the ground that at the end of the driving less than ten blows of the hammer were required to secure one inch of penetration. And it refers for support to the contract, which provides:

"The pile core shall in each case be driven until not more than ten blows of a No. 2 vulcan steam hammer are required to secure 1 inch penetration. Should boulders or other obstructions be encountered which prevent securing further penetration, driving shall cease and the pile be considered a completed pile, unless such obstructions are removed by you to permit of further driving. Length of pile to be paid for shall be the length of shell actually driven in the ground, unless the shell is filled to a point above the surface of the ground, in which case the length of pile to be paid for shall be the length from the point of the shell to the top of the concrete in said shell."

The defendant's argument is that less than ten blows of the hammer in fact were required to secure one inch penetration, and that, although the pile has been driven beneath the surface, pile should have been driven on pile until ten blows or less did not secure one inch penetration. According to that view, the pile wholly driven ceases to be the limit, but indefinite piles must be superimposed one upon another until the hammer in ten blows has exhausted its power to drive the vertical series another inch. The plaintiff insists that the pile, whatever its length, is the unit, and that, when it has been driven and the necessary resistance not met, another of greater length in the defendant's discretion may be driven, but not upon top of it, and that, if the pile is wholly inserted, it becomes a completed pile if, before its full length has been driven, ten blows of the hammer will not drive it another inch, or "boulders or other obstructions be encountered which prevent securing further penetration." But the defendant urges that, although the pile be fully in the ground, it shall be driven down as long as the ten blows of the hammer can make it penetrate a further

inch. The record furnishes no extrinsic aid to interpretation. The plaintiff would have shown "what steps were taken * * * to comply with the agreement"; but the question, maybe because its relevancy did not appear, was excluded as immaterial. If the object was to show how the work was carried on, the evidence might have aided an understanding of the contract. For instance, it might have shown whether with appliances usual in the trade one pile could be superadded to another to secure penetration, or whether, when a pile was fully driven and finally ten blows of the hammer were not required to secure one inch penetration, the practice was to drive in proximity to it longer piles. The letter from the defendant seems to favor the latter view, for it says:

"It was understood that you drive on Thursday with your 40 ft. core, it being assumed from the borings that the required resistance can be secured with this core, if not, why then other steps will have to be taken."

It is inferable from the letter that the length of the pile required was determinable from knowledge already at hand and not from inserting a pile, and, if it did not meet requisite resistance, piecing it out with other piles, end on end, until sufficient lengths were in the one line. In the absence of knowledge of practical operation advising otherwise, I think that such process of extension is not the intention of the contract.

Therefore the judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur.

(159 App. Div. 74)

GUENTHER v. RIDGWAY CO.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. APPEAL AND ERROR (§ 1195*)—REVIEW—LAW OF CASE.

Where, on appeal from an order requiring the secretary of defendant corporation to answer certain questions on examination before trial, no appeal was taken from the order granting the examination nor any question raised as to the propriety thereof or as to whether it should have been limited in any manner, and the order was general, covering the issues in the action, it was the law of the case that plaintiff was entitled to such examination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

2. DISCOVERY (§ 77*) — EXAMINATION BEFORE TRIAL — REFUSAL TO ANSWER QUESTION.

Where the examination of a witness before trial is had before a referee as authorized by Code Civ. Proc. § 873, and the witness refuses to answer a question, the referee is required by section 880 to report the fact to the court or judge, who must determine whether the question is relevant and whether the witness is bound to answer.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 91; Dec. Dig. § 77.*]

3. DEPOSITIONS (§ 64*)—EXAMINATION OF WITNESS UNDER COMMISSION—REFUSAL TO ANSWER QUESTIONS—RELEVANCY—DETERMINATION.

On examination of a witness under a commission from a sister state or foreign jurisdiction, the competency and admissibility of the evidence

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

must be determined by the foreign court; the courts of New York being limited to a determination of whether the testimony desired is relevant to the subject-matter of the action, not passing on the strict legality and competency of the evidence.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 133–141; Dec. Dig. § 64.*]

4. DISCOVERY (§ 77*)—EXAMINATION BEFORE TRIAL.

Where a witness on examination before trial for use within the state refuses to answer questions, and such refusal is referred to the court on application for an order to compel him to answer, the court's examination is limited to the determination of whether the questions are relevant and whether the witness would be privileged from testifying; the competency or admissibility of the evidence being for the determination of the judge at the trial.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 91; Dec. Dig. § 77.*]

5. DISCOVERY (§ 77*)—EVIDENCE—RELEVANCY.

In an action against a publishing corporation for libel, defendant pleaded the truth in justification both as a complete and partial defense and also in mitigation of damages. Defendant's secretary and treasurer having verified the answer as of his personal knowledge and stated that he derived such knowledge in the performance of his duties as such, an order was made for his examination as an adverse party before trial. After quoting part of the alleged libelous article, he was asked whether he had any knowledge or information on the subject of the article, and on his refusal to answer he was asked whether the portion read to him from the complaint was a false statement. This being objected to, he was asked whether he made any investigation to ascertain whether or not the article was true or false when it was published, whether defendant made any investigation before publishing it, and also to state the facts with respect to whether the article was true or false, and whether it was not a fact that plaintiff had no police record known to the police authorities of Chicago and New York. *Held*, that the questions were not plainly irrelevant, and that the witness was properly required to answer them.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 91; Dec. Dig. § 77.*]

Scott and Clarke, JJ., dissenting.

Appeal from Special Term, New York County.

Action by Louis Guenther against the Ridgway Company. From a Special Term order requiring Ray Brown, defendant's secretary and treasurer, to answer certain questions which he had refused to answer under an order therefor, as an adverse party, requiring him to testify "concerning the matters relevant to the issues in this action," pursuant to Code of Civil Procedure, § 873, defendant appeals. Affirmed.

See, also, 149 App. Div. 948, 134 N. Y. Supp. 1133.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

James B. Sheehan, of New York City, for appellant.

E. C. Crowley, of New York City, for respondent.

LAUGHLIN, J. This is an action for libel. The libelous article was published on the 5th day of August, 1911, in a periodical known as "Adventure." The defendant admitted the publication and that it was published of and concerning the plaintiff, and denied positively the falsi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ty of the article, and alleged positively, as a complete defense, that the statements therein contained are true, and also alleged positively the truth of the article as a partial defense, and alleged positively, in mitigation, that the article was published "after careful investigation and with full belief in the truth thereof and without malice or malicious or defamatory intent." The answer was verified by Brown, as of his personal knowledge, and in the verification it is stated that he derived his knowledge of the matters alleged in the answer "in the performance of his duties as secretary and treasurer of the said corporation."

The defendant publishes "Adventure," which it is alleged is a monthly periodical having a wide circulation. Brown has been in the employ of the defendant since its organization, and for a period of two or three years ending with the month of March, 1910, he was its assistant treasurer. On the 11th of November, 1911, he was elected a director and became secretary and treasurer of the company and still holds said office.

[1] No question with respect to the propriety of granting the order for the examination, or as to whether it should have been limited in any manner, is presented for review, for no appeal therefrom was taken. The order for the examination is general concerning the issues in the action, and, since the order stands in its entirety, it is the law of the case that plaintiff is entitled to such examination. Instead of appointing a referee to conduct the examination, the order directed that it be had before the justice who made the order, or one of the justices "who may be sitting at Special Term, Part 2," on the day fixed therefor.

[2] Where the examination is before a referee, as authorized by section 873 of the Code of Civil Procedure, and the person whose examination is authorized refuses to answer any question, the referee is required by section 880 of the Code of Civil Procedure to "report the fact to the court or judge, who must determine whether the question is relevant, and whether the witness is bound to answer it." The examination in question was evidently taken before a stenographer and not in the *immediate* presence of the judge sitting in Part 2, Special Term. The order from which the appeal is taken recites that the refusal of the witness to answer certain questions was reported to the *court,* and, after hearing counsel, the order requiring him to answer was made. If, upon the trial of an action, a witness should refuse to answer a question after being directed so to do by the court, it is manifest that the trial could not be suspended in order to enable him to have the ruling reviewed, and he would be obliged to answer or, by refusing to answer, subject himself to punishment for contempt and have to be adjudged in contempt before he could appeal.

[3] In the case of examinations within the state under a commission issued from a sister state or foreign jurisdiction, the rule is well settled that the competency and admissibility of the evidence are matters to be determined by the foreign court, and that, so far as the courts of this jurisdiction are concerned, "it is sufficient if it appear that such testimony may be competent, and, so far as the examination is not entirely irrelevant to the subject-matter of the action, the court will not, nor is it called upon to, pass upon the strict legality and competency of the ev-

idence sought to be elicited." Matter of Randall, 90 App. Div. 192, 85 N. Y. Supp. 1089, appeal dismissed 177 N. Y. 400, 69 N. E. 721.

[4] I am of opinion that substantially the same rule should apply to examinations before trial for use within the state, and that such was the intention of the Legislature. It will be observed that the Legislature did not confer authority on the justice of the court before whom the examination is had, or on the justice or the court if it be had before a referee, to pass upon the *competency* or *admissibility* of the evidence. It merely conferred authority to determine whether questions are *relevant* and whether the witness is bound to answer, which evidently was intended to provide for cases in which the witness would be privileged from testifying, for, by the express provisions of section 883 of the Code of Civil Procedure, it is provided that such a deposition has the same, and no other, effect "as the oral testimony of the witness would have" on the trial "and an objection to the competency or credibility of the witness, or to the relevancy or substantial competency of a question put to him, or of an answer given by him, may be made as if the witness was then personally examined and without being noted upon the deposition." If this were not so, it is manifest that such examinations could be readily delayed, and the justices or courts of original jurisdiction would have their time occupied in examining questions and making rulings that would have no binding effect on the trial court, and a party might thus be precluded from having the benefit of evidence which the trial court would deem competent and admissible. Moreover, the time of the courts of appeal would be occupied with frivolous appeals, which would accomplish nothing, save possibly to deprive a litigant of the right to competent evidence upon the trial of his action or to have the question of its competency presented upon the trial of the issues where a record could be made which would enable him to present the question intelligently to an appellate court. I am of opinion, therefore, that it is of importance to the parties to a particular litigation and to the general public, which is interested in having business before the courts dispatched, that we declare and adhere to the rule in accordance with that prescribed in said section 883 by the Legislature that only questions relating to the relevancy of the evidence to the issues, and with respect to whether the witness is privileged from answering, should be considered on such applications.

The learned counsel for the appellant cites Gavin v. New York Construction Co., 122 App. Div. 643, 107 N. Y. Supp. 272, in support of his contention that the test of the propriety of questions put to a witness on an examination before trial "is whether the testimony sought is material and proper to be used upon the trial of the action." In that case this court held that certain questions, which manifestly called for evidence not relevant to the issue, were improper. In the course of the opinion, it is stated argumentatively that, since an examination of a party before trial will not be granted unless the testimony sought is material and proper to be used upon the trial, that should be the test of the propriety of questions put to a witness on such an examination. It was not necessary to a decision of the appeal in that case to declare the rule so broadly, and I think the learned justice who wrote the opin-

ion overlooked the fact that it is for the trial court and not for the justice or the court supervising the examination to pass on the strict competency and materiality of the evidence provided it is *relevant* to the issues.

[5] In the case at bar the witness does not appeal, and the objections interposed do not relate to any question of personal privilege. The first question which the witness declined to answer was preceded by a quotation from the article published, which the witness by the answer alleged as of his own knowledge was true, and the inquiry made was whether he had any knowledge or information on the subject of the article. The question was objected to upon the ground that it was incompetent, irrelevant, and immaterial and constituted an attempt to probe into the defense, and it was expressly stated that no objection to the form of the question was made. The witness was then asked, "Is not the statement just read to you from the complaint a false statement?" to which the same objections and the further objection that it called for a conclusion were interposed. He was then asked, "Did you make any investigation to ascertain whether or not the article of which we complained is true or false?" and this was objected to "unless it is confined to a time prior to the publication of the article." The parties then appeared before Mr. Justice Giegerich, who directed the witness to answer the questions. On request of counsel for the defendant, the justice manifested a willingness to make a formal order so that the ruling might be reviewed. On the examination being resumed, the witness again declined to answer. He was then asked whether the defendant made any investigation to ascertain whether or not the libelous article was true before it published it. He answered:

"I was not officially connected with Adventure at that time and had no office with the Ridgway Company and I could not answer that question intelligently; that is, at the time things were going on I had no official knowledge of it."

The question was again repeated, and the witness answered:

"I was not working on this story."

He was then asked whether the defendant made any investigation before it published the article, and he answered:

"I do not think I am qualified to answer that."

He was then asked if he understood the question, and he asked that it be read, and it was read by the stenographer. The question was then objected to on the ground that it related to the defense and that the witness had testified that he was employed only in making pictures and had no connection with the publication of the article in question. Counsel for the plaintiff then drew attention to the answer which the witness had verified as of his own knowledge, but the witness failed to answer. The witness was then asked whether he had any knowledge with reference to the truth or falsity of one of the charges contained in the article, and he answered in the affirmative. He then testified that he did not personally make any investigation prior to the publication of the article to ascertain whether or not it was true, and added:

"I knew nothing about the matter before that."

He was then asked in effect to state the facts with respect to whether or not the article was true or false. To this the same objections were interposed, and the witness did not answer. He was then asked if the statement in the article that the police authorities of New York and Chicago could give the plaintiff's record with reference to a certain matter referred to in the article was not false, and if it was not a fact that the plaintiff had no record known to the police authorities of Chicago or New York in connection with the matter. To these questions the same objections were interposed, and the further objection that they called "for the operation of the minds of other people," and the witness did not answer. The parties then appeared before Mr. Justice Whitaker and submitted to him the questions to which objections were taken, and, after hearing counsel, he overruled the objections and made the order from which the appeal is taken.

Although the evidence called for by some of these questions and particularly the last might be excluded on the trial as incompetent and immaterial, still it cannot be said to be plainly irrelevant. Those relating to the truth of the article were authorized by Turton v. New York Reporter, 3 Misc. Rep. 314, 317, 22 N. Y. Supp. 766, affirmed 144 N. Y. 144, 38 N. Y. Supp. 1009. It was not material what knowledge the witness had individually with respect to the truth or falsity of the article, but, if the plaintiff had been permitted to show what knowledge the witness had on the subject, it might have appeared, or been readily developed therefrom, that those representing the defendant in the particular matter, and for whose acts it was responsible, had knowledge that the article was false or that it was published without proper investigation, which would be competent and material evidence on the question of damages (Carpenter v. N. Y. Evening Journal Pub. Co., 111 App. Div. 266, 97 N. Y. Supp. 478) and might properly be shown on an examination of the defendant before trial (Mason v. N. Y. Review Pub. Co., 154 App. Div. 651, 139 N. Y. Supp. 639). Considerable latitude should be given in examining an adverse party, for it is in the nature of a cross-examination to elicit the truth and shorten the trial.

It follows that the order should be affirmed, with $10 costs and disbursements.

INGRAHAM, P. J., and McLAUGHLIN, J., concur.

SCOTT, J. In my opinion the order appealed from should be reversed. It is perfectly obvious that in asking the questions which were objected to the plaintiff was not examining the defendant through its secretary but was trying to examine the secretary as an individual witness. I quite agree as to the usefulness, in the interest of justice, of the power to examine an adversary before trial, but I think that we should be careful to guard against the abuse of that power even if it does entail a certain amount of work upon the court.

CLARKE, J., concurs.

(158 App. Div. 628)

CUPPY v. STOLLWERCK BROS., Inc.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. MASTER AND SERVANT (§ 8*)—CONTRACT OF EMPLOYMENT—TERM.
Acceptance of a proposition for employment at a specified rate per year is not an employment for a year but merely at will.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 8–10, 17; Dec. Dig. § 8.*]

2. MASTER AND SERVANT (§ 80*)—EMPLOYMENT—CONTRACT—CONSTRUCTION.
Plaintiff, while in defendant's employ, became dissatisfied with his arrangement and on December 16th made a proposition for increased compensation to date from January 1, 1910. On January 3d he cabled defendant asking confirmation of the agreement and added, "Twelve months also one authority." In reply he received a cablegram that his letters had been answered and that he would have "authority within certain limits." He thereupon cabled that, if defendant would not agree to abide by the conditions of letters specifying "twelve months," he offered his resignation and requested its acceptance. In reply to this on January 7th, defendant stated that it wished to see plaintiff satisfied, working with enthusiasm, and that it agreed to plaintiff's proposals for 12 months, subject to conference, according to plaintiff's decision with defendant's vice president, who was expected to arrive in the United States on the 25th, to which plaintiff replied that he would remain on the terms of his previous letters. *Held*, that his letter of December 16th, referred to, having contained a proposition that unless plaintiff received a cablegram accepting his first proposition he would "remain by the week" to be compensated, etc., defendant's cablegram of January 7th was not an unqualified acceptance of his proposal and did not constitute an employment for 12 months as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107–127; Dec. Dig. § 80.*]

3. MASTER AND SERVANT (§ 7*)—CONTRACT OF EMPLOYMENT—WAIVER—CORPORATIONS.
Where plaintiff, claiming an annual contract of employment as general manager of defendant corporation, accepted a position as general managing director after being elected to that office, be thereby waived his contract of employment for a year and subjected himself to removal under a by-law of the company authorizing the board of directors to remove a director or officer and fill the vacancy so created at any regular or special meeting.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 7; Dec. Dig. § 7.*]

4. CORPORATIONS (§ 294*)—DIRECTORS—REMOVAL—MEETING OF BOARD.
Where the by-laws of a corporation authorized the removal of an officer or director by a majority of the board at any regular or special meeting, and the minutes showed that, at a special meeting held pursuant to a written call of the president, a resolution was adopted by a majority of the board removing plaintiff as general managing director and appointing another as his successor, such resolution operated to remove plaintiff from office from the date notice thereof was communicated to him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1263–1266; Dec. Dig. § 294.*]

5. CORPORATIONS (§ 319*)—OFFICERS—REMOVAL ACTION OF BOARD—MINUTES—EVIDENCE.
Where plaintiff claimed that action taken by defendant's board of directors by which he was sought to be removed as general managing di-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rector was illegal, defendant was entitled to introduce in evidence the minutes of a subsequent meeting of the board at which a resolution was adopted by a majority reciting that the directors had lost confidence in plaintiff because of certain letters he had written, and that it was resolved that he be removed from office as managing director and that another be elected in his stead; defendant being entitled to contend that it was justified in discharging plaintiff for misconduct even though he had a contract for a year, as claimed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1415, 1416–1425; Dec. Dig. § 319.*]

Appeal from Trial Term, New York County.

Action by Hazlitt A. Cuppy against Stollwerck Bros., Incorporated. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed on condition.

See, also, 150 App. Div. 903, 135 N. Y. Supp. 1107.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Edward H. Wilson, of New York City, for appellant.

Frederick M. Thompson, of New York City, for respondent.

LAUGHLIN, J. The plaintiff alleges that on the 7th of January, 1910, he was employed as managing director by the defendant for the year 1910 on the basis of an annual salary in addition to expense money and a percentage of the profits; and that he was discharged on the 24th of May thereafter. He brought this action to recover the balance unpaid on the salary for the year and his percentage of the profits.

The trial court ruled, as matter of law, that the evidence proved a contract of employment for the year 1910. The uncontroverted evidence shows that the plaintiff was discharged as alleged, but there was a question of fact as to whether the discharge was justified by his conduct, and with respect to the intention of the parties concerning the manner in which the profits were to be computed, and as to whether the profits were sufficient to entitle the plaintiff under his contract to recover any part thereof or to damages measured thereby. The court submitted those questions to the jury, and the former was determined in his favor and the latter adversely to him, and he recovered nothing on account of profits. In the event of such findings on those issues, the court instructed the jury that they should render a verdict in favor of the plaintiff for salary, the amount of which was not disputed, for the balance of the term, and a verdict therefor was accordingly rendered.

Counsel for the defendant duly excepted to the rulings that the evidence showed a contract of employment for a year not terminable without cause, and that if the discharge was without just cause the plaintiff could recover as damages the amount of the unpaid salary for the term of the employment. These exceptions present the principal points that we deem it necessary to consider.

Prior to the 15th day of December, 1904, the plaintiff was in charge of the business of the Puritan Pure Food Company, a domestic corporation, and he owned all of its capital stock save the shares necessary to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

qualify other directors. On the last-mentioned day three agreements in writing were executed by the plaintiff representing his company and by one A. Stollwerck, who was engaged in the business of manufacturing and selling chocolate and confections at Stamford, Conn., and Gebrueder Stollwerck Aktien Gesellschaft, a German corporation which it is recited in the agreements owned a New York corporation known as Stollwerck Bros. The purpose of those agreements, so far as material to the decision of the appeal, was to have a corporation organized to take over the business of said Stollwerck and to manufacture "cocoa and chocolate food products and table luxuries" and to have the products of such corporation sold by the plaintiff's corporation and Stollwerck Bros. on a co-operative basis; the profits to be divided as therein provided. It was expressly agreed that the business of the three companies should be under the "responsible management" of the plaintiff and said Stollwerck "for a period of not less than four years." It would seem that no new corporation was organized at that time, as provided in the agreements, and said Stollwerck continued in charge of the manufacturing business, the products of which were, however, delivered to the other companies for sale and sold as contemplated by the agreements. The business of Stollwerck Bros. was jointly managed by the plaintiff and said Stollwerck, and the plaintiff managed the business conducted by his corporation, and said Stollwerck managed the manufacturing business until October, 1908, when he retired. After the year 1905 the plaintiff had the exclusive management of the business of his own corporation and that of Stollwerck Bros., and after the retirement of said Stollwerck the plaintiff's exclusive management extended to the manufacturing business as well and was so continued until his discharge. In the year 1908 there were negotiations between the plaintiff and the German company for a modification of the contracts; and, according to the testimony of the plaintiff, a proposition was made to him by the German corporation under date of August 15, 1908, which he accepted, and which provided that he and his fellow managing director, Stollwerck in America, should receive a salary of $100 per week and one-half of the net profits of the business, after certain deductions therein specified.

The defendant was incorporated under the laws of Connecticut on the 4th day of November, 1908, and the plaintiff became and remained its treasurer until his discharge. One Ludwig Stollwerck was the first vice president and the principal stockholder of the defendant. He was also the first vice president of the German company, and he appears to have had the general charge and management of both companies. On the 17th of November, 1908, he wrote the plaintiff, drawing attention to the fact that the agreements of December 15, 1904, had terminated, or were about to terminate, and to the fact that the plaintiff had been receiving thereunder "a fee of five thousand" dollars per annum and saying, "We herewith agree to give to you or Mrs. Elizabeth Cuppy, your wife, as long as you are working in our American business, a fee of $5,000" per annum, and further providing that, if the plaintiff quit or left "our firm under any reasons whatever, we agree to pay to you or Mrs. Elizabeth Cuppy a fee of five thousand dollars" per annum,

and in the event of his death to pay the same to his widow as long as she should live "out of any profits of our New York and Stamford business, before any interests are paid on capital," and to pay a smaller annuity to the plaintiff's mother in the event of the death of the plaintiff and of his wife leaving his mother surviving, and offering in behalf of the German firm to sign a contract in accordance with the terms of his letter; and he assigned as a reason for so doing the former contract, by which he says "all earnings of the Puritan Pure Food Company" were to accrue to Stollwerck Bros., and also the services the plaintiff had rendered "to our American family business." After the receipt of this letter, the plaintiff continued in charge of the business of the two corporations and of the manufacturing business, as sole managing director, without the execution of a formal contract, although it appears that he was desirous of having one, a more formal and definite arrangement. He received the salary of $5,000 per annum, in accordance with said letter, in monthly installments from Germany. Ludwig Stollwerck resided in Germany. He was in this country in September and October, 1909, and by a table of figures outlined a proposal to the plaintiff for a new contract. The plaintiff was subject to the orders of Ludwig Stollwerck, with whom individually most, if not all, of the correspondence concerning the business was conducted. The plaintiff manifested dissatisfaction with being held strictly responsible for the business, and particularly for the manufacturing business, concerning which it seems his authority had been somewhat limited. He wrote Ludwig Stollwerck under date of November 15, 1909, referring to a letter of October 30th, not in the record, setting forth his grievances in regard to being held responsible, although obliged to divide authority, and rebelling against being obliged to carry out instructions from Germany regardless of whether he deemed them for the best interests of the business, and complaining that there had been no definite agreement with respect to his compensation, and manifesting a determination to resign the position, and offering to instruct another to take charge in his place. The receipt of this letter by Ludwig Stollwerck was acknowledged, but he postponed action thereon. In cabling on other business on December 8, 1909, the plaintiff said that he was anxiously awaiting an answer to his letter of November 15th, and in a letter written on the same day he further discussed his grievances and asked that immediate attention be given thereto. On December 16, 1909, he wrote Ludwig Stollwerck a peremptory letter, announcing his intention of severing his connection with the business unless a definite agreement was arrived at without delay, on the basis which he therein proposed, which was as follows:

"Beginning with January 1st, I shall expect to receive, aside from my share of the profits, in addition to the amount which I have been receiving during the past year, $10,000; or at the rate of $10,000 per year over and above the $5,000 which I am now getting and the $1,000 for expense money. Five thousand dollars of the $15,000 will be set aside, as it is paid to me, and returned to Gebruder Stollwerck, A. G. Cologne, in payment of the $5,000 which was loaned me during the year 1907, the first of the two years that I received no remuneration whatever for my work here."

The letter closed with the following:

"In the absence of any cablegram confirming these conditions you will understand, therefore, that I am only here from week to week, but in that case on the basis as above outlined."

It will be observed that this proposition contained no express provision with respect to the period of employment, excepting as it may be inferred from the last paragraph of the letter that the plaintiff contemplated an employment, if his proposition should be accepted, for some period longer than a week, at least.

[1] The acceptance of a proposition for employment at a specified rate per year is not an employment for a year but one merely at will. Martin v. N. Y. Life Ins. Co., 148 N. Y. 117, 42 N. E. 416; Watson v. Gugino, 204 N. Y. 535, 98 N. E. 18, 39 L. R. A. (N. S.) 1090, Ann. Cas. 1913D, 215; Granger v. Am. Brewing Co., 25 Misc. Rep. 701, 55 N. Y. Supp. 695; Wood on Master and Servant (2d Ed.) § 136. On January 3, 1910, the plaintiff cabled in cipher asking for a confirmation of the agreement, in accordance with his letters of December 16th and November 15th, adding, "Twelve months also one authority," and asking for a reply by cable. On January 5, 1910, he received a cablegram, also in cipher, saying:

"We have answered letters 16th of December 31st of December waiting your telegram after its receipt confirm letter 21st December you have authority within certain limits."

He thereupon cabled as follows:

"If you will not agree to abide by the conditions of letters dated 16 December 15 November twelve months I hereby offer my resignation and request its acceptance Monday will so advise trade bankers salesman."

He received a cablegram under date of January 7, 1910, in reply as follows:

"Wish to see you satisfied working with enthusiasm agree to your proposals for twelve months subject to conference according your decision with Ludwig arriving with Franz Kurfuerest 25th January protect our interests as hitherto."

He thereupon, under date of January 8, 1910, cabled in cipher as follows:

"Your telegram to hand remain upon terms of my letter 16th day of December 15 day of November."

He admits that he recognized that Ludwig Stollwerck's cablegram of January 7th was not an *unqualified* acceptance of his proposal for employment on the basis of his letters of December 16th and November 15th for the period of 12 months, as specified in his subsequent cablegram; and that is evidently the reason he cabled that he would remain on the terms of his letter of December 16th.

[2] It cannot be said as matter of law that the legal effect of his last cablegram herein quoted, if acquiesced in, was that he was to remain for a year, because he excluded from his proposition contained in that cablegram his cablegrams subsequent to December 16th, and his letter of December 16th contains two propositions, the latter of which was that, unless he received a cablegram accepting his first proposition therein contained, he would remain *by the week,* to be

compensated, however, on the basis of the salary thereinbefore demanded. I am of opinion that the defendant was justified in inferring from the plaintiff's cablegram of January 8th that he was to remain *by the week,* with the expectation, of course, that a satisfactory arrangement would be made after Ludwig Stollwerck arrived in this country. Ludwig Stollwerck did not arrive until the end of January or first of February. He remained until the 10th of March.

[3] There was a special meeting of the board of directors of the defendant held in the city of New York on the 7th day of March, 1910, at which Ludwig Stollwerck and the plaintiff were present, called for the purpose, among others, "of creating the position of general managing director for the corporation and electing a director to serve in that position." The call for the meeting was signed by the plaintiff and others. A resolution was offered and unanimously adopted creating "the position of general managing director, which office shall carry with it the general supervision and direction of all the affairs of the corporation, subject to the board of directors," and expressly providing that the plaintiff "be, and hereby is, elected to fill this office." The plaintiff interposed no objection to the creation of the new office or to his election thereto. He accepted it by remaining with the company and performing the duties of the office. If there was any question with respect to Ludwig Stollwerck's authority to represent the company, it is removed by the action of the board of directors on that day, by which all acts of officers of the corporation were expressly ratified. If the plaintiff at that time claimed a contract for a year, I am of opinion that he was called upon to assert it, instead of acquiescing, without protest, in the creation of an office which necessarily superseded his functions and accepting it.

By section 4 of article 1 of the by-laws of the defendant, the board of directors was expressly authorized by a majority vote at any regular or special meeting to remove a director or officer and to fill the vacancy so created. On the 24th of May, 1910, the plaintiff was notified in writing by Ludwig Stollwerck, who was then in New York, that at a special meeting of the board of directors of the defendant, held in Cologne on the 28th of April, he had been removed from his position as managing director, in accordance with said section 4 of article 1 of the by-laws, and that the writer of the letter had been appointed general managing director. On the trial the defense was asked to produce the resolution of the board of directors adopted on the 28th of April, purporting to discharge the plaintiff, and on the production of the minutes of that meeting of the board of directors the attorney for the plaintiff offered them in evidence, saying that the meeting was held "pursuant to a written call issued by the president." Thereupon the attorney for the defendant announced that the defense did not stand upon that resolution of dismissal but claimed that the plaintiff was removed and discharged by a resolution of the board of directors of the defendant at a regular monthly meeting duly held in this country on the 6th day of June, 1910. Thereupon the attorney for the plaintiff stated that the plaintiff stood on the resolution of April 28th and insisted on having the minutes of that meeting containing

the resolution received in evidence, and they were so received. The minutes recited the presence of four directors, and that they constituted "a majority of the board," and that a resolution, signed by four of the directors and attested by the vice president and secretary, was duly offered and unanimously adopted reciting that they were a majority of the members of the board of directors, and that their confidence in the plaintiff had been shaken by certain letters which he had written, which indicated to them that he was not carrying on the management of the affairs of the corporation "in a spirit that meets with our approval," and it was resolved that he be removed from his position as managing director, and that Ludwig Stollwerck be appointed and elected as managing director in his place. The defendant attempted to prove a resolution adopted by the board of directors at a regular monthly meeting on the 6th day of June, 1910, removing the plaintiff as managing director, treasurer, and as a member of the board of directors and electing Ludwig Stollwerck managing director and another director treasurer. This was objected to on the ground that it was immaterial and a self-serving declaration, since it was after the plaintiff had been discharged. The court sustained the objection, and the defendant duly excepted. The minutes of the meeting of June 6, 1910, were marked for identification and are printed in the record. There was a long colloquy between the court and counsel concerning their admissibility. The attorney for the plaintiff, while denying the authority of the board of directors to remove plaintiff, had not expressly questioned the regularity or validity of the meeting of the board of directors of April 28th; but he took the position that the plaintiff was in effect a partner in the business and could not be removed by the board of directors, and he asserted that he had no notice of the meeting, and that there was not a quorum present, although there was no evidence to impeach the recital in the minutes of the presence of a quorum, and the by-laws provided that the number of directors was to be five, and that a majority should constitute a quorum. The attorney for the defendant insisted that it was entitled to have the minutes of the meeting of June 6th in evidence if the plaintiff questioned the validity of the action of the board of directors on April 28th, and the plaintiff persistently objected on the ground that he was discharged on May 24th, pursuant to the resolution of April 28th.

I am of opinion that the court erred in ruling as matter of law that the plaintiff was employed for the entire year 1910. As already observed, the correspondence did not clearly show a meeting of the minds of the parties on the employment of the plaintiff for a year; and, when in those circumstances he acquiesced in the creation of the office of managing director and accepted that office, he waived any right he may then have had to claim an employment for a year, and he accepted employment in an office from which he was subject to be removed.

[4, 5] I am of opinion that the action of the board of directors on April 28th was valid, and that the plaintiff was removed when notice thereof was communicated to him on the 24th day of May thereafter; but, since upon the trial there appears to have been some

question with respect to the validity of that action of the board of directors and the defendant did not rely thereon, the court clearly erred in excluding the minutes of the meeting held on June 6th. The defendant had a right to contend that it was justified in discharging plaintiff for misconduct, even if he had a contract for a year, and it was proper for it also to contend that plaintiff had been duly removed from office pursuant to the by-laws.

It appears that the plaintiff received his salary for the first four months of 1910. He is therefore entitled to recover; but at most he was only to be entitled to salary from the end of April to and including the 6th of June.

It follows that the judgment and order should be reversed, and a new trial granted, with costs to appellant to abide the event, unless the plaintiff shall stipulate to reduce the recovery to the sum of $1,520.33, being his salary from the 30th day of April to and including the 6th of June, together with interest thereon from June 6, 1910, and, if he shall so stipulate, the judgment is reduced accordingly and affirmed, without costs. All concur.

(159 App. Div. 105)

RYAN v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. MUNICIPAL CORPORATIONS (§ 360*)—PUBLIC IMPROVEMENTS—BRIDGE ANCHORAGE—ADDITIONAL WORK.

Where plaintiff contracted to build a suspension bridge anchorage for defendant city according to plans and specifications, and the city, by insisting on a misconstruction of the specifications, compelled plaintiff to substitute a quantity of granite for limestone, the city was guilty of a breach of the contract, for which plaintiff was entitled to recover the difference between the value of the limestone rejected and the value of the granite substituted therefor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

2. MUNICIPAL CORPORATIONS (§ 360*) — PUBLIC IMPROVEMENTS — ADDITIONAL WORK.

Where plaintiff, under a contract for the construction of a bridge anchorage, was compelled to furnish additional labor and material to supply a shortage of height due to settlement of the anchorage, for which no allowance had been made by defendant's engineers in the specifications and drawings on which plaintiff's contract was based, he was entitled to compensation therefor as extra work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

3. MUNICIPAL CORPORATIONS (§ 360*)—PERFORMANCE OF CONTRACT—LOSS OF MATERIAL.

In providing for the construction of a bridge anchorage, defendant city condemned an amount of land so slightly in excess of the space actually occupied by the anchorage structure as to compel plaintiff, a contractor, to drive his cofferdam timbers so close to the structure that, on all but the river side, they became more or less bound into the concrete of the foundations, so that, had plaintiff pulled them out when his work was finished, as he was required to do by a clause in his contract providing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the removal from the work of everything in the way of plant, etc., he might have seriously interfered with the integrity of the work, and to avoid this the city requested him to leave the piling in place. *Held*, that plaintiff was entitled to recover from the city the value of the piling so left.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

4. MUNICIPAL CORPORATIONS (§ 370*) — PUBLIC IMPROVEMENTS — PAYMENTS — DELAY—INTEREST.

Where a city unreasonably delayed payments under a contract for the construction of a bridge anchorage beyond the time when they were due under the contract, the contractor was entitled to interest thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 902, 903, 908, 909; Dec. Dig. § 370.*]

5. MUNICIPAL CORPORATIONS (§ 374*) — PUBLIC IMPROVEMENTS — PAYMENTS — DELAY—MEASURE OF DAMAGES.

Where a city delayed payments under a contract for a public improvement beyond the time fixed in the contract, the contractor could not recover general damages for losses occasioned by the delay; legal interest being presumptively sufficient compensation therefor in the absence of the contractor's election to rescind the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.*]

6. MUNICIPAL CORPORATIONS (§ 374*)—CONSTRUCTION CONTRACT—PUBLIC IMPROVEMENTS—SUSPENSION OF WORK.

A clause, in a city's contract with plaintiff for the construction of a bridge anchorage, authorizing the city to suspend the whole or any part of the work without compensation to plaintiff, should be construed as covering only an actual cessation of work under direction of the city, and did not, while the work was actually progressing, serve as absolution for any and all delays that plaintiff might suffer incident to material changes of plan or failure to have completed, within the prescribed time, work to be done by others, on completion of which the progress of plaintiff's work necessarily depended; the city being under an implied obligation to proceed with good faith and diligence as to all such matters and carry them on without unnecessary delay.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.*]

7. MUNICIPAL CORPORATIONS (§ 374*)—PERFORMANCE OF CONTRACT—DELAY—EVIDENCE.

In an action against a city for damages to a contractor from delay in the construction of a bridge anchorage, evidence *held* to require a finding that plaintiff was not materially delayed in the construction of his work by a change in the plans nor by the city's failure to make prompt and sufficient appropriations for continuing the work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.*]

8. MUNICIPAL CORPORATIONS (§ 374*)—PUBLIC IMPROVEMENTS—CONSTRUCTION —DELAY.

A contractor for the construction of a bridge anchorage was not entitled to damages for delay resulting from the failure of other contractors with defendant city to complete their contracts for the cable within the time specified in such contracts, where it appeared that the time so fixed was unreasonably short, and the time consumed, considering unanticipated delays due in part to plaintiff's failure to clear away portions of his own plant and in part to a fire, was not unreasonably long.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

9. COSTS (§ 164*)—DIFFICULT CASE—EXTRA ALLOWANCE.

Where an action by a contractor for the construction of a bridge anchorage, against a city for breach of contract and for damages for delay, was long and involved intricate and difficult questions, and an extra allowance would afford plaintiff meager indemnity for the expense of the trial, it was properly granted.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 620–636; Dec. Dig. § 164.*]

Appeal from Judgment on Report of Referee.

Action by Patrick Ryan, as surviving partner, etc., against the City of New York. From a judgment in favor of plaintiff entered on a Referee's report, and from an order granting an additional allowance, both parties appeal. Affirmed.

See, also, 157 App. Div. 917, 142 N. Y. Supp. 1142.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, DOWLING, and HOTCHKISS, JJ.

John C. Wait, of New York City, for plaintiff.

William E. C. Mayer, of Brooklyn, for defendant.

HOTCHKISS, J. The firm of which plaintiff is the survivor were the contractors for the construction of the Manhattan anchorage of the Williamsburg Bridge. This anchorage was authorized by the Laws of 1895, chapter 789, and was, in pursuance of that act, contracted for in the joint names of the mayor, etc., of New York and the city of Brooklyn on October 5, 1897. This was prior to the date when the Greater New York Charter became operative. The work of building the bridge embraced contracts with other concerns for cables and the several towers over which they were strung. The work under the plaintiff's contract was begun in October, 1897, and was completely finished about July or August, 1903. The contract provided for specific prices to be paid for piles, according to length, and "a sum of $716,770 for the remainder of the whole work complete in place." The masonry work included granite base or underpinning, granite face stones, ashlar shaft, and moulded granite coping, with undressed limestone in the interior and faced limestone for certain exterior parts. Monthly or progress payments of the usual character were to be made by the city as the work progressed, and final payment after completion. The case comes here on cross-appeals; the city appealing from the judgment in plaintiff's favor, and the plaintiff appealing from so much of the judgment as dismissed certain of his claims. The items upon which plaintiff was awarded judgment are referred to throughout the case by numbers, which enumeration I shall follow.

Item 14, damages because of being compelled to furnish increased quantities of granite under a wrongful construction of the specifications appliable to face stones; or, in the alternative, item 21, the value of face limestone and limestone-backing actually furnished but omitted from monthly and final estimates.

The specifications attached to the contract purport to be divided into general subjects and again into particular subjects. Stonework

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and masonry seem to be included in a number of general titles, such as "Description," "Quality of Materials," "Backing Stones," "Knuckle Stones," "Coping of Cornice," etc. Under the general heading of "Masonry," with a subtitle of "Bond," is section 102, reading:

"The masonry will be laid in regular courses, and must be thoroughly bonded throughout. No stones in one course shall overlap the stones of the course next below by less than 15 inches."

Under the general title of "Face Stones" there are numerous subtitles. Included under "Headers" is section 109, reading:

"Every second or third stone in the face of each course shall be a header. Each header must be at least 3 feet in face width, and its length shall be at least 3 times its height."

Under the subtitle of "Stretchers" is section 110, reading:

"Stretchers shall not be less than twice nor more than 4 times their height in length, nor less than 3 feet wide."

Sections 111 and 112 bear subtitles of "Vertical Joints" and "Beds," and section 114, entitled "Bottom Beds, etc.," reads:

"The bottom bed shall always be the full size of the stone, and no stone shall have an overhanging top bed (*this clause applies also to backing*)."

The specifications also provided that:

"All questions as to their intent or meaning, or the intent or meaning of the drawings, should be referred to the (chief) engineer, whose decision, approved by the commissioners, shall be final."

The contract itself provided that the contractor should submit to the chief engineer "course plans," showing in detail the dimensions of each layer of stone for the anchorage. Such approval of the course plan was necessary before the stone could be cut. The first course plans prepared by plaintiff's engineers were submitted to the chief engineer, who rejected them, claiming they were not in accordance with the specifications because they did not show "15-inch" bond in the face stones. To this the plaintiff objected. After considerable discussion, the city modified its demand to the extent of permitting a lap of 11¼ to 11½ inches in the granite face ashlar. The practical difference between the parties with respect to the clauses of the contract affecting the question of bonding was that the construction claimed by the city required that at every alternate course of face granite there should be laid a second or interior course of granite. It is manifest that this construction required the use of very much more granite than would otherwise have been necessary, and, to a corresponding extent, required the use of less limestone, a much cheaper stone than granite.

The plaintiff continued to contend against the city's construction of the contract and insisted that, notwithstanding whatever was said about bonding in section 102 under the general title of "Masonry," the proper construction of the contract in this regard was to be found under the general heading of "Face Stones" as expressed in the various sections under the subtitles of "Headers," "Stretchers," "Vertical Joints," etc., laying particular stress upon section 114, entitled "Bottom Beds," and the last words thereof, which in the original are italicized and read,

"This clause also applies to *backing*"—thus, as plaintiff claimed, showing an intention to qualify any general expressions of section 102 by the particular phrases and measurements found in the sections under the general head of "Face Stones." Notwithstanding plaintiff's protest, the city insisted upon its construction, modified as above, and, still protesting, plaintiff completed the contract according to the city's demand.

[1] If the affirmance of the judgment, so far as this item is concerned, required the approval of certain classes of evidence offered by both parties and consisting in part of the testimony of experts as to the meaning of the contract, and in part of the practical construction put upon a different although similar contract between the city and another contractor, for the building of the Brooklyn anchorage of the same bridge, I should hesitate to express my concurrence. But upon other evidence of undoubted competence, voluminous in extent and convincing in weight, the learned referee has found that the position taken by the city, although not without some support from the confused expressions of the specifications, was without actual justification, and that the contract afforded it no valid ground for its demand. Under these circumstances, the act of the city in compelling plaintiff to substitute some 2,329 cubic yards of granite for a like quantity of limestone constituted a breach of the contract for which he is entitled to recover damages. Gearty v. Mayor, 171 N. Y. 61, 63 N. E. 804; Borough Const. Co. v. City of N. Y., 200 N. Y. 149, 93 N. E. 480, 140 Am. St. Rep. 633. The damages awarded were the difference between the value of the limestone rejected and the value of the granite substituted therefor. To this measure of damages no objection can be made.

[2] Item 2, additional labor and material in furnishing and setting masonry to compensate for a settlement of 2¾ inches in the anchorage: For this plaintiff recovered $3,508. It is not disputed that the anchorage settled 2¾ inches. The practical importance of this settlement arose from the fact that it decreased the height of the anchorage to an equal degree. The effect of the specifications and drawings was to fix the height of the anchorage, because the details of each course of stone, bed joints, etc., were exactly prescribed, and the total aggregated the height of the anchorage. Manifestly, if the anchorage was built according to the contract, any deficiency in the height arose from the failure of the city's engineers to provide for such settlement as was necessarily to be expected. I see no reason why plaintiff should not be compensated for the work covered by this item; and the amount allowed therefor by the referee was reasonable and is not seriously disputed.

[3] Item 13, value of sheet piling left in place and, at the request of the city, not withdrawn: It is not disputed that the sheet piling, which consisted of the timbers out of which a so-called cofferdam, surrounding the excavation, was constructed, was not withdrawn on three sides, but was left in place. The city contends that the evidence shows that this was done because plaintiff found it impossible to pull up the piling. There is testimony which gives color to such a claim, but the weight of evidence is to the contrary. The facts seem to have been that the city condemned an amount of land so slightly in excess of the space actually

occupied by the anchorage structure as to compel the contractor to drive his cofferdam timbers so close to the structure that, on all except the river side, they became bound more or less into the concrete of the foundations, so that, had the plaintiff pulled them out, as he was required to do under the clause of the contract binding him to remove from the work at the conclusion thereof everything in the way of plant, etc., belonging to him, he might have seriously interfered with the integrity of the work. To avoid this, the evidence justified the finding that the city requested plaintiff to leave the piling in place. It is true that the evidence of the value of this piling as secondhand material, in case it had been drawn out, was slight. Nevertheless there was some evidence from which such value could be inferred, and, taking all the evidence into consideration, the amount allowed by the referee seems to have been reasonable.

[4] Items 11 and 18 cover interest on delayed payments on account of monthly estimates. Item 20 is for interest because of similar delay in making the final payment. No question is made as to the correctness of the figures, but the liability of the city is denied. The evidence justified the finding that the payments were unreasonably delayed beyond the time when they were severally due according to the contract. The receipts given by plaintiff himself for the several monthly payments made to him or to his firm personally were qualified so as to reserve plaintiff's claim for interest. Certain other interim payments made to a bank to which they had been assigned by plaintiff as security for loans, and for which payments the bank necessarily receipted, were not made under circumstances which justify the presumption that they were received or paid with the intent to cut off plaintiff's claim for interest, or that the clean receipts given by the bank were evidence of any such intent. In view of these facts, I think the allowance of interest was proper.

The remaining items are 15 and 19, the former for furnishing larger knuckle or bearing stones than were required by the original plans, and the latter for cleaning face stones, etc., from dirt and unreasonable accumulations negligently permitted by the city; the two aggregating $822. As to these it is sufficient to say that their allowance involved questions of fact which I think were properly disposed of by the learned referee. This disposes of all the questions raised by defendants' appeal from the judgment.

On the plaintiff's appeal there is raised the question of his right to recover a large sum claimed as damages for alleged unreasonable delays on the part of the city. Two periods of construction were provided for by the contract. The first included the work up to a point which would allow the stringing of the cables, for which work a time period of 16 months from the execution of the contract and giving bond therefor was allowed. The second period was to begin within four months after plaintiff was notified by the chief engineer to resume work. On account of the first period, plaintiff claims a delay of approximately eight months; and on account of the second period, a delay of some eighteen months.

There is practically no dispute between the parties that the first stage of plaintiff's work was begun October 15, 1897, and was fully completed in March, 1900, a period of some 15 months in excess of the time stipulated in the contract. The second stage was begun in November, 1902, and completed in or about August, 1903. The causes of the alleged delays in the second stage fall into three general classes: (1) Failure to pay moneys earned and due under the contract; (2) time lost and expenses entailed by a change in the plans for the anchor chain chambers; (3) time lost and expenses incurred because of delay in letting and causing to be promptly executed the contracts for the towers and spans, viaducts and cables, the completion of all of which was necessary before plaintiff could begin work on the second stage of his contract.

[5] I can see no legal ground for awarding plaintiff general damages for any loss occasioned by delay on the part of the city in making its payment to him on contract time. For such delays, legal interest is presumptively sufficient compensation; and that plaintiff has already been awarded. While a failure by the city to pay as agreed might have afforded plaintiff ground for rescinding the contract (Wharton v. Winch, 140 N. Y. 287, 35 N. E. 589), he did not elect so to do. After having proceeded with the contract to completion, it would certainly be a novelty in the law if he could recover, beyond interest, damages for the city's failure to pay as and when agreed.

[6] There is a clause in the contract which gives the city the right to "suspend the whole or any part of the work * * * without compensation" to plaintiff; but I take it that this covers only an actual cessation of work under direction of the city, and does not, while the work is actually progressing, serve as absolution for any and all delays that the contractor may suffer. Although in express terms the contract contained nothing binding the city not to embarrass plaintiff by delays incident to material changes of plan, or to have completed within any prescribed time the work to be done by others, and upon the completion of which the forwarding of plaintiff's work necessarily depended, nor even any words of express obligation on the city's part to proceed with diligence in those things which the situation necessarily indicated were to be done by it and the doing of which controlled the progress of plaintiff's work, I take it that it was under an implied obligation of good faith and diligence with respect to all of these matters, and that, having entered into the contract with plaintiff, it was bound to go on with the work without unnecessary delay and carry the business to completion within a reasonable time. McMaster v. State, 108 N. Y. 542, 15 N. E. 417. In the light of this principle, what does the record show?

[7] On August 30, 1898, plaintiff had been notified of an intended change of plan, and on October 3d he received the detailed or working plan, embracing the proposed changes, which were different from those indicated by the communication of August 30th. The plaintiff did not finish the work of demolishing the old buildings and clearing the site of the anchorage, excavating to the necessary depth, and driving the foundation piles upon which the timbers and concrete, which were to be covered by grillage and masonry, rested, until late in October, 1898,

about a year after he had commenced work. This left not to exceed four months within which to complete the first stage of his contract. It is idle to argue that up to this time plaintiff had been materially, if at all, delayed by reason of the changes made by the city in the anchor chain chambers, because he had not then reached the stage of the work where construction of these chambers was to commence. It may be true that, as an incident to the changed plans, additional forms for concrete and a new and perhaps novel system of waterproofing was required, one or both of which added somewhat to the expense and time required for completing the work up to the point where the laying of masonry was to begin. But however this may be, I can find nothing in the evidence which would permit of a finding as to what such expense amounted to or what the delay, if any, was, and it is only by inference that the fact of any such expense or delay can be learned. On March 15th, less than five months after the preliminary work was completed, the anchor chain chambers were finished. I see no ground for the assertion of plaintiff's counsel that these five months, or any equal period, was lost to plaintiff by any act of the city. It is conceded in the brief of plaintiff's counsel that during the particular period referred to "the work was carried on continuously and expeditiously." It is apparent that construction of the chambers as originally planned would have taken a considerable time; that it would have taken less than was occupied in completing according to the final plans is not shown.

In excuse for the long time, over one year, which plaintiff took to complete the work preliminary to the construction of the chambers, and as justifying such delay, the plaintiff relies upon evidence tending to show a failure on the part of the city to make appropriations for continuing the work, during which period plaintiff admits a corresponding cessation of activities on his part because of want of funds. For any unreasonable delay due to its failure to provide moneys for the cost of work to be done by others, and upon which the progress of plaintiff's work depended, the city, within the rule already referred to, would be liable to respond in damages for any loss to plaintiff. But, as I understand it, plaintiff, under this item of his demands, does not claim to have suffered delay from any such cause. Such delays as he complains of were incident to his own failure to advance his own work more expeditiously, and as such they were, in the eye of the law, voluntary because directly chargeable to plaintiff himself; for if, in anticipation of sufficient funds not forthcoming, he relaxed his efforts and chose to apportion the amount of his work to the sums which would probably be at the disposal of the city on account of his contract, I know of no rule which would permit of his recovering damages, if for no better reason, because none were suffered, as he could not be entitled to pay for more work than he did. If he sought to put the city in default, he should have taken the steps necessary to do so. It is possible to conceive of a state of facts to which the foregoing principle might not apply, as where an employer had definitely announced an unqualified intention not to allow the work to proceed beyond the pace to which the contractor was unreasonably limited and to

refuse payment for any additional work. See Wharton v. Winch, supra. But such is not the present case.

[8] The plaintiff's claims arising out of an alleged delay of 18 months on the part of the city in causing to be completed the several contracts for the towers and spans, viaducts, and cables, remain to be considered. The chief cause of the alleged delay plaintiff attributes to the time consumed by the contractors for the cable, who had agreed to complete in ten months. The plaintiff contends that the city is bound by the ten months fixed by the contract, which prima facie was a reasonable time. The referee has found that in fixing ten months for the performance of this work both the city and its contractor were too sanguine, and that the period so fixed was unreasonably short, that the time actually consumed, and which there is reason to believe was extended to some degree by a failure on plaintiff's part to clear away portions of his plant, and in part by a fire and by other unanticipated delays which could not have been reasonably avoided, was not unreasonable.

I have carefully read and weighed the mass of oral and documentary evidence bearing, not only on the work of the cable contractors, but upon that of the contractors for towers and spans. As a result, I confess that the subject, as an original question, impresses me as one of doubt. Having in mind the periods which originally it was believed the work would consume, beyond question there were delays. They were fairly and beyond doubt attributable in part, not to one alone, but to several contractors (among whom the plaintiff may justly be suspected of being included), and possibly in part to the failure of the city to provide necessary funds for the more rapid completion of the work. But to what extent, if any, the neglect of the city contributed to the delay, I find impossible to determine, because the period of any such delay seems to be inextricably confused with contemporaneous periods of apparent and excusable delay on the part of one or more of the contractors. I am not unmindful of the fact that, as between the plaintiff and the defendant, the latter is responsible for any unreasonable delay on the part of other contractors, whether caused by the city's failure to provide funds or by other of its own acts or omissions.

But whether any delay was or was not unreasonable, and hence wrongful, must be determined in the light of the entire situation. Here was an undertaking of great magnitude and public importance. Its performance was committed to several contractors, whose work to a certain degree interlocked, so that the progress of one measurably depended upon the others. The celerity with which the entire task could be completed depended upon a vast number of details, difficult, complicated, delicate, to some extent novel, requiring time for experiment and the discovery of methods for their successful solution. Experience has shown that in construction work of a character simple and insignificant, in comparison with this in question, it commonly happens that the time for completion, as originally contracted for or anticipated, is long exceeded, bringing disappointment to all and loss to some. Under these circumstances, men are prone to judge the past in the light of their later experience, and to entirely overlook, or attach too

little weight to, an infinitude of things of greater or less importance, which, combined, tended largely to produce the unfortunate result, and which, in the broader aspect, were either unavoidable or excusable. The evidence in this case offers abundant opportunity for this point of view, which was that the learned referee seems to have taken. On the whole, I cannot say that his finding that the time actually consumed was reasonable is so clearly against the weight of evidence as to justify a reversal.

[9] The extra allowance was justified. The case was long, intricate, and difficult, and necessarily involved plaintiff in an expense for its trial, for which the allowance is but meager indemnity.

The judgment should be affirmed, without costs, and the order for an extra allowance affirmed with $10 costs to the plaintiff. All concur.

(158 App. Div. 665)

BARSTOW v. NEW YORK, N. H. & H. R. CO.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. COMMERCE (§ 8*)—POWER TO REGULATE—EXERCISE BY CONGRESS OF POWER TO REGULATE INTERSTATE COMMERCE.

All state laws affecting the right of carriers to restrict their liability to an agreed or declared valuation on interstate shipments are superseded by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1288) § 7, known as the Carmack Amendment to the Interstate Commerce Act, limiting the right of contracting against liability, and Act June 18, 1910, c. 309, 36 Stat. 546 (U. S. Comp. St. Supp. 1911, p. 1286), § 7, requiring interstate carriers to prescribe regulations respecting the carrying of baggage, by which acts Congress took possession of the subject, and all questions arising thereunder are controlled by the decisions of the United States Supreme Court.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

2. CARRIERS (§ 405*) — CARRIAGE OF PASSENGERS — BAGGAGE — LIMITATION OF LIABILITY.

Under the decisions of the United States Supreme Court, where the fare from G., Mass., to New York City was based on the cost of transporting the passenger and not exceeding $100 worth of baggage, and plaintiff's ticket and baggage check stipulated that liability for baggage was limited to $100, unless a greater value was declared and excess charges paid, and proper schedules of such excess charges had been filed and the required notices given in compliance with the Interstate Commerce Act (Act February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as amended, and the regulations of the Interstate Commerce Commission, plaintiff, who had declared no excess value, could not recover more than $100 for the loss of her baggage, though she had no actual knowledge of the limitation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1544–1549; Dec. Dig. § 405.*]

Scott, J., dissenting.

Controversy, submitted upon an agreed statement of facts, by Katherine Barstow against the New York, New Haven & Hartford Railroad Company to recover the value of plaintiff's baggage which de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendant failed to deliver. Judgment in accordance with the defendant's prayer.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Hyman & Campbell, of New York City (Charles E. Scribner, of New York City, of counsel), for plaintiff.

Charles M. Sheafe, Jr., of New York City (William L. Barnett, of New York City, of counsel), for defendant.

CLARKE, J. The plaintiff on September 15, 1911, purchased at Gardner, Mass., a first-class passenger ticket to New York City via the Boston & Maine Railroad Company and the defendant, for which she paid $4.78. In determining the rate, the railroad companies, among other things, based the same upon the cost of transporting the passenger, together with the cost of transporting 150 pounds of personal effects of a value not exceeding $100. This ticket contains the following:

"Issued by Boston & Maine R. R. * * * Good subject to the following contract between purchaser and all lines over which this ticket reads for one passage to New York, N. Y."

It sets forth provisions as to limit of time, class, and stopovers, and contains the following:

"Baggage liability is limited to personal baggage not to exceed one hundred (100) dollars in value for a passenger presenting a full ticket and fifty (50) dollars in value for a half ticket, unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of checking the baggage."

The first word "baggage" of that clause is printed in large, black-faced type. After purchasing her ticket she checked a trunk not exceeding 150 pounds in weight and received a baggage check which, upon the face thereof, contained the following:

"A passenger is entitled to the free carriage of baggage not exceeding 150 lbs. in weight or $100 in value, except that in the state of New York the value is limited to $150. Excess in weight or declared value will be charged for at published tariff rates."

Plaintiff's attention was not called to said provisions on the ticket or the check. She did not read them and was not aware of them. The trunk and its contents, consisting of personal baggage, were of the value of $1,300, and their nature and amount were proper and reasonable with reference to plaintiff's station in life and the purpose of her journey. She did not declare and stipulate at the time her baggage was checked that it exceeded $100 in value; nor did she pay any charges for valuation in excess of $100; nor did the Boston & Maine Railroad Company, or any one in its behalf, make any inquiry as to the value of plaintiff's baggage nor inform her that it was material or necessary to state such value.

The defendant received the plaintiff and her baggage at Springfield, Mass., as a connecting carrier in interstate commerce and on the ticket aforesaid transported her and her baggage to the Grand Central Terminal in New York City. Upon the day after her arrival

she presented said check to the defendant and demanded her trunk, "but the defendant failed to deliver said baggage to her and has never delivered it to her nor accounted to her for such failure to deliver it nor given any excuse for such failure to deliver it. From these facts it is inferable that the failure to deliver the trunk was due to defendant's negligence."

At the time plaintiff purchased her ticket, there existed an order of the Interstate Commerce Commission dated the 2d day of June, 1908, requiring carriers to keep on file in their stations rates and schedules of fares. The Boston & Maine Railroad Company had fully complied with the requirements of said order and had printed, published, posted, kept open for public inspection, and had filed with the Interstate Commerce Commission, in compliance with the provisions of the act of Congress relating to interstate commerce, and the amendments thereof, and the orders and regulations of the Interstate Commerce Commission, all the rates, fares, and charges for transportation between different points, and also all the rules and regulations which in any wise change, affect, or determine any part of the aggregate of such rates, fares, and charges or the value of the services rendered to the passenger, including the rates, fares, and charges and the aforesaid rules and regulations between Gardner, Mass., and New York City, N. Y., via the defendant company, which rates were operative and in full force during September, 1911; and it had placed in the custody of its agent at Gardner, Mass., all the rate and fare schedules applying from said station, and said agent was instructed and required to give, and whenever inquired of gave, information contained in said schedules and lent assistance to seekers for information therefrom and gave and accorded any and all inquirers opportunity to examine any of said schedules. There was posted in two conspicuous places in the station near the ticket office a printed placard in large, black-faced type:

"Boston & Maine R. R. Complete public files of this company's freight and passenger tariffs are located at the offices of the general freight agent and general passenger agent, north station, in the city of Boston, Mass., and at the station freight and Union Station ticket offices respectively, in the cities of Worcester, Mass., and Portland, Me. The rate and fare schedules applying from or at this station and indices of this company's tariffs are on file in this office and may be inspected by any person upon application, and without the assignment of any reason for such desire. The agent or other employé on duty in the office will lend any assistance desired in securing information from or in interpreting such schedules."

In the said tariff schedules so filed with the Interstate Commerce Commission, and on file in the station, is the following:

"Baggage Rules. One hundred and fifty pounds of personal baggage, not exceeding $100 in value, will be checked free for each passenger on presentation of a full ticket, and seventy-five pounds for a half ticket. Baggage Liability is limited to personal baggage not to exceed one hundred (100) dollars in value for a passenger presenting a full ticket, and fifty (50) dollars in value for a half ticket, unless a greater value is declared and sitpulated by the owner and excess charges thereon paid at time of checking the baggage. Excess Valuation.—For excess value the rate will be one-half of the current excess baggage rate per 100 lbs. for each one hundred (100) dollars or fraction

thereof increased value declared. The minimum charge for excess value will be 25 cents."

And there was posted in a conspicuous place in the baggage room of the station where the baggage was checked a notice "Boston & Maine R. R.," in large, black-faced type, "Excess Baggage Rates in Effect July 1, 1908," containing the provisions just quoted from the tariff as to excess weight and excess valuation, and also the rate upon excess baggage per 100 pounds to be calculated upon the various rates of ticket fare. The excess rate for the valuation of $1,300 was $4.80. The plaintiff's attention was not called to the schedules or notices and she did not know that the defendant's charges were based on the value of the baggage or in any way affected by the value of the baggage.

Upon the foregoing facts the plaintiff demands judgment for $1,300, with interest from September 16, 1911, with costs, and the defendant demands judgment dismissing the plaintiff's action with costs, except as to $100, with interest from the same date.

[1] The original Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), was amended by the act of June 29, 1906, 34 Stat. 584, c. 3591 (U. S. Comp. St. Supp. 1911, p. 1288). The twentieth section as amended, generally referred to as the Carmack Amendment, is as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, reviewed a judgment of the circuit court, Kenton county, Ky., against a carrier for the full value of an undelivered interstate shipment, notwithstanding a stipulation limiting the carrier's liability to the agreed value. The receipt or bill of lading issued showed no value, but contained a stipulation limiting the liability to $50 if no value was stated therein. Lurton, J.:

"The answer relies upon the act of Congress of June 29, 1906, * * * as the only regulation applicable to an interstate shipment and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. * * * Under the law of Kentucky this contract, limiting the plaintiff's recovery to the agreed or declared value, was invalid, and the shipper was entitled to recover the actual value, 'unless' as said in Adams Express Co. v. Walker, 119 Ky. 121 [83 S. W. 106, 67 L. R. A. 412], * * * 'sufficient facts are shown, independently of the special contract, to avoid the contract for fraud or to create an estoppel at common law.' The question

upon which the case must turn is whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local law of the state or by the acts of Congress regulating interstate commerce. That the constitutional power of Congress to regulate commerce among the states and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury, or damage to such property needs neither argument nor citation of authority. But it is equally well settled that, until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state."

After alluding to the Carmack Amendment and the diverse holdings of the different state and United States courts prior thereto, the court proceeded:

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But, when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. * * * To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full; and, though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

After quoting the language of the bill of lading limiting the liability, the court proceeded:

"The answer states that the schedules which the express company had filed with the Interstate Commerce Commission showed rates based upon valuations; and that the lawful and established rate for such a shipment as that made by the plaintiff from Cincinnati to Augusta, having a value not in excess of $50, was 25 cents, while for the same package if its value had been declared to be $125, the amount for which the plaintiff sues as the actual value, the lawful charge according to the rate filed and published would have been 55 cents. It is further averred that the package was sealed and its contents and actual value unknown to the defendant's agent.

"That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of $50 unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission. * * * That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. * * * But the rigor of this liability might be modified through any fair, reasonable, and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations and the right to agree upon a rate propor-

tionate to the value of the property transported. It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may by a fair, open, just, and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. * * * Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. * * * The demurrer to the answer of the defendant below should have been overruled. For this reason the judgment is reversed."

Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, was error to the Supreme Court of Arkansas to review a judgment affirming a judgment from the Circuit Court affirming a justice's judgment for the value of an undelivered interstate shipment, notwithstanding a stipulation limiting the carrier's liability. The defendant in error testified, over objection, that, though he could read and write and had signed the release set out and had received the bill of lading, he had neither read them nor asked any questions about them and had not been given any information as to the contents of either document and had no knowledge of the existence of the two rates. He was also allowed to testify that, if he had known of the existence of the two rates and the effect of accepting the lower, he would have paid the higher rate. There was no evidence tending to show any misrepresentation made by the company or of any deceit, fraud, or concealment, unless it be inferred from the fact that the company made no explanation of the rates or of the contents of either the bill of lading or release. The shipper merely said that the bill of lading was handed to him with the release, which he was asked to sign. Lurton, J.:

"In the leading case of Hart v. Pennsylvania R. R. Co., 112 U. S. 331 [5 Sup. Ct. 151, 28 L. Ed. 717], the right of the carrier to adjust the rate to the valuation which the shipper places upon the thing to be transported is the very basis upon which a limitation of liability in case of loss or damage is rested. This is an administrative principle in rate making recognized as reasonable by the Interstate Commerce Commission and is the basis upon which many tariffs filed with the Commission are made. Re Released Rates, 13 Interst. Com. Com'n R. 550. It follows, therefore, that, when the carrier has filed rate sheets which show two rates based upon valuation upon a particular class of traffic, it is legally bound to apply that rate which corresponds to the valuation. If the shipper desires the lower rate, he should disclose the valuation, for in the absence of knowledge the carrier has a right to assume that the higher of the rates based upon value applies. In no other way can it protect itself in its right to be compensated in proportion to its insurance risk. But when a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped, upon plain principles of justice, from recovering, in case of loss or damage, any greater amount. The same principle applies if the value be declared in the form of a contract. If such a valuation be made in good faith for the purpose of obtaining the lower rate applicable to a shipment of the declared value, there is no exemption from carrier liability due to negligence forbidden by the statute when the shipper is limited to a recovery of the value so declared. The ground upon which such a declared or agreed value is upheld is that of estoppel. * * * The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied must be conclusive in an action to recover for loss

or damage a greater sum. * * * To permit such a declared valuation to be overthrown by evidence aliunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station. Texas & Pacific Ry. v. Mugg, 202 U. S. 242 [26 Sup. Ct. 628, 50 L. Ed. 1011]; Chicago & A. Ry. v. Kirby, 225 U. S. 155 [32 Sup. Ct. 648, 55 L. Ed. 1033]. * * * That the valuation and the rate are dependent each upon the other is an administrative rule applied in reparation proceedings by the Interstate Commerce Commission. * * * In Hart v. Penn. R. R. Co., supra, parol evidence that the horses shipped were of a far greater value than the valuation agreed upon was rejected as incompetent. 'The presumption is conclusive,' said the court, 'that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation.' * * * The defendant in error must be presumed to have known that he was obtaining a rate based upon a valuation of $5 per hundredweight, as provided by the published tariff. This valuation was conclusive, and no evidence tending to show an undervaluation was admissible."

Missouri, K. & T. R. Co. v. Harriman Bros., 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690, was in error to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. It was a case where live stock valued at the lower of two rates had been killed by the negligent derailment. Lurton, J.:

"The ground upon which the shipper is limited to the valuation declared is that of estoppel and presupposes the valuation to be one made for the purpose of applying the lower of two rates based upon the value of the cattle. This whole matter has been so fully considered in Adams Express Co. v. Croninger, 226 U. S. 491 [33 Sup. Ct. 148, 57 L. Ed. 314], and Kansas City Southern Ry. v. Carl [227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683], just decided, that we only need to refer to the opinions in those cases without further elaboration. That the trial court and the Court of Civil Appeals erred in holding this stipulation null and void because forbidden by either the law or policy of the state of Texas, or by the 7th section of the act of June 29, 1906, is no longer an open question since the decisions of this court in the cases just referred to. Nor is there anything upon the face of this contract, when read in connection with the rate sheets referred to therein (of which the defendants in error were compelled to take notice not only because referred to in the contract signed by them but because they had been lawfully filed and published), which offends against the provisions of the 7th section of the act of June 29, 1906. * * * The contract here involved is substantially identical with the contract and schedule upheld in Hart v. Pennsylvania Railroad, 112 U. S. 331 [5 Sup. Ct. 151, 28 L. Ed. 717]. * * * In the case at bar it has been said that the shipper was not asked to state the value but only signed the contract handed to him and made no declaration. But the same point was made in the Hart Case, when the court said: * * * 'A distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said that while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation and was fixed on condition that such

was the valuation and that the liability should go to that extent and no further."

Wells Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469, 33 Sup. Ct. 267, 57 L. Ed. 600, was in error to the Court of Civil Appeals from the Fifth Supreme Judicial District of the state of Texas to review a judgment against a carrier for the full value of an undelivered interstate shipment, notwithstanding the stipulation limiting the carrier's liability to a declared value. It was proved in that case that the consignors kept in their shipping office an express book containing blank express receipts. One of these was filled out in their office by their shipping clerk. When the wagon of the express company called at the shipping office the agent signed the receipt and the package was delivered to him by a boy assistant to the shipping clerk. No questions were asked as to the value and no value declared other than as shown in the receipt. It was also shown that the clerk who wrapped and marked the package did not know the value and had no actual knowledge of the graduated rates of the express company. In reversing, Lurton, J., said:

"The Court of Civil Appeals, while not in express terms denying the validity of such a stipulation limiting recovery, did so in effect, for it seems to have placed its judgment of affirmance upon the rule requiring the company's agents to ask the shipper to declare the value and, if no value is stated, that the package should be stamped, 'Value asked and not given.' This was not done. Therefore, said the court, 'the company's agent failed to perform a plain duty, * * * and it is in no attitude to complain that the shipper did not state the value.' But the shipper, in accepting the receipt reciting that the company 'is not to be held liable beyond the sum of $50, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated,' did declare and represent that the value did not exceed that sum and did obtain a rate which he is to be assumed to have known was based upon that as the actual value. There is no substantial distinction between a value stated upon inquiry and one agreed upon or declared voluntarily. The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis."

By Act June 18, 1910, c. 309, 36 Stat. 546 (U. S. Comp. St. Supp. 1911, p. 1286), the Interstate Commerce Act was amended. Section 7 of the act, so far as material, now reads as follows:

"It is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, * * * the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing and delivery of property subject to the provisions of this act."

[2] So that by express provision the subject of passengers' baggage transported in interstate commerce has been taken over by the Congress of the United States and is subject to the regulations of the Interstate Commerce Commission, and questions arising thereunder are to be controlled by the reasoning laid down in the decisions of the Supreme Court of the United States. It is admitted in this case

that the rate of fare paid by the plaintiff was based upon the cost of transporting the passenger together with the cost of transporting 150 pounds of baggage of a value not exceeding $100, and it appears that the proper schedules were filed and the required notices given. It would therefore seem that the decisions of the Supreme Court of the United States hereinbefore cited are directly applicable to the case at bar and govern the questions of the transportation of the passenger's baggage no less than express or freight matter in interstate commerce. This is directly recognized by the Court of Civil Appeals in Texas, from which two of the hereinbefore cited cases went to the Supreme Court of the United States. Missouri, Kansas & Texas Ry. Co. v. Hailey (Tex. Civ. App.) 156 S. W. 1119. The facts are similar to the case at bar. The plaintiff purchased a ticket in Oklahoma City, Okl., to Dallas, Tex., and upon the ticket checked his trunk and received a check indorsed on which was a clause limiting liability to $100 unless a greater value was declared. The trunk was not delivered to plaintiff at destination; defendant pleaded the baggage rules and regulations filed with the Interstate Commerce Commission and published according to law, containing a limitation clause similar to the one involved in this case. The special defense was demurred to and sustained. The appellate court, in its opinion reversing the court below, said:

"Under the law of this state it is well settled that a common carrier cannot, by inserting such conditions in its bills of lading, receipts, etc., limit the shipper in case of loss, damage, or destruction to values therein 'agreed' on or 'declared' but must pay the actual value or the market value as may be determined by the rule of the state as applied to the article lost, damaged, or destroyed."

It then cites the late cases in the Supreme Court of the United States and says, referring to the Croninger Case, supra:

"It will be seen by an examination of the facts in that case that there is no escape from the conclusion that the instant case comes sharply within the rules there announced. The check or receipt issued by appellant's connecting line recited that, unless a greater sum was declared by appellee and the charge for such increased valuation paid, the value of the baggage was agreed to be not in excess of $100, while the rules and regulations set out in appellant's answer contained the same provisions amplified. The difference in the facts disclosed by the pleadings in the instant case and the facts in the Croninger Case is that in the latter case the receipt or bill of lading contained the provision 'that the company shall not be liable in any event for more than the value so stated, nor for more than $50, if no value is stated,' while in the instant case there is no express provision with reference to liability."

(It should be noted in the case at bar that the ticket expressly sets forth that fact and that the check here held to be the equivalent of the express receipt repeats the limitation and gives notice that excess value must be paid for.) The court goes on:

"But it occurs to us that, since the agreement as to value is conclusive upon the shipper as held by the Supreme Court of the United States, such an agreement would necessarily preclude any claim for a greater liability than the agreed valuation, and to hold otherwise it seems to us would be to run counter to the spirit of the rules and regulations pleaded and the decision in the Croninger Case."

The plaintiff cites and relies upon Hooker v. Boston & Maine, 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B, 669, Wells v. Great North-

ern Co., 59 Or. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A. (N. S.) 818, 825, and Homer v. Oregon Short Line, a Utah case, 126 Pac. 522. These cases were all decided prior to the recent decisions in the Supreme Court of the United States beginning with the Croninger Case, which hold that interstate rates and contracts with respect to liability are exclusively within the control of Congress and supersede policies and rules of the states upon such subjects. The Hooker Case, supra, admitted that the public are held to knowledge of the tariff schedules filed and published, regardless of actual knowledge or assent. It denied that the carriers were obligated to include in their schedules regulations such as those in question and adhere to them without change or modifications. But, since said case arose, section 1 of this act has been amended expressly making it the duty of carriers to make regulations in regard to baggage a part of their schedules and not to depart from them. The Wells and Homer Cases each followed the local policies of their respective states, which is that a carrier cannot make a valid contract limiting its liability for its negligence. In the opinion in the Homer Case, however, it was recognized that the question might ultimately be determined by the federal tribunals, and the court said:

"When they have spoken we will conform our rulings."

The Supreme Court of the United States has now spoken, and so the state courts must abandon their local policies and conform to that announced by federal authority. It seems useless, in view of the cases cited, to review our own state authorities.

The case presented being admittedly one of interstate commerce, upon the authorities cited and the submission at bar, judgment is directed for the plaintiff for $100, with interest from September 16, 1911. This being in substance a judgment for the defendant under the submission, the defendant is entitled to costs.

INGRAHAM, P. J., and McLAUGHLIN and LAUGHLIN, JJ., concur.

SCOTT, J. I dissent and am in favor of a judgment in favor of plaintiff. The question involved is not one of a conflict between state regulation and federal regulation of interstate commerce but the old question so often discussed in the so-called "baggage cases" whether the mere acceptance of a ticket or a baggage check on which is printed a limitation clause amounts to a declaration by the passenger that her baggage is of no greater value than the amount of the limit of the carriers' liability. The Croninger Case and others cited by my Brother CLARKE are all "merchandise" cases in which the court found a declaration by the shippers as to the value of the shipment and an acceptance of a contract for shipment knowing that it contained a limitation of liability clause. These cases have always been distinguished from "baggage cases" like the present. It is distinctly stipulated in the submission that:

"The plaintiff's attention was not called to the said schedules, Exhibits D and E, or to any provisions thereof, or to the said notices, Exhibits F and G, and she had no knowledge of the same or of their existence. The said Boston

& Maine Railroad Company did not give nor offer to give to the plaintiff any information in regard to such schedules, nor was any statement made to her, either as to their existence or contents, at the time plaintiff purchased her ticket and checked her baggage, except by the publishing, posting, and filing of the schedules and notices above mentioned. *The plaintiff did not know that the defendant's charges were based on the value of the baggage or in any way affected by the value of the baggage.*"

This concession distinctly negatives any idea that plaintiff agreed to the limitation of liability or made any representation as to the value thereof. The element of estoppel, therefore, so strongly dwelt upon in Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, is entirely absent from the case. In the Croninger Case the decision was based, in part at least, upon the statement embodied in the opinion that:

"The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission."

The court evidently referred to the presumption as one of fact. In the present case it is expressly stipulated that the passenger had no such knowledge; there is therefore no room for any presumption upon the subject. If it had been the law of this state prior to the passage of the Interstate Commerce Law and Carmack Amendment thereto that a carrier might not by any agreement limit his liability, there would be no doubt that the state law would have been superseded as to interstate commerce by the federal law. But there was not any such law in this state, and the plaintiff does not rely upon any such law. It has been the law here, and the Supreme Court of the United States says is now the law of the land under the Interstate Commerce Act, that:

"It has become an established rule of the common law, as declared by this court in many cases, that a carrier may by a fair, open, just, and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an *agreed* value made for the purpose of obtaining the lower of two or more rates of charges proportionate to the amount of the risk."

Under this rule the question still remains since the passage of the Interstate Commerce Act, as it did before, whether, in the case of a shipment of baggage under the circumstances agreed to in the submission, there has been any *agreement* as to a limitation of liability or any representation by the passenger, express or implied, as to the value of the baggage. It may even be conceded that the plaintiff and defendant could not lawfully *agree* to carry the baggage at a lower rate than that specified in the filed schedules, but the only point of my dissent is that there was no agreement at all. With full recognition of the paramount authority of Congress to regulate respecting interstate commerce, and with a sincere desire to give full effect to its enactments, I can find nothing in the federal statutes, or in the opinions of the Supreme Court of the United States, to change the long-established rule that, in the absence of an *agreement* between the carrier and passenger as to a limitation of liability based upon value, or a representation by the passenger as to the value of his baggage, or a knowledge on his part that the price of a ticket is based upon the value of the baggage carried, the carrier is liable for the actual value if the baggage is lost by its negligence or

fault. All that has been decided is that, when Congress, by the Interstate Commerce Law, authorized contracts for the limitation of the liability of common carriers, its enactment superseded and abrogated, as to interstate shipments, the provisions of any state law undertaking to forbid such contracts. That, in my opinion, does not touch the real question in this case.

SPENCER & CO. v. BROWN.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. BILLS AND NOTES (§ 60*)—ACCOMMODATION MAKER.
It is immaterial whether an accommodation note was complete when delivered to the payee or whether the maker's name was originally signed to an otherwise blank note.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 85–94; Dec. Dig. § 60.*]

2. BILLS AND NOTES (§ 452*)—WANT OF CONSIDERATION.
Want of consideration is a good defense to an action by the payee against the maker of a note.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1303, 1352–1364, 1367–1376; Dec. Dig. § 452.*]

3. BILLS AND NOTES (§ 493*)—ACTIONS—BURDEN OF PROOF—ACCOMMODATION NOTE.
Though the note has been admitted or proved, the burden of proving that it was an accommodation note is on the maker in an action against him by the payee.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652–1662; Dec. Dig. § 493.*]

4. EVIDENCE (§ 432*)—PAROL EVIDENCE—PROMISSORY NOTES.
The maker may show by parol evidence, in an action against him by the payee of a note, the real agreement between the parties at the time of its execution in order to show that it was accommodation paper.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1981–1989; Dec. Dig. § 432.*]

Appeal from City Court of New York, Trial Term.

Action by Spencer & Company against Clark T. Brown. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Edward J. Kelly, of New York City (Robert A. McDuffie, of New York City, of counsel), for appellant.

Wellesley W. Gage, of New York City (G. H. Hinnau, of New York City, of counsel), for respondent.

GUY, J. The action was brought on a promissory note drawn to the plaintiff's order. The answer somewhat inartificially denies that the note was made or delivered for value, also that anything is due thereon. It alleges that the note was for the accommodation of the plaintiff only and was without consideration. The note was admitted in evidence without objection, after a motion for judgment on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pleadings was denied. On the defendant's examination all proof of what occurred between him and plaintiff's officers at the time of the delivery of the note to the plaintiff was excluded, on the ground that, by not denying that it was made and delivered, the defendant was precluded from proving that it was for the payee's accommodation only; defendant excepted. A verdict was then directed for plaintiff; defendant excepted.

[1] It is of no legal consequence whether an accommodation note was complete when delivered to the payee and holder thereof, or whether the maker's name was merely signed to an otherwise blank note.

[2, 3] In an action by the payee of a note against its maker, the plea of want of consideration is a good defense (St. Lawrence County Nat. Bk. v. Watkins, 153 App. Div. 553, 138 N. Y. Supp. 116; First Nat. Bk. of Towanda v. Robinson, 105 App. Div. 193, 196, 94 N. Y. Supp. 767, affirmed 188 N. Y. 45, 80 N. E. 567), although after the note has been admitted or proved the burden of proof of accommodation or want of consideration is on the maker.

[4] In support of the defense of accommodation paper or want of consideration, as between the payee and maker, the latter may show by parol the real agreement between the parties at the time of execution. Niblock v. Sprague, 200 N. Y. 390, 392, 393, 93 N. E. 1105; Higgins v. Ridgway, 153 N. Y. 130, 133, 134, 47 N. E. 32; Great Northern Moulding Co. v. Bonewur, 128 App. Div. 831, 833, 113 N. Y. Supp. 60; Ryan v. Sullivan, 143 App. Div. 471, 473, 128 N. Y. Supp. 631.

Judgment reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

(82 Misc. Rep. 431.)

LOVELL v. ALTON.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. EVIDENCE (§ 442*)—PAROL EVIDENCE—SUPPLEMENTING WRITTEN CONTRACT—ORDER FOR GOODS.
   Where coal was purchased upon a written order given by the buyer but not accepted in writing by the seller, and the order did not in express terms contain any warranty, parol evidence was admissible to show that the coal was warranted to be of a particular quality.
   [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1897; Dec. Dig. § 442.*]

2. EVIDENCE (§ 417*)—PAROL EVIDENCE—ORAL CONTRACT REDUCED TO WRITING.
   Where the original contract is oral and entire and part only is reduced to writing, parol evidence is admissible.
   [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1899; Dec. Dig. § 417.*]

Appeal from City Court of New York, Trial Term.

Action by Leander D. Lovell against Lee T. Alton. Judgment for the plaintiff, and defendant appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Leo Oppenheimer, of New York City, for appellant.
Arthur Lovell, of New York City, for respondent.

GUY, J. The action is brought to recover for coal sold and delivered. The defense was a breach of a warranty that the coal agreed to be delivered was Scranton coal, and the coal actually delivered was Wilkesbarre coal, an inferior grade; also, that it was adulterated and mingled with stone and slate. There was also a counterclaim for breach of the warranty.

The coal was purchased as the result of a written order of the defendant, which was not accepted in writing by plaintiff. The order did not in express terms contain any warranty. The trial justice excluded all proof of the warranty alleged in the answer, defendant excepting, and instructed the jury that the law implies a warranty that the coal was good, merchantable coal that would burn. So much of defendant's proof as was admitted showed that the coal was not Scranton coal; that it was mixed up with dirt, stone, and slate; defendant testified that of every 1,000 pounds of one lot it burned, 750 pounds of slate, dirt, stone, and ashes would be left behind. Defendant claimed that only 25 per cent. of it burned. Proof as to how little heat it produced was excluded; defendant excepting. Proof of an analysis of it by a practical, though not a graduated, chemist, was excluded; defendant excepting. Proof by an analytical chemist and fuel engineer that it was 20 per cent. deficient in heating power was received.

[1] A written order for goods, which does not contain the complete contract, permits parol proof of a warranty as to quality. Brigg v. Hilton, 99 N. Y. 517, 526, 527, 3 N. E. 51, 52 Am. Rep. 63; Lichtenstein v. Rabolinsky, 75 App. Div. 66, 68, 77 N. Y. Supp. 792; Guttentag v. Whitney, 79 App. Div. 596, 599, 600, 80 N. Y. Supp. 435.

[2] Where the original contract is oral and entire, and part only is reduced to writing, parol evidence is admissible. Chapin v. Dobson, 78 N. Y. 74, 79, 34 Am. Rep. 512; Routledge v. Worthington Co., 119 N. Y. 592, 596–598, 23 N. E. 1111.

The cases cited by the respondent are cases where the writing contained the entire contract. In the bought and sold note cases which respondent especially relies on, the entire contract is contained in the note.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

NATIONAL DISCOUNT CO. v. WILLIAM R. JENKINS CO.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

BILLS AND NOTES (§ 452*)—DEFENSES—EXCLUSION OF EVIDENCE.

In an action against the acceptor of a draft, who alleged that the draft was without consideration and that an agreement had been made between the defendant and the payee for its cancellation, which facts were known

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the plaintiff when it received the draft, rulings which afforded defendant no opportunity to prove the defense alleged were erroneous.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1303, 1352–1364, 1367–1376; Dec. Dig. § 452.*]

Appeal from City Court of New York, Trial Term.

Action by the National Discount Company against the William R. Jenkins Company. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Raeburn W. Jenkins, of New York City (Michel Kirtland, of New York City, of counsel), for appellant.

S. C. Sugarman, of New York City, for respondent.

SEABURY, J. This is an action against the defendant as acceptor of a draft. The answer alleged that the draft was without consideration, and that an agreement had been made between the defendant and the payee for the cancellation of the draft, and that all of these facts were known to the plaintiff at the time of the transfer of the draft to it.

It may be doubtful whether the defendant could prove the defense alleged, but it is clear that the rulings of the learned court below afforded the defendant no opportunity so to do. The defendant had the right to present its evidence, and the court erred in denying it the opportunity to do so. For this reason, the judgment must be reversed.

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

(82 Misc. Rep. 211.)

In re HUNT'S ESTATE.

(Surrogate's Court, Oneida County. September, 1913.)

WILLS (§ 775*)—LEGACY—LAPSE.

A legacy to a person who, without legal adoption, had for more than 25 years borne the relation of daughter to testatrix, lapsed where she died before testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1997–2000; Dec. Dig. § 775.*]

Proceedings upon the accounting of the administrator of Charlotte L. Hunt, deceased. Objections overruled, and account ordered passed as filed.

Miller & Fincke, of Utica, for Utica Trust & Deposit Co., accounting party.

Pritchard, Deecke & Lisle, of Utica, for Citizens' Trust Co., as administrator, and Geo. E. Pritchard, special guardian for C. Stuart Myers, an infant, contestants.

B. A. Capron, of Boonville, for A. Stanley Myers, contestant, and First Methodist Church of Boonville.

Cookinham & Cookinham, of Utica, for Lena Cook, Charles R. Lee,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Oliver Dodge, Clinton E. Dodge, and Jennie A. Cook, administrator of the estate of Henry P. Palmer.

J. Arch Bateman, of Boonville, for J. Henry Pease, as special guardian.

Frederick A. White, of Boonville, for Fred Bush, Olive Bush Porter, Jennie Bush, and as special guardian for Charlotte L. Bush.

R. C. Briggs, of Rome, for Roxanna Hunt Dixon, Dexa Hunt Evans, Della Hunt Smith, Calvin Hunt, Hattie Hunt Watt, Ellen Hunt, Ethel Watt, and Irene Watt.

Jay A. Pease, of Boonville, in pro. per.

Geo. E. Philo, of Utica, special guardian for Lewiston McCoombs, Gladys McCoombs, Alice McCoombs, Vernon McCoombs, Dorothy Dodge, and Carleton Dodge.

B. H. Loucks, of Lawville, for Frances A. Palmer, Sarah Jones, and Anna H. Rogers, executrix of Ward B. Rogers.

SEXTON, S. On November 28, 1910, Charlotte L. Hunt died and left a will containing this provision:

"Second. I give, and bequeath unto Ida S. Myers, who though not legally adopted, has for more than twenty-five years borne the relation of adopted daughter to me, the sum of twenty thousand dollars, and in addition thereto, all my household furniture and effects and wearing apparel and personal adornment."

Said Ida S. Myers died intestate March 21, 1907, and prior to the death of said testator, leaving as her sole heirs and next of kin, A. Stanley Myers and C. Stuart Myers. The Utica Trust & Deposit Company, the accounting party herein, took the position in its account that said legacy of $20,000 to said Ida S. Myers lapsed. The Citizens' Trust Company of Utica, as administrator of the estate of Ida S. Myers, deceased, and also C. Stuart Myers and A. Stanley Myers, sons of Ida S. Myers, deceased, filed objections in writing to said account, contending that said legacy of $20,000 had not lapsed, and that it should be decreed to be paid to the representative of the estate of said Ida S. Myers, deceased.

The general rule is that a legacy lapses where a legatee dies before the testator. Section 29 of the Decedent Estate Law [1] contains the exceptions, but the legacy in question does not fall under this statute, because Ida S. Myers was not a child of the testatrix, either by birth or adoption. From early childhood and until the time of her marriage, said Ida S. Myers had lived in the Hunt family, and had been reared and educated and treated as their child, but had never been legally adopted. Because of these conceded relations, it was contended on the trial, and proof was offered in support thereof, that such moral obligation rested upon the deceased, Charlotte L. Hunt, to care for said Ida S. Myers as would prevent the lapsing of said legacy. The evidence fails to establish such an obligation. If such an obligation existed, it was more than met by transfers of real estate and gifts of personal property on the part of the Hunts to said Ida S. Myers, independent of the will. The children of said Ida S. Myers were given a legacy of $2,500 each, and will share with others in the residue of

[1] Consol. Laws 1909, c. 13.

the estate. The attention of said Charlotte L. Hunt, who outlived said Ida S. Myers by about four years, was called to the fact that the legacy of $20,000 to said Ida S. Myers had elapsed, and she was unavailingly importuned by said A. Stanley Myers to modify her will to the extent of giving said sum, or a part thereof, to him and his brother.

The cases of Cole v. Niles, 3 Hun, 326, and Matter of Gough, 74 Misc. Rep. 315, 134 N. Y. Supp. 222, relied upon by the contestants, have no application, as the decision, in each of said cases, rests upon a different state of facts. The question of a moral obligation was not involved.

I hold and decide that a decree may be entered overruling the objections and passing the account as filed.

Decreed accordingly.

(82 Misc. Rep. 565)

In re ROE'S WILL.

(Surrogates' Court, New York County. November 11, 1913.)

1. WILLS (§ 117*)—EXECUTION—PRESENCE OF TESTATOR AND WITNESSES.
   It is well settled that the present statute of wills does not require the simultaneous presence of testator and the attesting witnesses at the execution of a will.
   [Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 299–301; Dec. Dig. § 117.*]

2. WILLS (§ 120*) — EXECUTION — ATTESTATION AND SUBSCRIPTION BY WITNESSES.
   Though the simultaneous presence of testator and attesting witnesses is not required, yet both a sufficient publication and rogatio testium must be proved by each of the attesting witnesses; hence, where testatrix did not request a witness to attest nor acknowledge her signature to him, the will was not well executed.
   [Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 314–317; Dec. Dig. § 120.*]

3. WILLS (§ 289*)—EVIDENCE—PRESUMPTION—HOLOGRAPHIC WILL.
   Though publication in case of a holographic will is more easily presumed than is the case with an allographic testament, yet such presumption will not override proof of a noncompliance with the statute.
   [Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 653–661; Dec. Dig. § 289.*]

Application for the probate of the will of Alida Roe, deceased. Probate denied.

James F. Carroll, of New York City (William S. Bennet, of New York City, of counsel), for proponent.

Frank M. Patterson, of New York City, for contestant.

FOWLER, S. [1] The proofs show, in substance, that Alida Roe, the alleged testatrix, evidently animo testandi drew the very informal paper propounded in this proceeding. I shall assume that it is, as alleged by proponent, in her handwriting, or a holograph. It is dated at the foot, 31st of December, 1911. It seems Mrs. Roe, the maker of the will, on the 5th of March following called on one of the attesting witnesses, Mr. Michels, an undertaker, at his place of busi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ness, No. 208 East Forty-Seventh street, Manhattan, and then handed him the paper in question. It was already signed by Mrs. Roe before her visit to Mr. Michels, and she simply told Mr. Michels that the paper was her will, but Mrs. Roe did not at any time state to Mr. Michels that it was her signature which was affixed to the paper. Mr. Michels informed Mrs. Roe that she must have two witnesses to her will. She said, "I will go over and see Mr. Mealy." This it seems she did, for Mr. Mealy's signature is on the paper. The next evening in Mr. Michels' absence from his office testatrix left the paper at his office, with Mr. Mealy's signature affixed. Mr. Michels, without any request, then, in Mrs. Roe's absence, affixed his own signature as a witness, and kept the paper, expecting Mrs. Roe to call for it. Meanwhile she died. The paper writing remained in Mr. Michels' custody until produced in court.

Mr. Mealy, the other attesting witness, testified in substance that in March, 1912, or thereabouts, Mrs. Roe asked him at No. 301 East Forty-Sixth street, Manhattan, to sign her will as a witness, and then showed him her signature telling him it was her signature. Mr. Michels, the other witness, was not, however, then present. At no time were the attesting witnesses together in the presence of Mrs. Roe. Whatever occurred between Mrs. Roe and the attesting witnesses took place on separate occasions.

The question is whether this was a good execution pursuant to the existing statute of wills. A short retrospect will, perhaps, facilitate the correct application of the principle of testamentary law controlling this cause. Prior to the passage of the first statute of wills, 32 Hen. VIII, c. 1 (afterwards in force in the Province of New York and again expressly re-enacted after our independence of the Crown by the new state Legislature, 2 J. & V. 93), the Ecclesiastical Courts in England did not follow the Roman law regulating the execution of wills, as the English jurist Jenks thinks they logically should have done (Jenks' Histy. English Law, 267, 269). Contrarywise, by the testamentary common law of England, almost any paper of a testamentary character sufficed for a will of personal property. Signing by the testator was unnecessary; publication was unnecessary. If the testament was a holograph, even witnesses were unnecessary. Swinburne, 353; 4 Burns, Ecc. Law, 123. Nuncupative wills of chattels were commonly allowed if made before witnesses. Godolphin's Orphans Legacy, 13. The early tendency in England was to adopt that part of the Roman law governing unsolemn testaments and not that relative to solemn testaments. Godolphin's Orphans Legacy, 65; Swinburne on Wills, pt. 4, §§ 23, 24. After the statute of wills (32 and 34 Hen. VIII), even a devise need not by the testamentary law of England be signed by the testator.

It was not until the statute of frauds (29 Car. II) that the execution of devises was regulated by statute, and thereafter they were required to be in writing, signed by the party, or some other in his presence and by his direction, and attested and subscribed in the presence of the devisor by three or four credible witnesses. The statute of frauds, although passed after New York had an established government of its

own, and although New York was not named in the act, was regarded as in force in this province, and was subsequently so treated by the Legislature of the state of New York. It had thus become a part of the statute of wills in the Province of New York as in England, a condition of things repeated by the first reconstructive legislation enacted after our independence of the Crown. When the English statutes operative in New York came to be re-enacted by authority of the independent state government, the old wills acts (32 and 34 Hen. VIII), with its several amendments, was re-enacted here (chapter 47, Laws of 1787; 1 K. & R. 178; 1 R. L. 364), and until the Revised Statutes our law of wills corresponded very closely with the old law in force before our independence of the Crown. Even after the statute of frauds a devise was well executed if attested by three witnesses who subscribed their names at the request of the testator, although at several times and out of each other's presence. Gilb. 92 Vin. Devise N., 10, 12; Lovelass on Wills, 299; Smith v. Codron, 2 Ves. Senior, 455; Parsons v. Cook, Pre. Ch. 184, 2 Vern. 429; Jones v. Lake, 2 Atkyns, 176. The first case on this point arose in Trinity Term (34 Car. 2; Anon, 2 Ch. Cas. 109). In Jones v. Lake, in the year 1742, it was again argued that, if the witnesses did not act together on one occasion, the testator might be sane when some attesting witnesses attested, and insane when others attested. But the court held that the old statute of wills, as amended by the statute of frauds, did not require the simultaneous presence of the attesting witnesses. This decision was binding on the Privy Council and consequently on appeals from the Province of New York. Thus the law of New York was fixed.

In England the law of wills was extensively remodeled and for the future regulated by the wills act of 1838 (1 Vict. c. 26). It is only necessary to allude to those reforms in the common law which reflect light on this case. Every will in England was required by the English "wills act" of 1838 to be signed at the end by the testator, or by some other person in his presence and by his direction, and such signature must be made or acknowledged in the *simultaneous* presence of two witnesses. Hindman v. Charlton, 8 H. L. Cas. 160; Wyatt v. Berry, 1893, 5 P. Of course the Act 1 Vict. could have no influence on the then independent common law of the state of New York. But as the English act was enacted subsequently to the Revised Statutes of New York it is significant. The New York Revised Statutes very soon after their passage were reprinted in England, where they received the closest attention from the bench and the bar of that country. There was at that time, as at present in the instance of the equity rules of the federal courts, some indirect interaction between common-law countries. While the Revised Statutes of New York made some changes in the substantive testamentary common law and the old statute of wills, the part of the revision relating to wills did not go so far as did the subsequent English "wills act" of 1838. Chapter 6, pt. 2, R. S., relating to wills and testaments, neglected to provide that the testator's signature or its acknowledgment should be made in the *simultaneous* presence of two witnesses. 2 R. S. 63, § 40, now

section 21, Decedent Estate Law. This, as it proved subsequently, was an error or omission of consequence.

By the Roman law, which may be regarded as the common law of Europe, the formal authentication of a testamentary act was carefully prescribed, and the simultaneous presence of the testamentator and the attesting witnesses at the moment of publication and subscription gave the testamentary session a solemnity and the testamentary paper an authenticity which is expedient in any prosperous and highly developed state. By the Roman law "rogatio testium," or testator's request to the attesting witnesses to act as such, was essential (D. 28, 1, 21, 2; D. 28, 1, 20, 8). Mr. Jenks in the most recent "History of English Law" calls the departures from the Roman Law of Wills by the Ecclesiastical Courts of England illogical (pages 267, 269). If we have regard to the fact that the transmission of an estate on the death of its owner to a new proprietor is a matter of public law, and not a matter of private law, we shall perceive that an act of testamentation is always in law one of extreme importance, not only to the persons immediately concerned, but to the public at large. Excepting in rare cases of emergency the formal execution of a will before assembled witnesses should be such as to cast no doubt on the authenticity of the will. By the Roman law the signing and sealing of the testament by the testator, or in his presence, and the due publication of the will, must take place on one occasion, "unitas actus," before the testator and the assembled witnesses, who must then subsign and subseal the same before the session could be interrupted by extraneous matter. The statute of England (1 Vict.) revived for England the necessity of a simultaneous presence of the attesting witnesses and the testator. But unfortunately, as I believe, our modern law in this state is a strict logical sequence of the older testamentary law of England and New York. It does not require simultaneous presence of the attesting witnesses, although the sense of the profession of the law in this state, as to the necessity of a simultaneous presence, is best evidenced by their almost universal adherence to the practice of a simultaneous presence of the testator and the attesting witnesses on any occasion of celebrating a last will. Every "attestation clause" in common use on wills recites accordingly.

The New York Revised Statutes of 1830 required that the testator's subscription to a will should be made in the presence of *each* of the attesting witnesses or should be acknowledged by the testator to have been so made to *each* of the attesting witnesses. Section 40, 2 R. S. 63, now section 21, Decedent Estate Law (Consol. Laws 1909, c. 13). The Revised Statutes of Wills required only two attesting witnesses instead of three or more required by the old statute. As framed, it was easier to construe the Revised Statutes as dispensing with the simultaneous presence of the attesting witnesses than it was to so construe the old statute of wills as amended by the statute of frauds. The Revised Statutes, it will be observed, used the distributive "to each witness." Yet in Seymour v. Van Wyck, 6 N. Y. 120, a very badly reported case, there was evidently some latent idea that the simultaneous presence of attesting witnesses might be necessary under the

Revised Statutes in order to constitute a good execution of a will. But in Hoysradt v. Kingman, 22 N. Y. 372, the statute was fully considered and construed as the old statute of wills had been construed. The simultaneous presence of attesting witnesses was in that case held to be unnecessary. The English cases on the old statute of wills were reviewed in Hoysradt v. Kingman, and held to have been binding here as authority. In conformity with the old law, the Court of Appeals then proceeded to place the construction of the Revised Statutes at rest. Mr. Surrogate Rollins in this court followed Hoysradt v. Kingman in Barry v. Brown, 2 Dem. Sur. 309, as did my immediate predecessor, Mr. Surrogate Thomas (Matter of Diefenthaler, 39 Misc. Rep. 765, 80 N. Y. Supp. 1121). This point, indeed, is well settled law in this state. Matter of Levengston, 158 App. Div. 69, 142 N. Y. Supp. 829. This is an instance where a statute of wills might well have received a different construction from that accorded. When a statute of wills requires two witnesses to an act, it ought not to be satisfied by proof of a single different witness on two separated occasions. In old testamentary law and in the Ecclesiastical Courts one witness was no witness, "testis unus, testis nullus," or, as the jurist Loysel said, "The voice of one is the voice of none." This rule of Hebraic origin dominated the whole procedure of the Middle Ages, and was very potent in the canon law and in the Ecclesiastical Courts of England. It was intended to be recognized in all the early statutes of wills. But, as we have seen, it miscarried by construction both in England and New York. But the present law of this state is settled, as already stated. The law of Scotland, although largely Roman in origin, is, I observe, to the same effect. Hogg v. Campbell, 2 Macp. 849.

[2, 3] But while publication and rogatio testium, or the testator's request to the attesting witnesses to attest his will, may be made to such witnesses on different occasions, and when they are separated and apart; yet both a sufficient publication and rogatio testium must be proved by each of two attesting witnesses, or the testamentary paper is not well executed. Now in this cause it is established by proponent that the testatrix never in any way asked Mr. Michels to act as a witness to her will. Nor did the testatrix acknowledge her prior signature to him. This is fatal to proponent's paper. 2 R. S. 63, § 40, subd. 4; now section 21, Decedent Estate Law; Tarrant v. Ware, 25 N. Y. 425, note; Matter of Will of Hewitt, 91 N. Y. at page 263; Neugent v. Neugent, 2 Redf. Sur. 369; Matter of Lyman, 14 Misc. Rep. 352, 360, 36 N. Y. Supp. 117; Burke v. Nolan, 1 Dem. Sur. 436. For the reasons stated the script propounded is not established to be the last will and testament of the late Mrs. Roe, and it is not entitled to probate as such. While it is true that publication in the case of a holographic testament is more easily presumed than is the case with an allographic testament, yet a presumption never overrides proof of a noncompliance with the statute. Here such noncompliance is established.

The probate sought is refused. Decree accordingly.

(82 Misc. Rep. 202.)

BOVE v. CROTON FALLS CONST. CO.

(City Court of New York, Trial Term. September, 1913.)

1. NEW TRIAL (§ 99*)—GROUNDS—EVIDENCE.
Newly discovered evidence is not ground for a new trial, where it is not material and would not probably produce a different verdict.
[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. § 99.*]

2. NEW TRIAL (§ 99*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.
To constitute ground for new trial, newly discovered evidence must have been discovered since the trial, and not have been obtainable upon the former trial by the exercise of reasonable diligence and must be material to the issue, not merely impeaching, and so decisive in character that there is a reasonable certainty that on another trial it would change the result.
[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. § 99.*]

Action by Angelo Bove against the Croton Falls Construction Company. Motion for new trial denied.

Simmons & Harris, of New York City (Maxwell S. Harris, of New York City, of counsel), for plaintiff.

Reed & Pallister, of New York City (Claude V. Pallister, of New York City, of counsel), for defendant.

LUCE, J. At the close of the trial the motion to set aside the verdict of the jury in the plaintiff's favor was entertained, and after the examination of the able briefs the motion was granted because of an error in the charge. N. Y. L. J., March 29, 1913. Upon appeal this order was reversed, and the verdict reinstated. 81 Misc. Rep. 241, 142 N. Y. Supp. 531.

[1] The defendant now moves for a new trial upon newly discovered evidence, consisting of the testimony of two witnesses not sworn upon the trial. There were two interviews between the parties; both agree the first one occurred at the defendant's Brooklyn office. The plaintiff claims the second interview also occurred at the defendant's Brooklyn office; the defendant claims it occurred at its office in Croton Falls or Brewster. The plaintiff claims the account was stated at the second interview; the defendant denies the account was ever stated. The new witnesses are to testify to what occurred at the first interview in Brooklyn, an interview concerning which there is but little dispute. Their testimony would be chiefly corroborative of facts having small bearing on the issues and but little disputed. The new evidence could not therefore have any material effect upon the result of the trial. To warrant granting this motion it must appear that with this new evidence before the jury a different result could be expected. Keister v. Rankin, 34 App. Div. 288, 54 N. Y. Supp. 274.

[2] To constitute a case for a new trial upon the ground of newly discovered evidence it must appear: (1) That the evidence has been discovered since the trial; (2) that the evidence could not have been ob-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tained upon the former trial by the exercise of reasonable diligence; (3) that the evidence is material to the issue; (4) goes to the merits of the case, and not merely to impeach a former witness; (5) is so decisive in its character that there is a reasonable certainty that on another trial it would change the result. Bishop v. Kingston Gas & Elec. Co., 147 App. Div. 920, 131 N. Y. Supp. 1039; Riley v. United States Title Guar. & Indemnity Co. (Sup.) 117 N. Y. Supp. 974; Baylies N. T. & App. (2d Ed.) 567–569. All these five elements must be found in the newly discovered evidence before the granting of a new trial. The main issue in the trial was, and on a new trial must be, was there an account stated? If so, when and where? This new evidence would throw no light upon either of those points; would render the jury no assistance in answering either question. It lacks two of the required elements—is not material; would not produce any different result upon the new trial. The motion is denied, with $10 costs.

Motion denied, with $10 costs.

(82 Misc. Rep. 205.)

In re HALPER.

(City Court of New York, Special Term. September, 1913.)

1. BANKRUPTCY (§ 424*)—DISCHARGE—"WILLFUL AND MALICIOUS INJURY."
   As used in Bankr. Act July 1, 1898, c. 541, § 17(2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), excepting liabilities for "willful and malicious injury" from a discharge in bankruptcy, the phrase quoted does not necessarily involve hatred or ill will as a state of mind but arises from a wrongful act done intentionally and without cause or excuse.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 818; Dec. Dig. § 424.*]

2. BANKRUPTCY (§ 424*)—DISCHARGEABLE DEBTS—JUDGMENT FOR PERSONAL INJURIES—CANCELLATION OF JUDGMENT.
   A judgment in an action for personal injuries resulting from plaintiff's washing her hands in pure carbolic acid sold her as a 2 per cent. solution by defendant's agent was not a debt dischargeable in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 17(2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), and hence a motion under Debtor and Creditor Law (Laws 1909, c. 17; Consol. Laws 1909, c. 12), § 150, to cancel same will be denied, though defendant listed such judgment in his schedules in bankruptcy.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 818; Dec. Dig. § 424.*]

3. WORDS AND PHRASES—"MALICE."
   Malice in its common acceptation means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse (citing Words and Phrases, vol. 5, pp. 4298–4312; vol. 8, pp. 7712–7713).

Application of John M. Halper, a bankrupt, to cancel and discharge a certain judgment of Betty Abrahams. Denied.

Harold R. Zeamans, of New York City, for petitioner Halper.
Weissberger & Leichter, of New York City, for Abrahams.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

FINELITE, J. This is an application by the petitioner to cancel and discharge a certain judgment obtained against him on a cause of action for a personal injury to the plaintiff. From the facts herein it appears that, before said petitioner was discharged from his debts, he was engaged in the business of maintaining and conducting a drug store and pharmacy in the city of New York; that about the 24th of August, 1904, plaintiff called at the petitioner's drug store and pharmacy and asked for a solution of carbolic acid diluted 2 per cent. for the purpose of washing her hand; that the defendant through his agent and servant carelessly and negligently gave to plaintiff pure carbolic acid in place and stead of carbolic acid diluted 2 per cent., as called for by the plaintiff, and informed said plaintiff that said drug as put up by him was the same as asked for by her, to wit, carbolic acid diluted 2 per cent.; and that plaintiff, believing that said drug as put up by defendant was carbolic acid diluted 2 per cent., used the same for the purpose of washing her hand and as a result thereof severely burned her hand and fingers, causing the flesh on the first finger of the right hand to become decomposed. The plaintiff in her complaint in said action recited the above facts, and further stated that said injury was caused through the negligence and carelessness of the defendant and without blame or cause on the part of the plaintiff. The action came on for trial, which resulted in a judgment in favor of the plaintiff for the sum of $1,082.58, inclusive of costs. Subsequently the said defendant went into bankruptcy, wherein he scheduled the judgment in favor of the plaintiff herein in his petition, and thereafter was discharged in bankruptcy from all debts and claims which are made provable by the acts relating to bankruptcy and which existed against him at the time of the filing of his petition. Annexed to the moving papers for the cancellation of this judgment is a schedule of said bankruptcy proceeding showing the amounts of judgments and in whose favor they were obtained, including the judgment of the plaintiff herein, also a certified copy of the order of the District Court of the United States, Southern District of New York, discharging said defendant. The defendant makes this application under the Debtor and Creditor Law (Laws of 1909, c. 17; Consol. Laws 1909, c. 12), section 150 thereof reading as follows:

"Discharge of Bankrupt from Judgment. At any time after one year has elapsed since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, he may apply * * * to the court in which a judgment was rendered against him * * * for an order, directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which said judgment was recovered, an order must be made directing said judgment to be canceled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same by marking on the docket thereof that the same is canceled and discharged by order of the court."

This is a re-enactment of former section 1268 of the Code of Civil Procedure. Section 17 of the Bankruptcy Act reads in part as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) * * * ; (2) are liabilities * * * for willful and malicious injuries to the person or property of another."

[1, 2] From an examination of the authorities both in the state and federal courts, it appears that the decisions are somewhat conflicting as to whether or not the discharge of a bankrupt releases certain particular debts contained in the schedule. In some of the decisions it has been held that irrespective of the discharge of a certain debt scheduled, when the bankrupt applies to the state court wherein a judgment was originally obtained, it is for the state court to decide whether the judgment is one that can be canceled by reason of the discharge. I now come to the all-important question involved on this motion: If the judgment in this proceeding be one which was recovered in an action for willful and malicious injury to the person, it was not released by the bankrupt's discharge; otherwise it was. There may be cases where the act is performed without any particular malice, in the sense of ill will, towards a party, and the act itself necessarily implies the degree of malice which is sufficient to bring the case within the exception stated in the statute. If the act was willful (that is, selling the carbolic acid in its raw state and not the carbolic acid that was asked for, diluted 2 per cent.) whether this was a willful act in the sense that it was intentional and voluntary, if it was malicious within the meaning of the statute, it follows that the bankrupt cannot be discharged at this stage. In order to come within that meaning as a judgment for willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice. In Bromage v. Prosser, 4 Barn. & Cres. 347, which was an action of slander, Mr. Justice Bayley among other things said:

"Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act and done intentionally. If I am arraigned for felony and willfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. And if I traduce a man, whether I know him or not and whether I intend to do him an injury or not, I apprehend the law construes it as done of malice and because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not."

It is said of this case in Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754:

"We cite the case as a good definition of the legal meaning of the word 'malice.' The law will, as we think, imply that degree of malice in an act of the nature under consideration, which is sufficient to bring it within the exception mentioned."

The court further says:

"It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has

been held by some courts not to be sufficient. Commonwealth v. Williams, 110 Mass. 401."

In Matter of Munro (D. C.) 195 Fed. 817, the court, quoting from Tinker v. Colwell, supra, says:

"It seems clear from the language of the court in this case that injury to person or property in the legal sense is a malicious injury in the absence of hatred, spite, or ill will, provided the act was intentional, wrongful, and without just cause or excuse."

It seems to me that the judgment itself in this case under the pleadings establishes that the act of the defendant was intentional, wrongful, and without just cause or excuse. The purchase from the defendant, if the article requested had been given to plaintiff for the compensation demanded, would have resulted in no injury to her; but, as the defendant gave her a liquid which when applied to the person was highly injurious and did result in injury, it was done intentionally, maliciously, and wrongfully, and without just cause or excuse. In Collier on Bankruptcy (8th Ed.) 321, it is said:

"The word 'willful' as here used means nothing more than intentional, while the 'malice' here intended is nothing more than that disregard of duty which is involved in the intentional doing of a willful act to the injury of another."

In Peters v. United States ex rel. Kelly, 24 Am. Bankr. Rep. 206, 177 Fed. 885, 101 C. C. A. 99, the Circuit Court of Appeals, Seventh Circuit, reversing United States ex rel. Kelley v. Peters (D. C.) 22 Am. Bankr. Rep. 177, 166 Fed. 613, held:

"The term 'willful and malicious injury,' as used in section 17(2) of the Bankruptcy Act of 1898, excepting liabilities therefor from a discharge in bankruptcy, does not necessarily involve hatred or ill will as a state of mind but arises from a wrongful act, done intentionally without just cause or excuse, and special malice is not necessary to sustain a judgment for such injury to person or property."

As was said in the Munro Case, supra:

[3] "I think a case is within the exception when the act producing injury to person or property was wrongful, intentional, and done without just cause or excuse; that is, a wrongful act was done under circumstances from which with the nature of the act the law implies malice. * * * In construing statutes making it a crime to do 'malicious' injury to property, the courts have quite generally held that the element of spite, hatred, or ill will was involved. * * * A careful reading of the cases found in 5 Words and Phrases Judicially Defined, pp. 4298–4312, will demonstrate that the decisions of the courts are far from uniform and incapable of reconciliation; but, after all, the great weight of authority is that: 'Malice in its common acceptation means ill will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse.'"

Under the authorities hereinabove cited it is quite apparent that the judgment obtained herein is not one that can be canceled of record by reason of the bankrupt's discharge. The motion should therefore be denied.

Motion denied.

(159 App. Div. 121)

SAUERBRUNN v. HARTFORD LIFE INS. CO.

(Supreme Court, Appellate Division, First Department. November 14, 1913.)

1. INSURANCE (§ 193*)—MUTUAL LIFE INSURANCE—ASSESSMENTS—MODIFICATION.

Where a contract of insurance provides for death assessments upon surviving members according to an annexed table of graduated assessment rates based on the age of members, and the table terminates at the age of 60 years, with a maximum rate of $2.68, the company cannot increase the rate on the prior contract to a rate above $2.68 after 60 years.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 430, 431; Dec. Dig. § 193.*]

2. INSURANCE (§ 26*)—FOREIGN COMPANY—JURISDICTION OF ACTION.

A court of this state has jurisdiction to order an accounting against a foreign insurance company, and to determine therefrom, in an action against it by a member, whether he has been and is being charged excessive rates on his insurance certificate, and thereupon to render judgment for any excess collected and enjoin such future collections.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.*]

3. INSURANCE (§ 26*)—FOREIGN COMPANIES—RIGHT TO REGULATE—ACTIONS—DEMURRER—GROUNDS.

In an action against a foreign insurance company to enjoin it from fixing and collecting alleged illegal rates, and asking an accounting, the question whether the court will attempt to regulate the internal affairs of a foreign company may not be raised by demurrer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.*]

Appeal from Special Term, New York County.

Action by Henry Sauerbrunn, Jr., against the Hartford Life Insurance Company. From an interlocutory judgment overruling its demurrer to the complaint, defendant appeals. Affirmed, with leave to withdraw demurrer and answer.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

John T. McGovern, of Providence, R. I., for appellant.

Hooker I. Coggeshall, of New York City, for respondent.

SCOTT, J. The action is brought upon several identical insurance contracts issued by defendant, an assessment company. Defendant is a Connecticut corporation. It is not alleged that plaintiff is at present a resident of this state; that defendant transacts any business in this state, or has any property therein. The contracts sued upon were made in 1881, within this state, whereof plaintiff was then a resident. They provide for the payment of an assessment upon the living contract holders whenever a death occurs, and a table is annexed to the contract showing the maximum rates of assessment to be levied, graduated according to the age of the person assured. According to this table a contract holder who has attained the age of 60 years is assurable at the rate of $2.68 per $1,000, and no greater rate of assessment is specified after the age of 60 years. The plaintiff claims, and with reason, that $2.68 per $1,000 per death is the most that he can

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

legally be charged, since, as he says, he became 60 years of age on January 15, 1900. Notwithstanding he has been assessed, as he says, since he became 60 years of age at a rate much larger than $2.68, which he has paid in ignorance of his legal rights. The relief demanded is: (1) An injunction to prevent further excessive and illegal assessments; (2) an accounting to ascertain the amount unlawfully assessed upon and collected from plaintiff since January 15, 1900, when he became 60 years of age; and (3) the recovery of whatever may be found to be due upon accounting. The defendant demurs: (1) That the court has no jurisdiction of the person of the defendant; (2) that the court has no jurisdiction of the subject-matter of the action; (3) that there is a defect of parties plaintiff and defendant.

An action similar to this was decided in favor of the plaintiff therein, and the judgment affirmed in this court and the Court of Appeals (Harrison v. Hartford Life Ins. Co., 63 Misc. Rep. 93, 118 N. Y. Supp. 401, affirmed without opinion 137 App. Div. 918, 122 N. Y. Supp. 1130; Id., 201 N. Y. 545, 95 N. E. 1130). It does not appear, however, that in that action any plea to the jurisdiction was interposed.

The defendant argues strenuously that this court will not entertain an action which has for its purpose the regulation of the internal management of a foreign corporation. This argument is based largely upon the supposed inconvenience of carrying on accountings in diverse jurisdiction, and the inability of the courts in this state to enforce a decree against a foreign corporation. This argument is supported by a considerable number of decisions in this and other states, and has recently been strongly asserted, in an action like this, against this same defendant in the Supreme Court of Missouri. State ex rel. Hartford Life Insurance Co. v. Shain, 245 Mo. 78, 149 S. W. 479. See, also, State ex rel. Minnesota Mut. Life v. Danton, 229 Mo. 187, 129 S. W. 709, 138 Am. St. Rep. 417.

[1, 2] The question is not one, however, to be raised by demurrer. It goes, not to the jurisdiction of the court, but to the question whether the court, having jurisdiction, will exercise it, and that depends upon whether or not the court could enforce a judgment if it made one. Strictly speaking, the action is one of which the court has jurisdiction, if the circumstances are such as to justify its exercise. It has jurisdiction of the person of the defendant because process has been served in the manner provided by law. That the complaint states facts sufficient to constitute a cause of action, and one of which the court has jurisdiction, has been established by Harrison v. Hartford Life Insurance Co., supra.

[3] The question which the defendant seeks to raise, and which has been so strenuously argued before us, can more properly be raised when the plaintiff applies to the court for judgment. It can then be determined to what judgment, if any, the plaintiff is entitled which the court can enforce.

It follows that the judgment appealed from must be affirmed, with costs, with leave to said appellant to withdraw its demurrer and answer within 20 days upon payment of all costs. All concur.

(159 App. Div. 887)

In re THIELE.

(Supreme Court, Appellate Division, First Department. November 14, 1913.)

ATTORNEY AND CLIENT (§ 54*)—PROCEEDINGS FOR PROFESSIONAL MISCONDUCT—SUSPENSION OF PROCEEDINGS.

It appearing in proceedings against an attorney on charges of professional misconduct that the controversy is principally a dispute between him and another attorney, formerly his partner, and that he has commenced an action against his former partner for an accounting, and claims that on that accounting a balance will be found due him, the proceedings will be suspended to give him a reasonable time to bring on the action, that the dispute may be tried out therein.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 73; Dec. Dig. § 54.*]

Proceedings against Carl L. Thiele, an attorney, on charges of professional misconduct. Proceedings suspended.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Einar Chrystie, of New York City, for petitioner.

G. E. Joseph, of New York City, for respondent.

PER CURIAM. This controversy seems to be principally a dispute between two attorneys at law who have dissolved partnership. It appears by the answer of the respondent that he has commenced an action against his former partner for an accounting, and he claims that on that accounting a balance will be found due him. I am inclined to think that these proceedings should be suspended so as to give the respondent a reasonable time to bring on his action against his partner, and thus have the dispute tried out in that action rather than in these proceedings. If the respondent fails to bring on that action for hearing within a reasonable time, or after the decision of the court in that action, the petitioner may move to continue these proceedings.

(159 App. Div. 881)

COHEN v. RATNER et al.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

TRIAL (§ 141*)—QUESTIONS OF LAW OR FACT—DIRECTION OF VERDICT.

Where, at the close of plaintiff's evidence, he had made out a prima facie case, and there was no evidence presented by defendants which established any defense, the court should have directed a verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

Appeal from Trial Term, New York County.

Action by Julius Cohen against Julius Ratner and others. From a judgment for defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Reversed, and new trial ordered.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Joseph Goldfein, of New York City, for appellant.
Edward Cahn, of New York City, for respondents.

PER CURIAM. At the close of the plaintiff's case he had made out a prima facie case, and there was no evidence presented by the defendants which established any defense. There should, therefore, have been a direction of a verdict in favor of the plaintiff.

The judgment and order should be reversed, and a new trial ordered, with costs to appellant to abide the event.

(82 Misc. Rep. 427)

OLIN v. UNITED ELECTRIC LIGHT & POWER CO.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. TRESPASS (§ 12*)—ENTRY BY DECEIT—SERVANT OF ELECTRIC LIGHT COMPANY—TURNING OFF CURRENT—UNPAID BILL.

Where defendant's cut-out inspector called at plaintiff's apartment and obtained entrance by pretense of a desire to read the electric meter, but, instead of reading or inspecting the meter, turned off the current, and, when asked for an explanation, said that it was because plaintiff did not pay his bills, and under the contract defendant was entitled to enter the apartment to read or inspect the meter and to turn off current, if bills were overdue and payment was refused after demand, but there was no unpaid bill owing from plaintiff to defendant at the time, the inspector's act constituted a trespass, for which defendant was liable.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 10; Dec. Dig. § 12.*]

2. TRESPASS (§ 12*)—REAL PROPERTY—MANNER OF ENTRY.

It is immaterial, except as to the amount of damages, whether a tortious entry is obtained by deceit, stealth, threats, force, or without actual consent; it being a trespass in either case.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 10; Dec. Dig. § 12.*]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Frank E. Olin against the United Electric Light & Power Company. From a Municipal Court judgment in favor of defendant on a verdict directed by the court, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Frederick W. Hamberg, of New York City, for appellant.
Beardsley, Hemmens & Taylor, of New York City, for respondent.

GUY, J. The action is brought for trespass in entering plaintiff's premises by trickery and wrongfully turning off the electric light without plaintiff's consent.

On December 2, 1912, about 4:30 p. m., after all bills due for electric light supplied to plaintiff by defendant had been paid, defendant's "cut-out inspector" called at plaintiff's apartment, rang the bell, and said he came to read the electric meter. He was given a chair, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the light turned on by the plaintiff's servant for him to read the meter. Instead of reading or inspecting the meter, he turned off the current. When asked why he was turning the lights off, he said, "Because you people do not pay your bills." Plaintiff's wife immediately called up on the telephone the defendant's Hamilton Place station, where she paid her bills; but all proof of what was said by her or defendant's representative was excluded, to which plaintiff excepted.

She was allowed to testify that, as a result of what was said, defendant sent a man to her apartment, who at 6:30 p. m. the same evening turned on the current. She mailed her check in payment of defendant's bill on November 29, 1912. The indorsement thereon shows that it was deposited by defendant in the bank on which it was drawn, and was also paid to defendant by that bank, on December 2, 1912. The defendant's bill was dated November 27, 1912, was received on November 27, 1912, part of the service charged therein was under date of November 11, 1912, and it seems to have been paid promptly.

The defendant's cut-out inspector testified that on December 2, 1912, he cut off the current as the result of a cut-off list he had had ever since November 29th, without, as he claims, either making any misrepresentations or using any force. His testimony is somewhat contradictory and unsatisfactory. But the direction of a verdict for the defendant establishes, for the purposes of this appeal, the truth of plaintiff's testimony in so far as there is any conflict as to details. Defendant's cashier testified to the receipt of plaintiff's wife's check for its bill, when he got to his office at 9 a. m. on the morning of December 2, 1912, in the first mail, and that he deposited it about noon.

[1] Under the contract defendant had a right to enter plaintiff's apartment to read or inspect the meter at all reasonable times; under the statute it had a right to enter and cut off the current if bills were overdue and payment was refused after a demand; 4:30 p. m. on a Monday afternoon was a reasonable time to read or inspect the meter or to cut off the current because of an unpaid bill; but at that time there was no unpaid bill, and the entering of the apartment for the pretended purpose of inspecting the meter, and then wrongfully turning off the current without plaintiff's consent, constituted a trespass for which defendant would be liable.

[2] It is immaterial, except as to the amount of damages, whether such a tortious entry is obtained by deceit, stealth, threats, force, or without actual consent; in any case it is a trespass. Dobbs v. Northern Union Gas Co., 78 Misc. Rep. 136, 138, 139, 137 N. Y. Supp. 785; Reed v. N. Y. & Richmond Gas Co., 93 App. Div. 453, 455, 87 N. Y. Supp. 810; Fortescue v. Kings County Lighting Co., 128 App. Div. 826–827, 112 N. Y. Supp. 1010.

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

EQUITABLE TRUST CO. OF NEW YORK v. WEHRENBERG.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

JUDGMENT (§ 152*)—DEFAULT—DISMISSAL.

After several adjournments, after issue joined, neither party appeared on the adjourned day, and the action was dismissed. Plaintiff moved to vacate the dismissal and to open its default, which motion was denied. *Held*, that by such dismissal the court did not lose jurisdiction, so as to preclude the granting of the motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 299; Dec. Dig. § 152.*]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by the Equitable Trust Company of New York against William Wehrenberg. From an order of the Municipal Court denying a motion to vacate a judgment of dismissal and to open plaintiff's default, plaintiff appeals. Reversed, and judgment vacated.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

McLear & McLear, of New York City, for appellant.

Antonio Ferme, of New York City, for respondent.

GUY, J. After several adjournments of the trial of this action, after issue joined, neither party appeared upon the adjourned day, and the action was dismissed. Subsequently the plaintiff moved to vacate the judgment of dismissal and to open its default, which motion was denied. From the order denying such motion, the plaintiff appeals.

The only objection raised against granting the plaintiff relief was that the court below had lost jurisdiction of the case and that plaintiff's only remedy was to begin a new action. This was error. Johnson v. Monahan, 47 Misc. Rep. 689, 94 N. Y. Supp. 351; Droege v. Herz, 48 Misc. Rep. 346, 95 N. Y. Supp. 570; Goldstein v. Mason-Seamon Trans. Co., 137 N. Y. Supp. 961.

Order reversed, judgment vacated, and a new trial ordered, with costs to appellant to abide the event. All concur.

FEIBER v. HOME SILK MILLS.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. EVIDENCE (§ 441*)—PAROL EVIDENCE—VARYING CONTRACT—PRIOR NEGOTIATIONS.

All parol negotiations prior to the signing of a written contract are merged therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. § 441.*]

2. MASTER AND SERVANT (§ 20*)—CONTRACT OF EMPLOYMENT—HIRING AT WILL.

A hiring at the rate of so much a year, without specifying any definite time of employment, is a hiring at will, which may be terminated at any time by either party.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 19; Dec. Dig. § 20.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from City Court of New York, Trial Term.

Action by Silas Feiber against the Home Silk Mills. From a judgment for plaintiff, defendant appeals. Reversed, and complaint dismissed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

George H. Bruce, of New York City, for appellant.

Kogan & Goldstein, of New York City (S. S. Kogan, of New York City, of counsel), for respondent.

GUY, J. The action was brought to recover for the breach of an alleged contract to employ plaintiff as a salesman for a year from February 15, 1913, at $3,000 per annum. The contract is in a letter, which reads:

"We herewith beg to confirm arrangement whereby you are to cover the Western territory for us with the retail trade, salary to be at the rate of $3,000 per annum, and your services to commence on February 15th, unless it is your judgment that it will be wise to start out a little earlier than this; in the meantime we would thank you to unofficially spend as much time as you care to in getting acquainted with our merchandise and mapping out a plan for the future. Trusting that the arrangement will be permanent and to our mutual benefit, we remain."

[1] All parol negotiations prior to the signing of the above letter are merged therein. Wightman v. N. Y. Life Ins. Co., 119 App. Div. 496, 498, 104 N. Y. Supp. 214. Because of a change in defendant's plans, plaintiff was discharged on March 15th. At the close of plaintiff's case, defendant moved to dismiss; the motion was denied, and defendant excepted.

[2] A hiring at the rate of so much per year, no time being specified, is an indefinite hiring; and such a hiring is a hiring at will, and may be terminated at any time by either party. Martin v. Insurance Co., 148 N. Y. 117, 121, 42 N. E. 416; United States v. U. S. Fidelity & Guaranty Co., 139 App. Div. 262, 264, 123 N. Y. Supp. 938; Outerbridge v. Campbell, 87 App. Div. 597, 599, 84 N. Y. Supp. 537; Granger v. American Brewing Co., 25 Misc. Rep. 701, 702, 55 N Y. Supp. 695.

Judgment reversed, with costs, and complaint dismissed, with costs. All concur.

(159 App. Div. 30)

GENUNG v. HAWKES.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

MECHANICS' LIENS (§ 207*)—AGREEMENT NOT TO FILE LIEN—BREACH.

Where an owner promised one who had furnished materials to a contractor for use in the repair of a building that, if the materialman would discount his account, furnish an estimate for the completion of the work, and not file a lien, the owner would pay the account, the agreement not to file a lien was an agreement not to file a notice of lien, and the filing of a notice, even though the materialman was not entitled to a lien, was a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

breach of the contract which precluded recovery by the materialman on the owner's promise.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 381; Dec. Dig. § 207.*]

Appeal from Judgment on Report of Referee.

Action by Sherman A. Genung against Frederick E. Hawkes, as sole executor of the last will and testament of Emma Toles, deceased, for closing of mechanic's lien upon defendant's property for material furnished to a contractor. From a judgment denying the right to lien but awarding money judgment in favor of the plaintiff and against the defendant for the amount claimed, the defendant appeals. Reversed, and complaint dismissed.

See, also, 147 App. Div. 380, 132 N. Y. Supp. 274.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Frederick E. Hawkes, of Waverly, for appellant.

Charles C. Annabel, of Waverly (James O. Sebring, of Corning, of counsel), for respondent.

SMITH, P. J. The action was originally brought to foreclose a mechanic's lien upon defendant's property for material furnished to one Mosier, who under contract was improving said property. The court has denied to the plaintiff the foreclosure of the lien on the ground that there were no moneys due from the owner to the contractor at the time of the filing of the lien. A money judgment, however, was awarded as against the defendant in favor of the plaintiff upon the ground that the defendant's testatrix had for a valuable consideration agreed to pay the debt. The case was originally brought on for trial before Mr. Justice Horton in the Sixth district. When his term of office expired, the case had not been decided, and it was stipulated that he might retain the case and decide the same as referee, so that the judgment was entered upon his decision as referee.

From the findings of the court it appears that the defendant's husband made a contract with one Mosier to make certain repairs upon the house upon defendant's property for between $800 and $900. The materials furnished by the plaintiff were furnished to Mosier as such contractor. Part of the materials went into the improvements upon defendant's property, and part of them went on some other house that Mosier was building. Mosier failed to perform his contract, so that the defendant was required to discharge him from further work upon the contract. The finding is to the effect that no moneys were thereafter due from the defendant to said Mosier. The finding of the referee is that after the discharge of Mosier the defendant's intestate agreed with plaintiff "that the plaintiff should discount his account 5 per cent., should make an estimate for her use of the amount that it would cost to complete the house at 31 Lyman avenue, and should not file a lien upon the said premises, and in consideration thereof she (the said Emma Toles) would pay the said account of the plaintiff for materials furnished, less the 5 per cent., without de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lay." This agreement was made upon August 12, 1909. About 12 days thereafter the plaintiff did file a notice of lien upon the property for these very materials furnished, and it was this lien that was sought to be foreclosed in this action. One of the contentions of the defendant is that the plaintiff has violated his part of the contract by the filing of the notice of lien. The learned referee has held otherwise. In his opinion he says:

"The promise of the plaintiff at the request of Mrs. Toles not to file a lien must, I think, be eliminated, for, if the plaintiff did not have a right to file a lien upon her premises, then there could be no consideration for her promise to pay the plaintiff's account. It has already been found that the plaintiff could not at this time have filed a lien upon the decedent's premises which would have been valid."

In this reasoning I am unable to follow the learned referee. As to the interpretation which must be given to the plaintiff's contract as found by the court, there can be no doubt. The object sought to be accomplished by the defendant's intestate was that there should be no notice of lien filed which might affect her credit and cause her annoyance, and the agreement of the plaintiff not to file a lien must fairly be deemed an agreement not to file a notice of lien. The filing of such notice, therefore, was a violation of the agreement on his part, which precludes him from recovering against the defendant's intestate upon the contract. The judgment thus awarded was therefore improper and must be reversed, with costs, and the complaint dismissed, with costs.

Judgment reversed, with costs, and complaint dismissed, with costs. All concur; KELLOGG, J., in result.

(82 Misc. Rep. 415.)

GREENBERG et al. v. GINSBERG et al.

(Supreme Court, Appellate Term, First Department. November 10, 1913.)

BILLS AND NOTES (§ 301*)—DISCHARGE OF INDORSER—EXTENSION OF TIME OF PAYMENT.

After the maturity of a number of notes, the holder and maker entered into an agreement by which the maker was to execute and deliver a participation certificate in a mortgage in part payment of the notes, and execute new notes for the balance due; the agreement further providing that the acceptance of such notes should not be construed to relieve, release, or discharge the parties thereto from the indebtedness previously accruing, that such liability should remain in full force and effect until full payment of the amounts due, and that the makers should have renewals of such notes for reasonable lengths of time upon payment of a small amount. The original notes were surrendered to the maker. *Held* that, under Negotiable Instruments Law (Consol. Laws 1909, c. 38) § 201, subd. 6, providing that a person secondarily liable on a negotiable instrument is discharged by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved, an indorser who was not a party to such agreement was discharged from liability on the original notes, since the effect of the agreement was to extend the time of payment of such notes and to make it impossible for the indorser upon payment thereof to proceed against the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

maker in subrogation of the holder's rights, at least during the time for which the extension was granted, and the provision that the agreement should not release or discharge the parties thereto from the previous indebtedness was not a reservation of the holder's rights against the indorser, who was not a party thereto.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 706–721; Dec. Dig. § 301.*]

Appeal from City Court of New York, Special Term.

Action by Isaac Greenberg and another against Harry Ginsberg and others. From an order denying his motion to vacate and set aside a judgment against him, the defendant named appeals. Reversed, and judgment vacated.

Argued November term, 1913, before LEHMAN, PAGE, and WHITAKER, JJ.

Foster & Cunningham, of New York City (Jos. J. Cunningham, of New York City, of counsel), for appellant.

Loeb, Bernstein & Ash, of New York City (Max Ash, of New York City, of counsel), for respondents.

PAGE, J. The plaintiffs furnished labor and material to the Gingold Realty Company, a corporation, and received in payment a number of promissory notes, executed by the Gingold Realty Company as maker, payable to the order of the plaintiffs, and indorsed by Abraham J. Goldstein, Moses A. Goldstein, and Harry Ginsberg, the appellant. After the maturity of these notes the plaintiffs entered into an agreement in writing with the Gingold Realty Company and Abraham J. Goldstein, dated September 27, 1912, which provided that the Gingold Realty Company should execute and deliver to the plaintiffs a participation certificate for $1,000 in a mortgage on New York City real estate in part payment of the amount due upon the notes and contained the further provisions as follows:

"Fourth. It is expressly understood and agreed that the remaining $1,028.47 due to the parties of the first part after the participation of $1,000 in the first mortgage, as hereinbefore described and agreed, shall be paid by notes executed by the Gingold Realty Company and indorsed by Abraham J. Goldstein in the following sums and due at the following time: $328.47 three months after the date of execution; $300 four months after the date of execution; $400 four and one-half months after the date of execution.

"Fifth. It is expressly understood and agreed that the acceptance of such notes for the indebtedness herein set forth shall nowise be construed to relieve, release, or discharge the parties hereto from the indebtedness previously accruing, and the liability shall remain in full force and effect until full payment of the amounts shall be made as herein set forth. That it is understood and agreed that the Gingold Realty Company and Abraham J. Goldstein shall have renewals of said notes herein mentioned for reasonable lengths of time upon payment of a small amount on said notes. * * *"

The participation certificate and the new notes were accepted by the plaintiffs pursuant to this agreement, and the old notes, including the one here in suit, were surrendered to the Gingold Realty Company, the maker and primary debtor. During all this time an action had been pending in the City Court against maker and indorsers of the last of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the old notes, which was one for $500, dated November 6, 1911. After the acceptance of the participation certificate and new notes by the plaintiffs as above set forth, and on March 3, 1913, the plaintiffs entered judgment by default against the defendant appellant, Harry Ginsberg, as indorser, for $550.30, which included protest fees, interest, and costs. The appellant moved to vacate the judgment on the ground that he had been discharged as indorser by the actions of the plaintiffs before the judgment was entered. This appeal is taken from the order denying his motion.

It is a well-established rule of law that an indorser of negotiable paper, like any surety, is entitled to have the engagement of the principal debtor preserved without variation, and any change or extension of time granted by the holder to the maker of a promissory note without the consent of the indorser discharges his liability as indorser unless the right of recourse against the indorser is expressly reserved. Negotiable Instruments Law (Consol. Laws 1909, c. 38) § 201, subd. 6. Both the object and effect of the agreement and subsequent transaction above set forth was undoubtedly to extend the time of payment of the old notes for the benefit of the maker, and as this defendant, Harry Ginsberg, was not a party to the agreement and in no way consented to it, his liability as indorser upon the note in suit was discharged (Dorlon v. Christie, 39 Barb. 610; Pomeroy v. Tanner, 70 N. Y. 547; Hubbard v. Gurney, 64 N. Y. 458), and the fact that the extension was granted after the maturity of the note is immaterial.

The plaintiffs attempt to take the case out of the operation of this rule by virtue of the fifth clause of their agreement above set forth, which they claim amounted to a reservation of their rights against the indorser. The agreement merely states, however, that the acceptance of the notes "shall nowise be construed to relieve, release, or discharge *the parties hereto* from the indebtedness previously accruing, and the liability shall remain in full force and effect until full payment of the amounts shall be made as herein set forth." Ginsberg was not, however, one of the parties to the agreement, and it is difficult to spell any reservation against him out of the language of the agreement. The entire transaction, including the surrender of the notes to the maker, would negative such a construction. Had Ginsberg determined to pay the note in suit after the execution of the above agreement, it would have been impossible for him to proceed against the maker in subrogation of the plaintiffs' rights and recover back the money which he had paid (Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130), at least during the interval for which the extension was granted. As indorser he is entitled to a strict application of the rule above stated, and under it he was undoubtedly discharged. National Park Bank v. Koehler, 204 N. Y. 174, 97 N. E. 468.

The order appealed from is reversed, with $10 costs and disbursements, and the judgment vacated. All concur.

(82 Misc. Rep. 422)

SIMERS v. GREAT EASTERN CLAY PRODUCTS CO. et al.

(Supreme Court, Appellate Term, First Department. November 10, 1913.)

ATTORNEY AND CLIENT (§ 75*)—RIGHT TO DISMISS.

While an action cannot be dismissed without an order of court, those rules do not apply to a motion to substitute attorneys; consequently a party may, without an order of court, withdraw a motion to substitute attorneys, where he offers the opposite party his costs.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110–119; Dec. Dig. § 75.*]

Appeal from City Court of New York, Special Term.

Action by George W. Simers against the Great Eastern Clay Products Company and others. From an order denying the motion of the Great Eastern Clay Products Company to vacate an order of substitution, it appeals. Order reversed.

Argued November term, 1913, before LEHMAN, PAGE, and WHITAKER, JJ.

Bruce R. Duncan, of Brooklyn, for appellant.

Liston L. Lewis, of New York City (John Vernou Bouvier, Jr., and W. Montague Geer, Jr., both of New York City, of counsel), for respondent.

WHITAKER, J. The order appealed from denied the application of the defendant to vacate an order in the same action, made by the same justice, dated February 24, 1913, and entered March 11, 1913. Prior to February 3, 1913, the above-entitled action was pending in the City Court. Liston L. Lewis, Esq., appeared as attorney for defendant Great Eastern Clay Products Company. About February 3, 1913, before issue was joined, the defendant petitioned the court to substitute Bruce R. Duncan, Esq., as its attorney in place of said Liston L. Lewis, Esq. The motion was returnable on February 14, 1913. On that day Mr. Lewis served on Mr. Duncan three affidavits in opposition. These affidavits it is claimed showed reasons why the motion to substitute Duncan for Lewis should be denied. The motion was adjourned from time to time in order to enable Mr. Duncan to obtain opposing affidavits, which affidavits Mr. Duncan was not able to obtain within the limited time before the hearing of the motion, which had been set for February 24th. On that day the parties appeared before the court. Mr. Duncan stated to the court that he was not ready because of his inability to procure certain affidavits in time, but that he would probably receive them the latter part of the week. The court thereupon stated that Mr. Duncan might serve his replying affidavits on Mr. Lewis on or before February 28, and that they should be submitted to the court on March 3, 1913. When the motion was called on February 24th, counsel for Mr. Lewis made some argument to the court. No papers, however, were submitted at that time, nor was any argument made by Mr. Duncan in support of the motion and in reply to Mr. Lewis' counsel. The court ordered that the matter should be finally submitted to it on March 3d.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Prior to March 1st Mr. Duncan became aware that he could not get the affidavits he required in time for March 3d, as the proposed affiants resided in Ohio. Mr. Lewis refused to give him additional time, and on March 1st Mr. Duncan served a written notice upon Mr. Lewis that the motion was withdrawn and tendered him $10 motion costs. Notwithstanding this notice and tender, of which the court had notice, the court proceeded on March 3d with the hearing. Mr. Lewis submitted his affidavits and papers in opposition to the motion, including two additional affidavits, copies of which were never served upon Mr. Duncan. Mr. Duncan did not appear, nor did he submit any papers. The court paid no attention to the withdrawal of the motion, heard Mr. Lewis, and denied the motion to substitute Mr. Duncan as attorney for the said defendant in place of Mr. Lewis. Thereafter Mr. Duncan, on behalf of the said defendant, made a motion to vacate the order denying the motion to substitute Mr. Duncan as attorney in place of Mr. Lewis. This motion was based upon the withdrawal of the original motion, and was made upon proper notice, and was heard by the same justice, and was denied. The said defendant and Mr. Duncan are now before this court upon the appeal from the order denying the motion to vacate.

The only question presented by this appeal is the right of Mr. Duncan to withdraw the motion for substitution in the manner in which he attempted to withdraw it. It may be conceded, I think, that a plaintiff cannot effectually discontinue an action without an order of the court. This has been settled by authority, and no discussion is necessary. The respondent argues that the withdrawal of a motion involves the same principles as the discontinuance of an action, and that the objections to the discontinuance of an action without an order of the court apply with equal force to the withdrawal of a motion. We disagree with the respondent's contention. In very many cases where an action has been begun reciprocal rights and remedies of the parties arise, especially where affirmative defenses or counterclaims are set up. In all such cases the defendant becomes to all intents and purposes a plaintiff. Of course, in such cases it would be inequitable to allow the plaintiff to arbitrarily discontinue as a matter of right upon his own motion. It is true there are also a number of actions where the defendant can in no way be hurt by an arbitrary right of plaintiff to discontinue. There are also actions in which the defendant may be justly entitled to disprove the allegations of plaintiff, notwithstanding that his property or pecuniary interests might be helped rather than hurt by such discontinuance. There being such a variety of reciprocal rights between litigants in an action, some of the rights affecting the property and some the persons of the parties, the courts have recognized it as a much safer and more just rule to require its order to discontinue actions in all cases, rather than leave it in the power of plaintiff.

This court can see no legal objection whatever to the withdrawal of a motion at any time before it has been finally submitted. Such withdrawal simply leaves the person opposed to the motion in precisely the same position as if the motion had not been made. It is certainly

optional with a litigant whether or not he will make a motion, and, having once made it, this court can see no reason or justice in compelling him to continue it, if he should become convinced that to continue it would be unwise or inexpedient. If it be necessary to get leave of the court to withdraw a motion, it follows as a necessary corollary that the court could decline to give such permission, the result of which would be to compel a litigant to ask and perhaps be compelled to receive something he does not want. If the motion should involve something which the litigant against whom it is made deems beneficial to him, or should such litigant ask affirmative relief in the same motion, it is possible a different rule might apply.

It seems to the court that the only right that the litigant has to object to the withdrawal of a motion is one of costs, and in the case under consideration costs were tendered. The case of Hoover v. Rochester Printing Co., 2 App. Div. 11, 37 N. Y. Supp. 419, is authority for the court's conclusion that Mr. Duncan had the legal right to withdraw the motion upon the payment or tender of costs. Having arrived at this conclusion, it necessarily follows that the court below, after having ascertained, either upon the original motion or upon the application to set aside the order denying the original motion, that the original motion had been withdrawn, should have granted the application to set aside the order.

Order reversed, with $10 costs and disbursements, and the motion to vacate the order of March 11, 1913, is granted, upon payment of $10 costs; costs of one party to be offset against those of the other. All concur.

BACHERT v. McKEE.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. SALES (§ 359*)—ACTIONS FOR PRICE—SUFFICIENCY OF EVIDENCE.
Evidence in an action for the price of goods sold *held* not to sustain a verdict for defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 511, 1056–1059; Dec. Dig. § 359.*]

2. SALES (§ 189*)—ACTIONS FOR PRICE—SUFFICIENCY OF EVIDENCE.
Evidence in an action for the price of calendars sold defendant *held* not to show that a substantial part of the calendars delivered was defective.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 504, 505; Dec. Dig. § 189.*]

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Albert Bachert against Robert W. McKee. From a judgment for defendant, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Hastings & Gleason, of New York City (Edward L. Dennis, of New York City, of counsel), for appellant.
W. Gibbes Whaley, of New York City, for respondent.

SEABURY, J. [1] While the amount involved in this case is small, it is plain that an injustice has been done. The evidence established that the defendant owed the plaintiff $11, whereas a judgment for $5 has been rendered against the plaintiff in favor of the defendant. Plaintiff sold and delivered certain calendars to the defendant, of the value of $11. The calendars were delivered in December, 1911. Statements of account were sent by plaintiff to defendant on February 1 and 29, on April 3 and 30, and on May 14, 1912. None of these statements was disputed by the defendant. The defendant retained the calendars until July, 1912, when they were returned to the plaintiff.

[2] The defendant claimed that the calendars delivered were incorrect and defective, but no satisfactory proof of this fact was given. The production of two of the calendars which had been improperly bound fell far short of establishing that a substantial part of all the calendars delivered were defective.

Judgment reversed, with costs, and judgment directed against the defendant for $11 and interest. All concur.

HIRSCHFELD et al. v. MONAHAN.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

JUDGMENT (§ 570*)—CONCLUSIVENESS—DISMISSAL.

A judgment dismissing the complaint because of plaintiffs' failure to make out a prima facie case is not an adjudication on the merits, which will support a plea of res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028–1034, 1036–1040, 1042–1045, 1165; Dec. Dig. § 570.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Harry Hirschfeld and Morris Beck, copartners doing business as Hirschfeld & Beck, against Terence E. Monahan. From judgment for defendant, plaintiffs appeal. Reversed and remanded.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Harry Weinberger, of New York City, for appellants.
Emanuel I. S. Hart, of New York City, for respondent.

BIJUR, J. It appears that the complaint was dismissed on the ground that the judgment in a previous action between the same parties on the same cause of action was rés judicata. The judgment in the previous action reads as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Judgment for the defendant dismissing the complaint, with costs. See memorandum filed. Dated April 11, 1913. Joseph P. Fallon, Justice."

The memorandum filed with the papers states:

"In my opinion the plaintiffs have not made out a case, and judgment is rendered in favor of defendant, dismissing the complaint, with costs."

This statement was introduced in evidence, and it was admitted that the defendant adduced no testimony on that trial. It is apparent, therefore, that the previous judgment was not on the merits.

Judgment reversed and new trial granted, with costs to appellant to abide the event. All concur.

(159 App. Div. 925)

ONONDAGA COUNTY MILK ASS'N v. STATE.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

STATES (§ 184*)—CLAIMS—DETERMINATION BY BOARD OF CLAIMS—REVIEW.

Determination by the Board of Claims of a claim for injuries to plaintiff's horse and wagon as a result of the alleged negligence of a bridge flagman in the employ of the state, based on conflicting evidence, will not be reversed by the Appellate Division on the facts.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 172–175; Dec. Dig. § 184.*]

Appeal from Board of Claims.

Claim by the Onondaga County Milk Association against the State of New York. From a determination of the Board of Claims awarding a claimant $285.80 for injuries to a horse and wagon backed off a bascule bridge over the Oswego Canal by an employé of the State, it appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Thomas Carmody, Atty. Gen. (Joseph P. Coughlin, of Albany, of counsel), for the State.

White & Barber, of Syracuse (Harry Barber, of Syracuse, of counsel), for respondent.

WOODWARD, J. The state of New York maintains and operates a bascule bridge over the Oswego Canal in North Salina street, Syracuse. The claimant is a domestic corporation engaged in buying and selling milk, delivered to customers in the city of Syracuse by means of horses and wagons driven by its servants. On the morning of the 13th day of June, 1911, Michael Rolio, an employé of the claimant, started from the plant of the company with a load of milk to be delivered to customers. He was using a covered wagon, and it is undisputed that as he approached the bridge in question he was looking ahead through the glass window in the wagon. He testifies that he was fully awake, having delivered one load of milk that morning before the then trip; that he was looking and listening; that when his horse and wagon were both upon the bridge he saw the defendant's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

flagman run out from a shanty on the far side of the bridge and wave a flag; that the flagman came forward, stopped his forward movement, and backed the horse off from the bridge, which was at that time being raised for the purpose of permitting a boat to pass through; and that the horse and wagon fell off the edge of the bridge, doing the injuries for which this complaint was entered.

There is a conflict of evidence upon the main facts. The state's witness claims to have seen the claimant's wagon when some 80 feet away from the bridge and to have given warning by the waving of the flag and calling to the driver, in the meantime having signaled the man who operated the bridge to lift the same; but the Board of Claims was not bound to believe this testimony, and it certainly is not entitled to be held to outweigh that of the claimant's witnesses. The case is one which no court would disturb as between private parties, and we see no reason for a different disposition here.

The determination appealed from should be affirmed, with costs. All concur.

(158 App. Div. 695.)

In re PRATT.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

EXECUTION (§ 420½, New, vol. 10 Key-No. Series) — SPECIAL EXECUTION AGAINST WAGES—ENFORCEMENT.

Under Code Civ. Proc. § 1391, authorizing the levy of execution against the wages of a judgment debtor and providing that, if the person or corporation, municipal or otherwise, to whom such execution shall be presented shall fail or refuse to pay over to the officer presenting the execution the percentage of the indebtedness, it shall be liable to an action therefor by the judgment creditor, the judgment creditor cannot compel compliance with the execution by motion but is put to his remedy by action; the statutory remedy being exclusive.

Appeal from Appellate Term, First Department.

Application by George W. Pratt for an order directing the Comptroller of the City of New York to comply with an execution issued on a judgment in favor of applicant against Eugene T. Lenahan. From an order of the Appellate Term reversing an order of the City Court denying a motion to direct the Comptroller to pay, the Comptroller appeals. Order of Appellate Term reversed, and that of the City Court affirmed.

See, also, 156 App. Div. 942, 141 N. Y. Supp. 1143.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Archibald R. Watson, Corp. Counsel, of New York City (William E. C. Mayer, of Brooklyn, of counsel, and Terence Farley, of New York City, on the brief), for appellant.

Mirabeau L. Towns, of New York City, for respondent.

CLARKE, J. Applicant Pratt sued one Lenahan in the City Court and obtained a judgment therein in his favor for $350. The judgment roll was duly filed; execution thereon was issued to the sheriff and returned wholly unsatisfied. Thereafter an order was obtained

under section 1391 of the Code of Civil Procedure directing issuance of execution against the wages, earnings, and salary due said Lenahan and in the hands of the comptroller of the city. The comptroller has failed, neglected, and refused to comply with the terms of said execution. Whereupon this application was made for an order to compel the comptroller to pay. The Special Term of the City Court denied the motion. On appeal the Appellate Term of the Supreme Court reversed said order and granted the motion. On leave granted by the presiding justice this appeal is taken by the comptroller and the city.

Section 1391 provides that:

"If such person or corporation, municipal or otherwise, to whom such execution shall be presented, shall fail, or refuse to pay over to said officer presenting said execution, the percentage of said indebtedness, he shall be liable to an action therefor by the judgment creditor named in said execution."

The statute itself having provided the remedy by action against the person or corporation refusing to pay upon presentation of such an execution, such remedy is exclusive. There is no authority to proceed by way of summary order.

The order of the Appellate Term is therefore reversed, and the order of the City Court affirmed, with $10 costs and disbursements in this court and the Appellate Term. All concur.

(158 App. Div. 733.)

LEWIS v. CITY REALTY CO.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. PLEADING (§ 349*)—JUDGMENT ON THE PLEADING—PROPRIETY.

Plaintiff alleged by paragraph 5 of the complaint that defendant neglected to comply with an agreement to exchange land which required it to pay $5,000 and convey its property, to plaintiff's damage in the amount of $12,000. The answer denied all of the allegations of paragraph 5 of the complaint save that it had not paid plaintiff the sum of $5,000 or conveyed the land. *Held*, that the answer did not admit the amount of the damage, and hence a judgment for plaintiff on the pleadings was improper, as plaintiff's damages should be assessed under Code Civ. Proc. § 1183, providing that in an action to recover a sum of money only, if there be a verdict for plaintiff, the jury must assess the amount of the damage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1067–1069; Dec. Dig. § 349.*]

2. PLEADING (§ 327*)—BILL OF PARTICULARS—OFFICE OF BILL.

A bill of particulars cannot aid the pleadings by showing the value of the property, in an action for breach of a contract to exchange, and thus entitle plaintiff to judgment on the pleadings; defendant having admitted its breach.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 993, 994; Dec. Dig. § 327.*]

3. APPEAL AND ERROR (§ 679*)—RECORD.

Where the bill of particulars is not contained in the record before the appellate court, it cannot aid the judgment on the pleadings by showing the amount of the damage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2878, 2879; Dec. Dig. § 679.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, New York County.

Action by Minnie Lewis against the City Realty Company. From a judgment dismissing the counterclaim interposed by defendants and giving judgment for plaintiff on the pleadings, defendant appeals. Reversed and remanded.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Geo. E. Blackwell, of New York City, for appellant.

Isaac N. Miller, of New York City, for respondent.

DOWLING, J. [1] The action is brought to recover alleged damages for breach of a contract for the exchange of real estate. The allegations of the complaint setting forth the damages claimed to have been sustained by the plaintiff are contained in paragraph 5 as follows:

"The defendant neglected to comply with the terms of the agreement on its part and wholly failed to pay the said $5,000 and to convey to this plaintiff the said premises situated in the borough of Roselle Park, in the county of Union, and state of New Jersey, to the damage of the plaintiff $12,000."

The defendant by its answer denied all the allegations contained in said paragraph 5 save that it had not paid the plaintiff the sum of $5,000 therein referred to and had not conveyed to her the premises in question in New Jersey. Upon this state of the pleadings it was improper to direct an entry of the judgment in the sum of $12,000 in favor of the plaintiff. The defendant had put in issue the amount of the plaintiff's damage, and, even though no issue was left as to the breach of the contract, the amount of damages sustained should have been assessed pursuant to section 1183, Code of Civil Procedure, and there should not have been a direction for judgment. The complaint contains no averment of the value of the property in New Jersey, and the defendant has made no admission as to the same.

[2, 3] It is now claimed, in the effort to sustain the judgment, that the bill of particulars did set forth the value of that property, but that would not have supplied the defect in the complaint, and in any event it is not available here, for the bill of particulars is not before us.

It follows, therefore, that the judgment appealed from must be reversed, and a new trial ordered, in order that the damages sustained by the plaintiff, if any, may be properly assessed by a jury. In so far as the judgment dismissed the counterclaims, we think it was properly granted. All concur.

(158 App. Div. 818.)

WILLIAMS v. POST et al.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

1. ABSENTEES (§ 6*)—COLLECTION OF ASSETS—PETITION.

An administrator of infant heirs, petitioning to have their interest in the proceeds of land, sold in partition on deposit with the State Treasurer under order of court to the credit of the action, delivered to petitioner, must show the death of the infants at such time as would give

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

him title to the fund, and the issuance of letters of administration on the infants' estates cannot operate as an adjudication that they died after reaching their majority.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 12, 13; Dec. Dig. § 6.*]

2. CONVERSION (§ 7*)—NATURE—PERSONAL PROPERTY.

The proceeds of infants' interest in land held as tenants in common and sold at a partition sale would become personal property if and when the infants attained their majority.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 13–15; Dec. Dig. § 7.*]

3. ABSENTEES (§ 6*)—COLLECTION OF ASSETS—EVIDENCE.

Evidence in application by an administrator in 1913 to obtain moneys paid into court as the share of his intestates in the proceeds of a partition sale of land in 1838 *held* insufficient to show that the decedents, who were infants of five and seven years when the decree was entered, survived until they reached majority.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 12, 13; Dec. Dig. § 6.*]

4. DEATH (§ 2*)—PRESUMPTIONS.

One who disappears from his home or ordinary place of residence and ceases to communicate with relatives or friends and is not heard from and cannot be discovered with reasonable inquiry will be presumed to be dead after a lapse of seven years.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1–3; Dec. Dig. § 2.*]

5. EXECUTORS AND ADMINISTRATORS (§ 39*)—TITLE OF ADMINISTRATOR—LAND.

An administrator could obtain no title to land after it ceased to be personalty and was converted into land.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 280, 285–294; Dec. Dig. § 39.*]

6. DESCENT AND DISTRIBUTION (§ 30*)—PERSONS TAKING.

Under Decedent Estate Law, § 84 (Consol. Laws 1909, c. 13), providing that if the mother be dead an inheritance descending from a child on the mother's part shall go to the father for life, and the reversion to the brothers and sisters, and, if there be no brothers and sisters or their descendants, shall go to the father in fee, the father would take the entire fund representing realty where the children died without issue after their mother's death and left no brother or sister or descendant of such.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 84–90; Dec. Dig. § 30.*]

Appeal from Special Term, New York County.

Proceeding by James Williams against Sylvanus Post and others. From an order granting the petition of Charles W. Moon, as administrator, and directing the State Comptroller to draw and deliver to petitioner's attorney in fact his warrant on the Treasurer for certain moneys in the hands of the State Comptroller to the credit of the action for the benefit of certain decedents, the People and others appeal. Reversed, and proceeding dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Robert P. Beyer, Deputy Atty. Gen., for appellants.

George W. Carr, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LAUGHLIN, J. One Jacob Post, who died in the year 1835 or 1836, and the plaintiff owned a farm as tenants in common, and after Post's death a suit was brought in the Court of Chancery for a partition or sale thereof. Post left a widow and three children and two grandchildren, being the children of a deceased daughter, Mary Brown, as his heirs at law and next of kin. They were parties to the action. Final judgment under which the premises were sold and the proceeds, with the exception of that part representing the interest of the grandchildren, were distributed, was entered in 1838. The grandchildren were Jacob Levi Brown and Mary Elizabeth Brown, and they were then five and seven years of age, respectively. The proceeds of the sale representing their interests were deposited with register of the court and subsequently transferred to the chamberlain of the city of New York and were thereafter duly transferred by orders of the Supreme Court and of the Appellate Division to the custody of the Treasurer of the state of New York to the credit of this action, subject to the warrant of the State Comptroller to be drawn pursuant to an order to be made by the court under section 751 of the Code of Civil Procedure. The petitioner applies for this fund on the theory that said grandchildren are dead, and he shows that nothing has been known of, or heard from, them by their relatives since the final decree of the court in 1838. Letters of administration on the estates of the two grandchildren were duly issued to the petitioner on the 10th day of March, 1913, by the Surrogate's Court of the county of New York.

[1] It is not at all clear that that was even an adjudication binding on this application that the grandchildren are dead (see Carroll v. Carroll, 60 N. Y. 121, 19 Am. Rep. 144; Marks v. Emigrant Industrial Savings Bank, 122 App. Div. 661, 107 N. Y. Supp. 491, and cases cited); but in no event was it an adjudication with respect to the time of their death, and it was incumbent upon the petitioner to show death at a time which would give him title to the fund (Eckersley v. Curran, 143 N. Y. Supp. 662, Appellate Division, Second Department, September 23, 1913).

[2] It is conceded that the fund when first deposited in court remained real estate, but under the authorities it became personal property if the infants lived and attained their majority. Horton v. McCoy, 47 N. Y. 21; Matter of McMillan, 126 App. Div. 155, 110 N. Y. Supp. 622.

[3] The petition to the Surrogate's Court for the appointment of administrators of the estates of the deceased grandchildren was made by their first cousins and first cousins once removed on their mother's side, and it is shown by the petition and by the affidavit of the attorney for the administrator that the records and proceedings in the partition suit show that the grandchildren, whose interests are involved in this proceeding, at the time of the final decree in the partition suit were living with their grandmother, the widow of their grandfather, from whom they inherited the estate, in the city of New York. It further appears by said petition and by the affidavits of two of the petitioners, none of whom, however, ever knew or heard of the deceased grandchildren, that their grandmother, with whom it otherwise ap-

pears, as already stated, the grandchildren resided in 1838, continued to reside, from the earliest recollection of the affiants, one of whom was 72 years of age in 1912, with her son, their uncle, at Uniontown, near Hastings on the Hudson, N. Y., until 1870, when she died and was buried at Dobbs Ferry, N. Y.; that from their earliest recollection they talked with her concerning their relatives and that she never made any allusion to the deceased grandchildren, from which they infer and allege on information and belief that said grandchildren must have died soon after 1838 and within seven years thereafter, and before attaining their majority, intestate, without issue and unmarried.

[4] The learned Deputy Attorney General contends that on these facts there is a legal presumption that the infants died within seven years of the final proceedings in the partition suit, and he cites as authority therefor the cases of Barson v. Mulligan, 191 N. Y. 306, 84 N. E. 75, 16 L. R. A. (N. S.) 151, and Matter of Benjamin, 155 App. Div. 233, 139 N. Y. Supp. 1091. Those decisions establish the rule that the death of a person disappearing from home or where he resided without communicating with relatives or friends, and without anything being heard from him, or discoverable on reasonable inquiry, will be presumed after the lapse of seven years. The facts were somewhat different in the proceeding at bar, for there is no evidence that the grandchildren ever *left* the place where they were living in 1838. That, however, I think, rather strengthens than weakens the case, for it would seem to be a reasonable inference that, if they were living in this vicinity, their cousins, who appear to have been on intimate terms with their grandmother, would have some recollection of, or information concerning, them; and, as one of the cousins was born in 1840, she would probably have some knowledge or information on the subject, had they been living as late as 1845. However, it is not necessary to decide whether or not, on these facts, it is to be presumed that they died within seven years after 1838. It is sufficient to defeat the application if there is a presumption that they died before attaining the age of 21 years. Had they lived, one would have become 21 in 1852 and the other in 1854. One of the cousins who makes affidavit was 12 years of age in 1852, and, if the grandchildren were then living with their grandmother, it is reasonable to infer that she would remember the fact.

[5] It was, as already stated, however, incumbent upon the petitioner to show that the grandchildren lived to attain their majority, for otherwise, since the fund remained real estate until that time, he obtained no title thereto. Eckersley v. Curran, supra; Priester v. Hobloch, 70 App. Div. 256, 75 N. Y. Supp. 405; Dunning v. Ocean Nat. Bank, 61 N. Y. 497, 19 Am. Rep. 293; Corley v. McElmeel, 149 N. Y. 228, 43 N. E. 628; Matter of Monroe, 142 N. Y. 484, 37 N. E. 517.

The learned counsel for the respondent attempts to support the order on the further ground that all of the heirs at law and next of kin of the grandchildren on their mother's side, who were of full age, excepting those representing a one-eighth interest, joined in the application to the Surrogate's Court for the appointment of the admin-

istrator for the sole purpose of collecting these moneys. The order cannot be sustained on that ground, for there is no assignment of the interest of the heirs at law and next of kin to the administrator.

There is, however, another fatal objection to the order. Counsel for appellants contends that the interest of the deceased grandchildren descended to their father, who survived them and appears to have been living until 1845 at least, and the only evidence tending to show his death at or about that time is hearsay and not even family tradition, for it was not shown that the individual who so stated to the attorney for the petitioner was related to the decedent. It is contended by counsel for the appellants that, although the property descended to the decedents from the grandparent on the mother's side, their father took the entire estate because the inheritance did not come to them on the part of their mother, since it came, not from her, but from the grandparent, and he cites in support of that contention the statute (section 84, Decedent Estate Law; chapter 13, Consol. Laws, being chapter 18, Laws of 1909), which provides in part:

"If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living."

It is, however, provided by subdivision 2 of section 80 of the same law that:

"The expressions 'where the inheritance shall have come to the intestate on the part of the father' or 'mother,' as the case may be, include every case where the inheritance shall have come to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent."

The corresponding provisions of the Revised Statutes as they existed in 1838, from which these statutory provisions were derived, were construed by the Court of Appeals in Morris v. Ward, 36 N. Y. 587, and it was there held that where an estate in reversion was conveyed as a gift to a great-grandson by his great-grandfather on his mother's side, and he died intestate without issue, his father took only an estate for life in the reversion.

[6] Under another provision of said section 84 of the Decedent Estate Law, it is perfectly clear that if the grandchildren died without issue, unmarried, and intestate, leaving their father surviving, he would take the entire fund on the death of the surviving grandchild, for their mother was dead, and they left neither brother nor sister nor any descendant of a brother or sister; and, if it had become personal property, he would likewise take it. Section 98, subd. 7, Decedent Estate Law. The evidence, therefore, is insufficient to show that the heirs or next of kin of the grandchildren on their mother's side took the fund in question.

It follows that the order appealed from should be reversed, with $10 costs and disbursements, and the proceeding dismissed, with $10 costs. All concur.

(159 App. Div. 19)

PEOPLE v. WILLARD.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

1. CRIMINAL LAW (§§ 510, 511*)—TESTIMONY OF ACCOMPLICES—NECESSITY OF CORROBORATION.
A jury may not convict a defendant upon the testimony of an accomplice alone, and his testimony must be corroborated in each essential detail.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126, 1128–1137; Dec. Dig. §§ 510, 511.*]

2. CRIMINAL LAW (§ 511*)—CORROBORATION OF ACCOMPLICE—SUFFICIENCY.
On a trial for receiving stolen goods, evidence *held* insufficient to corroborate an accomplice's testimony connecting accused with the goods.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. § 511.*]

3. WITNESSES (§ 383*)—IMPEACHMENT—INCONSISTENT STATEMENTS.
On a criminal trial where a witness denied on cross-examination that he had stated he did not want to confess because it would involve some one whom no one suspected, another witness was properly permitted to testify that he made such statement for the purpose of discrediting the first witness, though this evidence had no legitimate bearing on accused's guilt.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.*]

Appeal from Fulton County Court.

James R. Willard was convicted of receiving stolen property, and he appeals. Reversed, and new trial granted.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Eugene D. Scribner, of Gloversville, for appellant.

W. S. Cassedy, Dist. Atty., of Gloversville, for respondent.

SMITH, P. J. [1] The defendant has been convicted of having received stolen property with knowledge of the fact that same was stolen. Upon this appeal he contends that his conviction was not justified by the evidence. The details of the crime and of the defendant's participation therein were told by one Gallup, an accomplice. This was denied positively by the defendant, whose story was in part substantiated by a clerk in the defendant's store. So far as appears, the defendant had borne a good reputation, while the reputation of the accomplice was bad. Under our Criminal Law the jury is not allowed to convict a defendant upon the testimony of an accomplice alone. The story must be corroborated, and corroborated in each essential detail.

As to the fact that the goods in question were stolen, the accomplice is fully corroborated. As to the connection of the defendant therewith, I am unable to find any corroboration which satisfies the requirement of the law.

[2, 3] The story of the accomplice is that he and one Walton went to the defendant to borrow some money; that the defendant told them that he would loan them no money, but, if they would get goods from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a peddler in the town, he would buy those goods of them. They thereupon stole some goods of this peddler and brought them to the defendant, who paid them a small sum therefor. Thereafter the accomplice was charged with having stolen the goods and promised to return them, saying that they were stowed away in some woods near by. He went out of the justice's office and was seen to go at once into the front door of the defendant's store and thereafter to come from a street which connected with an alleyway which went to the back of defendant's store. There is evidence of one witness from which it is claimed that he came from this alleyway thereafter. On the record, however, it is not clear as to what the witness intended to swear upon this subject. There were sheds in the back of the lot upon which was defendant's store, access to which was had by this alleyway. There is no evidence that any one saw the accomplice speak to the defendant as he passed through the store, and no corroborating evidence that the defendant ever had possession of these goods. For all that appears, they might have been stored in those sheds back of the store without defendant's knowledge. Walton was a witness upon the stand, and upon cross-examination he was asked whether he had not stated that he did not want to confess because it would involve some one whom no one had suspected. He denied having made that statement, and another witness was brought upon the stand who swore that that statement was made by him. That was proper evidence to discredit Walton. It was no legitimate evidence, however, as against Willard. It had no legitimate bearing to prove that the defendant was involved in the crime. Still such evidence might have great weight with a jury in inducing the belief that Willard was a party to the crime. But the question is not one of weight of evidence so much as of entire absence of such evidence corroborating the testimony of the accomplice as the law requires in order to sustain a conviction. The judgment of conviction, therefore, must be reversed, and a new trial granted in County Court of Fulton county, to which the case is remitted.

Judgment of conviction reversed, and new trial granted in the County Court of Fulton county, to which court the case is remitted. All concur.

(82 Misc. Rep. 436)

KLEINMAN v. AUERBACH.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. FRAUDS, STATUTE OF (§ 33*)—ANSWERING FOR ANOTHER'S DEBT—INDEPENDENT PROMISE.

It appeared that defendant was a mortgagee of the premises on which plaintiff worked and was interested in the construction of the building, and that such work enhanced the value of the premises. Plaintiff, who contracted with the owner to construct the building, refused to continue after certain payments were in arrears, whereupon defendant promised that, if plaintiff would resume and complete the work without filing a mechanic's lien, he would pay plaintiff the money due, and plaintiff, relying on such promise, completed the work. *Held*, that defendant's promise to plaintiff was not within the statute of frauds, as being one to answer for another's debt; an independent consideration having moved to de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendant by the completion of the work by reason of his interests in the premises.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 50–53, 56; Dec. Dig. § 33.*]

2. CONTRACTS (§ 333*)—ACTIONS—ALLEGATIONS OF COMPLAINT—PROMISE.

An allegation of a complaint, in an action on defendant's agreement to pay plaintiff the amount due him from the owner for constructing a building, after plaintiff had refused to continue the work on the owner's default in payments, that thereupon defendant promised that if plaintiff would resume the work and complete it without filing a lien he would pay the money due to plaintiff, sufficiently alleged that defendant promised plaintiff to pay him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1196, 1640–1657, 1659; Dec. Dig. § 333.*]

Appeal from City Court of New York, Trial Term.

Action by Isidor Kleinman against Mayer S. Auerbach. From a judgment for defendant, plaintiff appeals. Reversed, and demurrer to answer sustained.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Nathaniel Choloney, of New York City, for appellant.

Hays, Hershfield & Wolf, of New York City (Ralph Wolf and Beno B. Gattell, both of New York City, of counsel), for respondent.

BIJUR, J. Plaintiff sues for work done in constructing a building. He alleges that defendant and an associate were mortgagees under both a first mortgage and a second mortgage or building loan; furthermore "that defendant * * * was interested in the performance and progress of the work, * * * as said work tended to and did enhance the value of said premises," etc. Plaintiff, having made an agreement with the owner to do the construction work, declined to go on when certain payments became in arrears. Thereupon defendant promised that if plaintiff would resume the work and complete it, and abstain from filing a mechanic's lien, he would pay plaintiff the moneys due, at the same time saying that he had enough money on hand out of the new building loan to pay the amount which he promised. Plaintiff, relying on this promise, resumed the work, finished it, and abstained from filing a mechanic's lien.

[1] The defense demurred to is that defendant's promise was one to answer for the debt, default, or miscarriage of another, was not in writing, and was, therefore, void under the statute of frauds. I think that the decision in Mechanics' Bank v. Stettheimer, 116 App. Div. 198, 101 N. Y. Supp. 513, is decisive of this case. The promise in the case at bar is an original promise, as described in the third category laid down by Mr. Justice Ingraham in the Mechanics' Bank Case, at page 202 of 116 App. Div., page 516 of 101 N. Y. Supp.:

"Where, although the debt remains, the promise is founded on a new consideration *which moves to the promisor.*"

Defendant's interest in the premises, as set forth, is sufficient warrant for holding that a benefit moved to him by the completion of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

work. See Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826. This point is emphasized by the distinction drawn in Mallory v. Gillett, 21 N. Y. 412, where the promisor had no such interest. See, also, Bruce v. Burr, 67 N. Y. 240; Cardell v. McNiel, 21 N. Y. 336; Milks v. Rich, 80 N. Y. 269, 36 Am. Rep. 615; Brookline National Bank v. Moers, 19 App. Div. 155, 45 N. Y. Supp. 997; Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516; Almond v. Hart, 46 App. Div. 431, 61 N. Y. Supp. 849; Schild v. Eckstein Brewing Co., 108 App. Div. 50, 95 N. Y. Supp. 493; Breen v. Isaacs, 49 Misc. Rep. 127, 96 N. Y. Supp. 741.

[2] Respondent makes a claim that the complaint is not good, because it is not alleged that the defendant promised to the plaintiff to pay him. I think, however, that the allegations of the complaint sufficiently show an agreement made between plaintiff and defendant, and plaintiff's performance thereof.

Judgment reversed, with $10 costs and disbursements, and demurrer of plaintiff sustained, with $10 costs, with leave to defendant to serve an amended answer within six days after service of a copy of the order entered herewith, with notice of entry of the same in the City Court, upon payment of costs in this court and in the court below. All concur.

BUTLER v. R. P. BOLTON CO.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

MASTER AND SERVANT (§ 43*)—WRONGFUL DISCHARGE—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an employé's action for damages for wrongful discharge *held* to make it a jury question whether the contract of employment existed on a certain date.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 57, 58; Dec. Dig. § 43.*]

Appeal from City Court of New York, Trial Term.

Action by Joseph F. Butler against the R. P. Bolton Company. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Moos, Prince & Nathan, of New York City (Alfred B. Nathan, of New York City, of counsel), for appellant.

Richard S. Harvey, of New York City (Lewis Squires, of New York City, of counsel), for respondent.

BIJUR, J. Plaintiff sued for breach of a contract of employment. He testified that while in the employ of defendant, apparently on a weekly arrangement, he had a talk with the president of the defendant on June 30, 1911, at which the following conversation occurred:

"Mr. Bolton said: 'Butler, I don't want to lose you. We are very busy here. I am glad I got you back. I have got a year's work for you to do, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

I want you to do it.' I said: 'Mr. Bolton, if you tell me to stay,' I said, 'your word is good enough for me. I will stick. I will turn down this other proposition.' Mr. Bolton said: 'I want you to stay. We are busy, and we have got this year's work. You are the man to do it, and I want you to do it.'"

He further testified that the salary "was to be the same as before," namely, $40 per week. A few days later, July 5, 1911, plaintiff, on learning from the vice president, during the absence of the president, that he was to be discharged, wrote Mr. Bolton a letter, in which he said, among other things:

"On Saturday we had a little talk together, and as above stated I gathered that you wanted me to stay with you. * * * Now, as you asked me not to do anything until you returned, and I promised not to, I do not relish being pitched out by the heels so summarily."

The motion to dismiss was made on the ground that "upon the plaintiff's own written admission and sworn testimony there was no evidence of any contract being in existence on June 30th," and the written admission is specified as being the letter of July 5th, to which I have referred. It seems to me that the plaintiff gave ample evidence of an oral agreement of employment for a year, and that the significance of an admission to the contrary in his letter of July 5, 1911, if such it be, was a matter to be determined by the jury.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

MARX v. WHITE CO.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. ACCORD AND SATISFACTION (§ 11*)—ACCEPTANCE OF CHECK MARKED IN FULL PAYMENT.

Where defendant wrote plaintiff, inclosing a statement purporting to show its entire indebtedness to plaintiff, and a check indorsed "in full settlement as per contract," which plaintiff deposited and used, there was an accord and satisfaction, though the check was indorsed by plaintiff's son, who had authority to indorse checks for deposit, without plaintiff's having seen it, and plaintiff wrote two days later that it would be credited on account.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75–82; Dec. Dig. § 11.*]

2. CONTRACTS (§ 232*)—MODIFICATION—ALTERATION OF TERMS.

Plaintiff cannot recover for extra work in addition to the amount called for by contract, where such extra work was only a modification of the contract, changing the character of some of the work to be done, and such modification was made before the contract was accepted.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1071–1094; Dec. Dig. § 232.*]

Appeal from City Court of New York, Trial Term.

Action by George B. Marx against the White Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles M. Russell, of New York City (Walter L. Post, of New York City, of counsel), for appellant.
Abraham Nelson, of New York City (William V. Zipser, of New York City, of counsel), for respondent.

BIJUR, J. This action was brought to recover for the price of 20 automobile bodies.

[1] One decisive point in the case requires a reversal of the judgment. It appears, without contradiction, that after a prolonged dispute as to the amount due from defendant to plaintiff, defendant wrote:

"We inclose our check for $132.59, together with statement showing our entire indebtedness to you on the Gimbel bodies. This statement is in accordance with the contract. * * *"

The check inclosed was indorsed:

"In full settlement as per contract."

The check was deposited and used by the plaintiff, and two days later plaintiff wrote defendant:

"Your check for $132.59 received, for which we will credit your account. * * *"

There can be no doubt that this would have constituted an accord and satisfaction as pleaded, were it not for the point raised by the plaintiff respondent to the effect that he himself never saw the check, but that it was indorsed by his son, who had authority "to indorse for him," and who was authorized "to sign for him," and who was his bookkeeper. He also said of his son:

"He has only a right to indorse checks for deposit; that is all."

Even if the authority of the son was not so extensive that the plaintiff was bound by his acceptance of the check with the qualifying indorsement, the accompanying letter which the plaintiff received sufficiently indicated that the check was in settlement of the account after a dispute. On familiar principles, an accord and satisfaction was thus established.

[2] Respondent's further claim that he is, at all events, entitled to recover for a further sum for "extra work," is disposed of by the conceded fact that the so-called "extra work" was only a modification of the contract, changing the character of some of the work to be done, and that such modification was made before the contract was accepted.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

(82 Misc. Rep. 451)

PETERSEN et ux. v. HUDSON P. ROSE CO.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

COURTS (§ 188*)—MUNICIPAL COURT—EQUITABLE JURISDICTION.

The Municipal Court of the City of New York, having no equitable jurisdiction except as expressly authorized by statute, in the absence of statutory authority therefor, may not rescind a contract for the sale of land on the ground of mutual mistake.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 439, 440, 442, 447, 448, 451, 452, 454, 458, 464, 465, 467, 468; Dec. Dig. § 188.*]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Martin Petersen and Anna Petersen, his wife, against the Hudson P. Rose Company. From a judgment for plaintiffs, defendant appeals. Reversed, and complaint dismissed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Franklin Pierce, of New York City (William Langdon, of New York City, of counsel), for appellant.

Kindleberger & Robinson, of New York City (Charles P. Robinson, of New York City, of counsel), for respondents.

SEABURY, J. The complaint alleges a cause of action for money had and received, and demands judgment for $848.37. The complaint alleged that plaintiffs were prospective purchasers of certain parcels of real property located in the town of Greenburg, Westchester county, N. Y., and that the defendant offered to sell the same to the plaintiffs for $1,400, $100 of this sum to be paid on the signing of the contract of sale, and the balance at the rate of $15 a month; that defendant exhibited a map to plaintiffs, and represented the real property aforesaid was designated on said map as lots 82, 83, and 84; that the contract of sale prepared by defendant designated the lots by the numbers referred to on said map; and that the plaintiffs signed said contract of sale, relying upon the aforesaid representations. The contract further alleges that the property described in said contract was not the property referred to on said map. The present action is brought to recover the money which the plaintiffs paid the defendant on account of said contract. No question of fraud is involved; the allegations of the complaint averring fraud having been expressly withdrawn.

Upon the trial, the court below submitted to the jury the issue whether the contract was entered into as a result of a mutual mistake of fact. The jury answered this question in the affirmative, and judgment was rendered in favor of the plaintiff. The judgment entered in effect declares the contract rescinded, and awards judgment as if there had been no contract entered into between the parties. To accomplish this result required the exercise of chancery powers, which were beyond the jurisdiction of the Municipal Court of New York. That court is without equitable jurisdiction, except to the limited ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tent expressly authorized by statute. There is no statutory authority for rescinding the contract on the ground of mutual mistake, which was what was attempted to be done in this case. The language employed by Mr. Justice Woodward in Earle v. Rafalovitz, 145 App. Div. 537, 539, 129 N. Y. Supp. 870, 872, is applicable to this case. In that case Mr. Justice Woodward said:

"Setting aside an executed contract is clearly not within the province of a court of law, and yet the Municipal Court, without any jurisdiction of an equitable nature, has in a simple action at law given judgment which could only come properly through an equitable action. Plaintiff's counsel attempts to justify the judgment on the authority of certain cases which hold that a defendant may interpose an equitable defense for the purpose of defeating an action in the Municipal Court, where no affirmative relief is asked; but how this can give the plaintiff any rights it is difficult to understand. In the first place, the plaintiff specially disclaimed upon the trial that there was any fraud claimed. All that was claimed was a mutual mistake, and the plaintiff has asked to be relieved from that alleged mutual mistake, which is a matter exclusively of equitable jurisdiction, and to recover a substantial amount of money. She has had affirmative relief in a court which is denied all power to give other than legal remedies, and there are no authorities which justify the judgment."

Judgment reversed, with costs, and complaint dismissed, with costs. All concur.

(82 Misc. Rep. 449)

SENNERT v. WEISBECKER.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

NEGLIGENCE (§ 134*)—USE OF BUILDINGS—MEAT SHOP.

The fact that a piece of meat was on the floor of a meat shop at the time plaintiff stepped thereon and slipped was not proof that the proprietor did not use due care in maintaining his place of business.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267–270, 272, 273; Dec. Dig. § 134.*]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Pauline Sennert against Charles Weisbecker. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Herrick C. Allen, of New York City (L. H. Schleider, of New York City, of counsel), for appellant.

Maurice B. & Daniel W. Blumenthal, of New York City, for respondent.

BIJUR, J. This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff while on the premises of defendant, who maintains a large butcher store, through slipping upon a piece of meat upon the floor of the store, which meat she says was about as large as her heel. But one witness, apart from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

herself, was examined on her behalf, and he testified that at the time of the accident she said she did not know what had caused her to slip, and that he himself looked all around, and saw nothing but sawdust on the floor. It is altogether probable, therefore, that this judgment should be set aside as against the weight of evidence. Klassen v. Interurban Co., 116 App. Div. 153, 101 N. Y. Supp. 581.

It is plain, however, that no negligence on the part of defendant has been shown. The mere fact, if it was a fact, that there was a piece of meat on the floor at the instant that plaintiff slipped, is no proof that defendant did not use due care in maintaining his place of business. Kelly v. Otterstedt, 80 App. Div. 398, 80 N. Y. Supp. 1008; Kipp v. Woolworth, 150 App. Div. 283, 134 N. Y. Supp. 646. The evidence of the defendant is well-nigh conclusive that he used every known, and indeed every possible, effort to keep his place in a perfectly clean and safe condition. Shaw v. Webber, 79 Hun, 307, at page 308, 29 N. Y. Supp. 437, 438, cited by respondent, is not decisive, although the court does say that evidence analogous to that in the case at bar—

"was sufficient to sustain the finding that the negligence of the defendant or his servants permitted a piece of suet or fat to be left on the floor."

It is plain that that remark is casual. The court says significantly:

"The questions of defendant's negligence and of the plaintiff's freedom therefrom were not really litigated on the trial."

Thereafter follows a long discussion of the only question really raised in that case, namely, of the right of the plaintiff to impeach a release executed by her, without restoration of a sum of money which she alleged had been given to her by the defendant as a gift.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

(82 Misc. Rep. 429)

FEINSOT et al. v. BURSTEIN.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. APPEAL AND ERROR (§ 1099*)—FORMER DECISION—EFFECT.

Where the court on a previous appeal held that a deposit as security for a lease constituted a penalty instead of liquidated damages, so far as the terms of the lease itself were concerned, but remanded the case for new trial, in order that the surrounding circumstances might be examined to see whether they would affect this view, the determination on the former appeal fixes the status of the security, where no surrounding circumstances material to that point were disclosed on the new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. § 1099.*]

2. LANDLORD AND TENANT (§ 184*)—LEASES—COVENANTS.

Where a lease providing for a deposit as security was abrogated before the expiration of the term by the eviction of the tenants in dispossess proceedings for nonpayment of rent, the security must be considered as held by the landlord upon no condition whatever, except as security for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

so much of the rent as was then unpaid; the termination of the lease in the dispossess proceeding ending the contractual relations between the parties.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 745–750; Dec. Dig. § 184.*]

Appeal from City Court of New York, Trial Term.

Action by Morris Feinsot and another against Maurice J. Burstein. From a judgment dismissing the complaint after verdict for plaintiffs (141 N. Y. Supp. 330), plaintiffs appeal. Reversed, and verdict reinstated.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Herman B. Goodstein, of New York City, for appellants.

Charles Burstein, of Brooklyn, for respondent.

BIJUR, J. [1] The only issue involved in this appeal is whether a clause in a lease providing for a deposit of $2,000 as security, and speaking of the same as liquidated damages, shall be construed as constituting such sum liquidated damages in the technical sense of the word, or as a penalty. It was held on a previous appeal to this court (78 Misc. Rep. 259, 138 N. Y. Supp. 185) that, so far as the terms of the lease itself were concerned, the sum was deposited as a penalty, and the court granted a new trial in order that the surrounding circumstances might be examined to ascertain whether their effect would be to modify this view. An examination of the case reveals no surrounding circumstances material to this controversy or otherwise, nor are any pointed out in the brief of respondent, nor in the opinion of the learned trial judge below.

[2] There has been raised for the first time on this appeal a new point, namely, that inasmuch as the lease provides that the landlord shall return the $2,000 "upon the termination of this lease at the end of the term aforesaid," referring to the full term thereof, and as this lease has expired because plaintiff tenants were dispossessed during the term of the lease for nonpayment of rent, this action is premature. It seems to me that a fair construction of the lease limits the application of the clause referred to to the case where the plaintiff remains undisturbed in possession of the premises until the end of the term, and was not intended to limit the rights of the plaintiffs in a contingency such as the one that happened. Indeed, since the lease terminated upon the final order in the dispossess proceedings, the contractual relations of the parties ended under the very terms of this lease, and the $2,000 is held by the defendant upon no condition whatsoever, except as security for so much of the rent as was then unpaid. See Cæsar v. Rubinson, 174 N. Y. 492, 498, 67 N. E. 58; Michaels v. Fishel, 169 N. Y. 381, 391, 62 N. E. 425.

Inasmuch as the judge below wisely permitted the issues of fact to go to the jury, which determined them in favor of plaintiffs, and reserved until after the coming in of the verdict his decision on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

questions of law involved in the motion for a dismissal of the complaint, the judgment is reversed, with costs, and the verdict of the jury reinstated.

Judgment reversed, with costs, and verdict reinstated. All concur.

BELLOS v. ATHENS HOTEL CO.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTION FOR JURY—NEGLIGENCE OF MASTER.

Where a hotel steward, who was injured by the falling of a wall which he was helping to knock down, testified that an officer of the company put him to work and, upon the steward's objecting to the danger of the wall falling, agreed to give warning if there was any danger of the wall falling, the plaintiff was entitled to go to the jury on the question whether the method of doing the work as prescribed by the company was safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. § 286.*]

2. APPEAL AND ERROR (§ 173*)—PRESENTING QUESTIONS IN LOWER COURT—GROUND FOR NONSUIT.

Where the defendant moved for a dismissal in the lower court on the ground that no negligence was shown, it cannot, on appeal, raise the point that the negligence shown was not that pleaded, since that objection, if raised below, could have been cured by amendment of the complaint; the evidence having been admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079–1089, 1091–1093, 1095–1098, 1101–1120; Dec. Dig. § 173.*]

3. MASTER AND SERVANT (§§ 288, 289*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

Where a hotel steward, who was helping to knock down a wall under the directions of an officer of the hotel company, was informed by his employer that if there was any danger of the wall falling he would be warned, it could not be considered as a matter of law that he was negligent or assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088, 1089, 1090, 1092–1132; Dec. Dig. §§ 288, 289.*]

Appeal from City Court of New York, Trial Term.

Action by Stathes Bellos against the Athens Hotel Company. From a judgment dismissing complaint at the close of plaintiff's case, plaintiff appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Joseph B. Rosenback, of New York City, for appellant.

Walter G. Evans, of New York City, for respondent.

BIJUR, J. This action was brought to recover damages for personal injuries suffered by an employé in knocking down a wall. He was a steward in the employ of defendant, whose officer put him to work to help destroy this wall, and when plaintiff pointed out that the wall was shaky, and might fall, the officer told him that he would

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

let him know if there was any danger of the wall falling. It did, however, fall without any warning, and plaintiff was injured.

[1] The motion to dismiss was made on the ground that no negligence of the defendant was shown; but it is evident that plaintiff was entitled to go to the jury on the question whether the manner of doing this work as prescribed by the defendant itself was safe. McGovern v. Central Vermont R. R. Co., 123 N. Y. 280, 288, 25 N. E. 373.

[2] The defendant respondent now claims that plaintiff showed no negligence *as pleaded* in the complaint, which is quite true, because the negligence there pleaded was as to an unsafe place and insufficient means of shoring up the wall. But defendant did not make that point below; consequently it is not available here. Had it been made below, plaintiff would, on the evidence admitted without objection, have been entitled to amend his complaint. McCarton v. City of N. Y., 149 App. Div. 516, 133 N. Y. Supp. 939.

[3] Respondent also claims that the plaintiff was guilty of contributory negligence, or assumed the risk of injury from the accident. Although the case was not brought under the Employers' Liability Law, it cannot be said, as matter of law, that plaintiff was not entitled to recover. Those issues were for the jury. See particularly Leddy v. Carley, 78 Misc. Rep. 546, 139 N. Y. Supp. 227.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

(158 App. Div. 735)

PEOPLE ex rel. HAYDEN v. WALDO, Police Com'r.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

MUNICIPAL CORPORATIONS (§ 185*)—POLICE DEPARTMENT—REGULATIONS—APPLICATION.

New York Police Rules, par. 78, provides that patrolmen, compelled to leave their posts for reasons other than the discharge of their duties, prior to doing so will telephone to the precinct station house from the nearest signal box and obtain permission, and report in the same manner a return to their posts. *Held*, that such provision did not apply to a policeman's absence from his post in the performance of duty, so that where relator was so absent he was not subject to discipline for failure to obtain permission.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492–509; Dec. Dig. § 185.*]

Certiorari by the People, on relation of Thomas C. Hayden, against Rhinelander Waldo, as Police Commissioner of the City of New York, to review respondent's determination in fining relator 15 days' pay for breach of police regulations. Reversed.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

William E. Murphy, of New York City, for relator.

Harry Crone, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DOWLING, J. This is a writ of certiorari to review the determination of the police commissioner in fining the relator, a patrolman of the police force of the city of New York, 15 days' pay.

The charge against the officer was that he had been absent from post for five minutes on the morning of June 20, 1911, beginning at 4:20 a. m. The relator admitted his absence from post during that period, but explained it by testifying that an Italian living in the rear house at 75 Mulberry street (which was on his post of duty at the time in question), had obstructed the sidewalk in front of said premises by unloading barrels of salads thereupon, rendering it almost impassable for pedestrians. Discovering this condition at the time in question, he went to the man's residence through an alley leading to the rear tenement, and notified him to immediately remove the obstruction. This person had been in the practice of returning from the market at the same hour each morning and leaving goods on the walk, and from this custom the officer knew who it was that had created the obstruction. He made an entry in his memorandum book, which was turned in to the station house at the close of his tour of duty that morning, and at a time when he had no knowledge of any charges against him, corroborating his testimony as to the purpose of his leaving post, and this was signed by the lieutenant in charge at the desk upon its being turned in.

There is no reason disclosed by this record to doubt the testimony of the officer, nor was it sought to contradict him. The action of the deputy commissioner in imposing the 15 days' fine seems to have been based upon a misinterpretation of paragraph 78 of the Rules and Regulations of the Police Department, as adopted September 17, 1908. That paragraph reads as follows:

"Patrolmen compelled to leave their posts for reasons other than the discharge of their duties, will, prior to so doing, telephone to the precinct station house, from the nearest signal box, and obtain permission of the lieutenant, and will report to the lieutenant in the same manner, their return to post."

Upon the relator's testimony, he was absent from his post for the five minutes in question in the discharge of his duties. It was not therefore incumbent upon him to telephone to the station house before entering upon the performance of his duty, and when he had entered in his memorandum book the length and reason of his absence from post, and promptly turned the same in upon his return to the station house, he had complied with all that was incumbent upon him to do under the circumstances.

The deputy commissioner was of the opinion, apparently, that because he had acknowledged leaving post without permission from the lieutenant, he was guilty of the charge; but we are referred to no other paragraph of the regulations which he is claimed to have violated save the seventy-eighth, and that has no application to this case.

The writ will therefore be sustained, the proceedings annulled, and the fine remitted, with $50 costs and disbursements to relator. All concur.

(158 App. Div. 709)

SHATTUCK v. BUEK.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

LANDLORD AND TENANT (§ 184*)—RENT—PAYMENT—DEPOSIT AS SECURITY—RECOVERY BACK.

Under a lease of a house at $375 a month, which provided that three months' rent should be paid on the delivery thereof, $375 to be applied on the first month's rent, and the balance to be retained by the lessor as a guaranty fund to be applied on the rent of the last two months of the term, the $750 was not paid in advance as rent for the last two months, but was deposited as security, and belonged to the original lessee, subject to any claim upon it for the last two months' rent, and hence an assignee of the lease, who paid the last two months' rent, could not recover the deposit on the theory that the rent was overpaid, the original lessee not having assigned her right to the deposit, especially where there was no allegation or proof justifying a recovery of money voluntarily paid.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 743–750; Dec. Dig. § 184.*]

Appeal from Appellate Term, First Department.

Action by La Forest A. Shattuck against Charles Buek. A judgment for plaintiff, after a trial by the court without a jury, was affirmed by the Appellate Term, and defendant appeals. Reversed, and new trial granted.

See, also, 156 App. Div. 899, 141 N. Y. Supp. 1146.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Carlisle Norwood, of New York City, for appellant.

John O'Connell, of New York City, for respondent.

SCOTT, J. On August 29, 1901, defendant leased to one A. E. Rogers, a house, etc., on Grammercy Park at the yearly rent of $4,500, payable $375 per month.

The lease contained the following clause:

"Three months rent, namely eleven hundred and twenty-five dollars ($1125) shall be paid upon the execution and delivery of this lease, of which $375 shall apply upon the first month's rent of the term hereby granted; and the balance $750 shall be retained by the lessor as a guaranty fund to be applied upon the rent of the last two months of the said term, upon which 6% interest shall be allowed."

One Susan A. Briggs guaranteed the payment of the rent.

At some time (when does not appear) A. E. Rogers, the lessee, seems to have assigned this lease to one Marion S. Furber. No actual assignment is produced, but there is a consent by defendant to such an assignment, and also a consent by the surety. September 5, 1903, Marion S. Furber assigned the lease to Ella F. Shattuck, who was thereafter recognized by defendant as his tenant. No reference to the deposit of $750 is contained in this assignment. On January 16, 1904, Mrs. Shattuck and defendant had a settlement, when it was found that she owed $1,122 for rent. She gave a note for this sum,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the lease was canceled, and Mrs. Shattuck remained in possession as a monthly tenant. She assigned to defendant a mortgage for $7,500 on some property in Pennsylvania. In December, 1906, one Radford, who had bought the mortgaged property from Mrs. Shattuck, paid defendant the amount of the note, with all interest and charges. Mrs. Shattuck assigned to plaintiff all her interest in the $750. I can see no principle upon which plaintiff can recover.

As I read the covenant, the $750 was deposited *as security* by Mrs. Rogers, the original tenant, and at all times belonged to her, subject to any claim upon it for the last two months' rent. If this be so, Mrs. Shattuck never acquired any right to it, for no assignment of this sum from Mrs. Rogers is shown.

The plaintiff, appreciating this difficulty, claims that the effect of this deposit was to *pay,* at the time the deposit was made, the rent for the last two months of the lease, and that when Mrs. Shattuck paid the rent for those months she overpaid defendant. We consider that the $750 was deposited as security, not paid, in advance, as rent, but, even if it were to be treated as a payment, and it be found that Mrs. Shattuck consequently overpaid defendant, the case is barren of allegation or proof to justify a recovery of money voluntarily paid.

It follows that the determination of the Appellate Term and the judgment of the city court must be reversed, and a new trial granted, with costs to the appellant in all courts to abide the event. All concur.

(159 App. Div. 116)

GOODYEAR v. H. J. KOEHLER SPORTING GOODS CO.

(Supreme Court, Appellate Division, First Department. November 14, 1913.)

CONTRACTS (§10*)—REQUISITES—MUTUALITY—SALES.

A contract, whereby plaintiff agreed to purchase from defendant a specified number of automobiles, depositing money as part payment in advance on each automobile accepted, but in which defendant nowhere agreed to sell and deliver them, but which gave it the option of delivering, subject to no penalty or damages on refusal to deliver, was void for want of mutuality, and was not cured by the appointment of plaintiff as defendant's agent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–40; Dec. Dig. § 10.*]

Ingraham, P. J., and Laughlin, J., dissenting.

Appeal from Appellate Term, First Department.

Action by Frank C. Goodyear against the H. J. Koehler Sporting Goods Company. From a determination of the Appellate Term affirming a judgment of the Municipal Court, defendant appeals. Affirmed.

See, also, 155 App. Div. 947, 140 N. Y. Supp. 1121.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Martin L. Stover, of New York City, for appellant.

Edward L. Dennis, of New York City, for respondent.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SCOTT, J. The sole question in this case is whether or not the contract between the parties was void for lack of mutuality. Such a lack exists where one is bound and the other is not.

In the present case the plaintiff agreed to purchase and accept from the defendant a specified number of automobiles, depositing a sum of money to be credited as part payment, in advance, of $35 on each automobile accepted. Nowhere in the contract does the defendant agree to sell and deliver the automobiles, or any of them, unless a schedule of delivery dates may be considered such an agreement. If it may be, however, its force is entirely destroyed by the following clause, which provides as follows:

"In the event that the company shall fail to deliver any one or more automobiles in accordance with the foregoing schedule, it may at its option return the agent's deposit on such car or cars, or deliver such car or cars as soon thereafter as it reasonably can; it being distinctly understood and agreed, however, that no liability whatsoever shall attach to or be asserted against the company in case of its failure to deliver any of said automobiles for any cause whatsoever."

By this clause it was left entirely optional with defendant whether or not it would deliver any automobiles at all, and if it refused to deliver any it became subject to no penalty or damages. It seems to me that it would be difficult to find a clearer case of a contract imposing an obligation on one party, and no obligation whatever on the other.

I am unable to see that the appointment of plaintiff as defendant's agent cured the lack of mutuality, because the position of agent to sell automobiles was an empty thing, unless backed up by an enforceable agreement on defendant's part to deliver such automobiles as plaintiff might be able to sell.

The determination of the Appellate Term should be affirmed, with costs.

DOWLING and HOTCHKISS, JJ., concur.

INGRAHAM, P. J. (dissenting). This action was brought in the Municipal Court. The complaint alleged that on the 25th of August, 1910, the defendant received from the plaintiff the sum of $700 to the use of the plaintiff; that thereafter the defendant furnished the plaintiff six automobiles, and applied on account of the purchase money thereof $210, part of the said sum of $700, and no more; and that there still remained in the hands of the defendant for the use of the plaintiff the sum of $490, payment of which had been demanded, and for which amount the plaintiff asked judgment. The case was tried before the justice without a jury who decided in favor of the plaintiff, and judgment was entered thereon. Upon appeal the Appellate Term affirmed that judgment, and from that determination the defendant appeals.

It appeared upon the trial that on the 25th day of August, 1910, the plaintiff and defendant entered into a written contract, by which, in consideration of the mutual covenants contained and the sum of $1, the parties agreed as follows: The defendant granted to the plaintiff permission to sell its automobiles in the town of Waterbury in the

state of Connecticut during the continuance of the contract; the plaintiff accepted the right of sale aforesaid, and agreed to observe and be bound by each of the following covenants and stipulations, which regulated the terms and conditions under which the plaintiff as agent for the defendant could sell these automobiles. The contract further provided that the plaintiff ordered and agreed to purchase and accept from the defendant the following quantity of the said automobiles, and further agrees to pay the following list or catalogue price therefor, less the discount set opposite the same. Then follows a net price, f. o. b. New York, of $650, 20 Hupmobiles, and sale price f. o. b. New York, $775. The agent further agreed to deposit with the company the sum of $700 to be applied on the purchase price of said automobiles as follows: $35 on each Hupmobile, and agreed to pay the balance due upon the purchase price of each automobile, together with all freight, etc., when notified that the same is ready for delivery at Newark, N. J., or New York, or the manufacturer's point of shipment. It was further provided that the said automobiles were to be delivered by the company in accordance with the following schedules of delivery, as nearly as may be, and the months of the years 1910 and 1911 in which these automobiles were to be delivered are there specified. It was then provided that, in the event that the company should fail to deliver any one or more automobiles in accordance with the foregoing schedule, it may at its option return the agent's deposit on such car or cars, or deliver such car or cars as soon as possible thereafter as it reasonably can, it being distinctly understood that no liability whatsoever should be attached to or asserted against the company in case of its failure to deliver any of the automobiles for any cause whatever; and there were other provisions limiting the liability of the company in certain particulars. The contract expired by limitation on the 1st day of August, 1911, provided the same was not sooner canceled by the company according to the option which it reserves to cancel the same by written notice by mail or otherwise.

The plaintiff has been allowed to recover on the ground that this contract, being unilateral, imposed no obligation upon the defendant, and therefore a breach thereof could not be asserted as against the plaintiff to prevent the return of the amount paid by the plaintiff, which was to be applied to the purchase of the cars, which had not been ordered by plaintiff or delivered. I do not think that this is a unilateral contract. The defendant appointed the plaintiff its agent to sell these automobiles in the town of Waterbury, Conn. This appointment as agent, although subject to be revoked by the defendant, was accepted, and, when the plaintiff actually acted under it, certainly a consideration for the obligation of the plaintiff to act as agent and to purchase a certain number of cars to be used in the business for which he was employed. The plaintiff actually agreed to purchase a certain number of these cars, and paid $35 on account of each car he agreed to purchase. There was here an implied obligation on behalf of the defendant to sell the cars subject to the further provision in the contract by which a failure of the defendant to deliver the cars would result in a repayment by the defendant to the plaintiff of the amount

actually paid on account of the purchase. The acceptance of the agency and the benefit that accrued to the plaintiff by being the defendant's agent for the sale of these cars in the locality named during the continuance of the contract was a consideration for his agreeing to purchase a certain number of the cars, and the parties then had a right to limit the damages to be sustained by a breach of the implied agreement to deliver the cars by the defendant to a return of the money paid on account of the cars so purchased. The parties have actually acted under this agreement during the continuance of the contract. Defendant never acted under its reserved power to terminate the contract. The defendant delivered and the plaintiff accepted under this contract six of these automobiles, and on account of the purchase price of these automobiles the defendant applied $35 on each automobile out of the $700 that defendant had received from the plaintiff. On the six cars that the plaintiff actually received, and for which he paid, he received the discount which was allowed by this contract, which was 15 per cent. of the purchase price. This contract was dated August 25, 1910. On the 22d of January, 1912, the plaintiff wrote to the defendant that developments had caused a change in his plans, which would take him out of his territory, and it would be quite impossible for the plaintiff to dispose of the 20 Hupmobiles. The plaintiff therefore requested the defendant to return the balance of his $700, $490, and refused a 1912 contract.

It thus appeared from the undisputed testimony that the plaintiff continued in the employ of the defendant from the 25th of August, 1910, until the 22d of January, 1912, during the whole time that the contract was to continue; that he received whatever benefit it was to be an agent of the defendant at Waterbury, Conn.; that he received six cars for which he was allowed a discount of 15 per cent.; and that he did not take, accept, or complete the purchase of the remainder of the 20 cars which he had agreed to purchase by his contract. This was not a unilateral contract, but was valid as between the parties. The plaintiff acted on it, and received the benefit of the contract accruing to him, but failed to comply with the contract on his part and purchase the automobiles that he had agreed to purchase, and the plaintiff cannot now be allowed to recover the money paid on account of the cars that he had purchased, but which he had refused to receive.

I think, therefore, the judgment appealed from should be reversed, and as on the undisputed facts the plaintiff is not entitled to recover, the complaint should be dismissed.

LAUGHLIN, J., concurs.

(82 Misc. Rep. 441)

DRESCHER ROTBERG CO. v. LANDEKER.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. JUDGMENT (§ 653*)—CONCLUSIVENESS—NATURE OF PROCEEDING—MOTION.
Plaintiff having recovered a verdict, it was set aside, the complaint dismissed, and judgment for costs awarded defendant, who issued execution on which the costs were collected. Plaintiff appealed, and the judgment was reversed and a new trial ordered, whereupon plaintiff moved in the appellate court for an order for restitution of the costs. The motion was denied, with leave to renew after final determination of the action in the lower court. *Held*, that the decision of the motion for restitution was in the nature of a judgment, and was a bar to an action to recover the costs so paid, prior to the final determination of the original action.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1160; Dec. Dig. § 653.*]

2. COSTS (§ 279*)—EXECUTION—ORDERS ENFORCEABLE.
An order granting restitution of costs collected under a judgment dismissing a complaint, on reversal thereof, may be enforced by execution.
[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1061–1071; Dec. Dig. § 279.*]

3. APPEAL AND ERROR (§ 1208*)—REVERSAL—RESTITUTION.
Where costs have been collected under a judgment dismissing a complaint, which is subsequently reversed on appeal, plaintiff may recover the costs so paid, either by a motion in the action or by a new action for such relief.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4701–4709; Dec. Dig. § 1208.*]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by the Drescher Rotberg Company against Adolph H. Landeker. Judgment for plaintiff, and defendant appeals. Reversed, and complaint dismissed without prejudice.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Taylor & Fatt, of New York City (Isidore Fatt, of New York City, of counsel), for appellant.

Benjamin I. Shiverts, of New York City, for respondent.

GUY, J. The material facts in this case are undisputed. The plaintiff herein began an action against the defendant in the City Court. The trial resulted in a verdict in favor of the plaintiff, which was set aside by the trial judge, the plaintiff's complaint dismissed, and a judgment for costs awarded the defendant. The defendant issued an excution, and those costs were collected. The plaintiff appealed to this court, and upon the hearing of the appeal the judgment in favor of the defendant was reversed and a new trial ordered in the City Court. The plaintiff then applied to this court for an order to show cause why an order of restitution should not be granted, directing the defendant to return to him the costs awarded in the City Court and collected upon the execution issued by the defendant. The motion was heard and an order entered denying the motion, with leave to renew the same after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the final determination of the action in the City Court. Thereafter the plaintiff brought this action in the Municipal Court to recover the costs paid by it under the execution, and has obtained a judgment.

[1, 2] It was conceded upon the trial of this action that the action in the City Court is still pending undetermined. The claim of the appellant herein is that the order of this court denying the plaintiff's motion for an order of restitution precludes the plaintiff from bringing an action in the Municipal Court until the final determination of the City Court action. In this contention we agree. The decision of the motion for restitution is in the nature of a judgment, and it has been held that under certain circumstances the granting of such an order is imperative. Lott v. Swezey, 29 Barb. 87. Had the order been granted, it could have been enforced by execution. The decision of the motion could not have been made by this court without involving the particular matter in controversy in the Municipal Court, and therefore the right of the plaintiff to the relief asked for must be deemed to have been settled until another or different situation arose. To litigate the matter again would be to impeach the first decision. Williams v. Barkley, 165 N. Y. 48, 58 N. E. 765; McCall v. Wright, 135 App. Div. 424, 119 N. Y. Supp. 1011.

[3] There is no doubt that the result of a litigation which takes the form of a motion may constitute a bar to another action involving the same question. Everett v. Everett, 180 N. Y. 461, 73 N. E. 231. That in the first instance the plaintiff had a right of either form of action cannot be doubted (Kidd v. Curry, 29 Hun, 216); but, having elected to resort to its motion, it is bound by the decision thereon. None of the cases cited by respondent hold otherwise, although it has been held that the pendency of an action did not preclude resort by motion for the same relief. Market Nat. Bank v. Pacific Bank, 102 N. Y. 464, 7 N. E. 302.

Judgment reversed, with costs, and complaint dismissed, with costs, without prejudice to a new action after final determination of the City Court action. All concur.

(159 App. Div. 882)

MURPHY v. NEW YORK PRESS CO., Limited.

(Supreme Court, Appellate Division, First Department. November 7, 1913.)

LIBEL AND SLANDER (§ 6*)—WORDS "LIBELOUS PER SE."

A newspaper article containing a story of the rescue of plaintiff, an unmarried young woman, from death in a steamship disaster at sea, falsely charging that she and her lover "eloped" or "ran away" from their home in Ireland, boarded the ship en route to New York, and were together up to the time the steamer sank several days thereafter, leaving an unmistakable inference that during all of this period they had not been married, was libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3–16; Dec. Dig. § 6.*]

Appeal from Special Term, New York County.

Action by Margaret Murphy against the New York Press Company, Limited. From an order sustaining a demurrer to the com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaint, plaintiff appeals. Reversed, and plaintiff's motion for judgment granted, with leave to defendant to withdraw its demurrer and answer within 20 days on payment of costs.

The following is the article alleged to be libelous:

New York Press, April 29, 1912.

Gave his Life to Save that of his Sweetheart.

Young Irishman Fought His Way to Titanic's Lifeboat.

They Eloped from Ireland.

Girl Tells of Heroism Displayed by the Man she had Selected for her Mate.

In the Mission of Our Lady of the Rosary No. 7 State Street, yesterday afternoon where several young women survivors of the Titanic were being entertained with music and refreshment in an effort to lighten their hearts and divert their minds from recollections of their dreadful experiences when the big ship went down, there was told by Margaret Murphy, nineteen years old, a bright and prepossessing girl, the story of love, courage, and self-sacrifice that ranks with the foremost deeds of heroism of the many recorded in the wreck. Deeply religious, and firm in her belief that her sorrow is a visitation earned because she ran away with her sweetheart from their home in Fostra, County Longford, the young woman grieves for the loss of one who gallantly died after fighting desperately to carry her to a boat through the struggling passengers in the steerage. After leading her safely to the boat deck, the young man, John Kiernan, unstrapped the life belt he wore and tied it on the girl. He reached the deck in time to catch a boat that just was being sent away. There was room for one more and into it he forced her despite her protests. There was little time in which to say good-by but in the fleeting moments the youth caught the girl in his arms, pressed his lips to hers, and half flung her into the boat as it swung outward from the davits.

The hum of nervous voices, the rumbling of the boat falls in the blocks as the boat was lowered away, drowned the parting message of the youth as he leaned over the rail, his form silhouetted in the starlight night, gazing at the upturned face of the girl he loved, as the distance between them gradually increased. In the confusion none but the girl in the boat heard the young man shout:

"Don't worry, I'll be saved."

But he died with those who unselfishly thought of the safety of others.

The boy and girl were playmates in childhood in their native town. The girl in her humble state was above the youth socially for he was employed in her father's grocery store. They loved each other and agreed to elope to America. They little dreamed of the tragic fate awaiting one of them. When the ship was stabbed fatally by the hidden spur of the iceberg they were with hundreds of others in the steerage on the fifth deck of the liner. Those who were able grabbed life belts. The young man got one, his sweetheart did not. Lest they should be separated in the crowd, Kiernan held the girl and fought his way with her to the boat deck.

"One of us must go," he told her quietly, "you haven't a life belt, I have."

Quickly he took the life preserver from his body and wrapped it around his sweetheart. She resisted and hampered his work, clinging to him and saying she would not go without him. By force he put her in the boat.

Miss Murphy told dramatically how after the boat left the ship and began to leak she and other young women, among them the Misses Agnes and Alice McCoy, set fire to their hats to warm their feet. The boat was half filled with water when they were picked up. The warmth of their blazing headgear probably saved them from being frostbitten, she said.

Father Michael J. Henry, in charge of the mission distributed among the thirty young women $25 each that had been collected from Irish societies by Michael McDermott.

Plaintiff was a young woman of 24 years, and had for several years been a resident of New York, and was returning from a short visit to her family when the Titanic was lost.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, DOWLING, and HOTCHKISS, JJ.

Charles J. Kelaher, of New York City, for appellant.

Philip Carpenter, of New York City, for respondent.

PER CURIAM. We think the publication alleged in the complaint was libelous per se, and that the court should have granted the plaintiff's motion for judgment.

The order appealed from is therefore reversed, with $10 costs and disbursements, and the plaintiff's motion for judgment granted, with $10 costs, with leave to the defendant to withdraw demurrer and to answer within 20 days on payment of costs in this court and at Special Term.

(158 App. Div. 768.)

BARLOW v. LEHIGH VALLEY R. CO.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

COMMERCE (§ 27*)—"INTERSTATE COMMERCE"—WHAT CONSTITUTES—RAILROADS.

The engineer of a switch engine, who was switching coal cars containing an interstate shipment of coal so that they could be dumped into the railroad company's bunkers from which the railroad's locomotives, both those engaged in interstate and those in intrastate commerce, would coal, is engaged in "interstate commerce" within the purview of the federal Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, vol. 4, pp. 3724–3731.]

Appeal from Trial Term, Cortland County.

Action by James H. Barlow against the Lehigh Valley Railroad Company. From a judgment for plaintiff and an order denying its motion for new trial, defendant appeals. Affirmed.

Argued before SMITH, P. J., and LYON, HOWARD, and WOODWARD, JJ.

Tompkins, Cobb & Cobb, of Ithaca, for appellant.

Davis & Lusk, of Cortland, for respondent.

LYON, J. The important question involved upon this appeal is whether the plaintiff was employed in interstate commerce at the time he received the injuries complained of, and hence whether the action is maintainable under the federal Employers' Liability Act. The material facts are undisputed. A portion of one of the divisions of defendant's railroad extended from Cortland, N. Y., southerly to Sayre, Pa., and beyond, and from Cortland northerly to Canastota, N. Y., where it intersected the New York Central Railroad. During the month of July, 1912, the defendant was running two milk trains each week day and one on Sunday from Cortland through Sayre to points farther south, and was also running trains carrying freight and passengers daily between Cortland and Sayre, and between Cortland and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Canastota and other points, connecting with the New York Central Railroad, carrying cars and freight consigned to within and without state points. The locomotives drawing these trains northerly did not pass without the state, and those going to Sayre, excepting those drawing milk trains which ran through to Sayre, were replaced by other locomotives at Elmira, N. Y., or Van Etten, N. Y., excepting upon extraordinary occasions or in emergencies.

On July 27, 1912, three car loads of defendant's coal contained in cars which could be dumped and which had been shipped by it from Sayre to Cortland, one of which had been received at the latter place July 3d and the other two July 10th, and placed on a siding to be used whenever required in coaling defendant's locomotives, were taken from the siding by defendant's yard engine, of which plaintiff was the engineer, and pushed on defendant's elevated coal trestle at Cortland to be dumped into defendant's coal pockets from which the coal was to be discharged through chutes into the tenders of defendant's locomotives, whether used about the Cortland yard or in interstate or intrastate commerce. These coal pockets supplied about 40 per cent. of the coal used at Cortland by defendant's locomotives, and the remaining 60 per cent. was shoveled into the tenders from flat cars which did not have open bottoms, and hence could not be dumped, standing in the Cortland yards.

After the switch engine had pushed the three cars of coal upon the trestle, and while standing upon the trestle in charge of the fireman, who at plaintiff's request had temporarily exchanged places with plaintiff, the attention of the plaintiff was called to the fact that one end of the brake beam of the tank was down, whereupon the plaintiff and another employé of the defendant endeavored to fix it. While the plaintiff was partly under the tank, the conductor signaled to the fireman to back the engine, which the fireman did suddenly, without giving any signal, and the plaintiff was caught under the wheels, his right leg severed, and other serious injuries inflicted, to recover damages on account of which this action has been brought. Upon the trial it was conceded that the coal contained in the three cars was used in coaling intrastate and interstate locomotives kept in defendant's roundhouse at Cortland. The trial judge submitted the case to the jury under the federal statute, charging them that the fact that an employé who was injured may have been guilty of contributory negligence shall not completely bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of his negligence. The defendant duly excepted to the submission of the case to the jury under the federal statute, and the validity of such exception furnished the serious question for consideration upon this appeal from the judgment entered upon a verdict in favor of the plaintiff.

The statute entitled "An act relating to the liability of common carriers by railroad to their employés in certain cases" (Act April 22, 1908, 35 Stat. at L. 65, c. 149, as amended by Act April 5, 1910, 36 Stat. at L. 291, c. 143, U. S. Comp. Stat. Supp. 1911, pp. 1322, 1324), commonly known as the federal Employers' Liability Act, provided, so far as is material to be noticed here:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier. * * *"

The crucial question is: Was the plaintiff, at the time he sustained the injuries complained of, employed by the defendant in interstate commerce within the meaning of the act?

The only authority necessary to be considered by us is the case of Pederson v. Delaware, Lackawanna & Western R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, which refers to all the leading cases bearing upon the question. In that case, decided by a divided court, it was held that the plaintiff, who was an iron worker in the employ of defendant, which was engaged in transporting passengers and freight by railroad, in both interstate and intrastate commerce, and who was injured, through the negligence of a coemployé by being run down by an intrastate passenger train, while plaintiff was carrying a sack of bolts to be used in repairing a bridge which was regularly in use in both interstate and intrastate commerce, was employed in interstate commerce within the meaning of the federal Employer's Liability Act. In the prevailing opinion the court says:

"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. * * * The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce. * * * It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of a larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

In the dissenting opinion it is said:

"Transportation has been defined as commerce, and those engaged in transportation are employed in commerce. * * * It is conceded that a line must be drawn between those employés of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in on one side those engaged in transportation, which is commerce, otherwise there is no logical reason why it should not include every agent of the company: for there is no other test by which to determine when he must sue under the state statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts, are similarly engaged. For they are all employed by the carrier, and the work of each contributes to its success in hauling freight and passengers."

The respondent contends that at the time of receiving the injuries he was employed in interstate commerce in two senses, that he was

engaged in the work of delivering, upon the coal trestle, coal which had been shipped from Sayre for that purpose, the delivery of which had been temporarily suspended during the time the car had remained upon the siding; and that he was engaged in delivering coal to be necessarily used in part by locomotives employed in hauling trains engaged in interstate commerce. He also contends that to switch interstate cars was to engage in interstate commerce, citing Thornton's Federal Employer's Liability Acts (2d Ed.) pp. 48, 49; Johnson v. Southern Pacific R. R., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

Undoubtedly the ultimate destination of the three car loads of coal were the coal pockets, which could only be reached by running the cars upon the trestle. Depositing the coal in the pockets was one step towards placing it in the tenders of the locomotives. How different would have been the liability of the defendant if plaintiff had been injured while dumping the coal directly into the tender of the locomotive attached to a train engaged in interstate commerce?

Coal for use in defendant's locomotives was as indispensable to the defendant engaging in interstate commerce as was a track or safe bridge upon which defendant might operate its trains.

While it is by no means clear that the plaintiff was engaged in "interstate commerce" within the meaning of that term as used in the federal Employers' Liability Act, yet we are inclined under the authority of the Pederson Case to affirm the judgment. All concur.

UNIVERSAL TAXIMETER CAB CO. v. BLUMENTHAL.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

DAMAGES (§ 113*)—INJURIES—MACHINE—LOSS OF USABLE VALUE.

In an action for injuries to plaintiff's motor cab in a collision with defendant's furniture van, the measure of damages for loss of usable value of plaintiff's machine was the cost of hiring such a machine in the market for the period while plaintiff was deprived of the use of the machine; the evidence of the profits derived from use thereof being incompetent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 279, 280; Dec. Dig. § 113.*]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by the Universal Taximeter Cab Company against Ben Blumenthal, doing business under the name of the West End Storage Company. From a Municipal Court judgment in favor of plaintiff, defendant appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Blumenthal & Levy, of New York City (Eugene Blumenthal, of New York City, of counsel), for appellant.

Wing & Wing, of New York City (George S. Wing, of New York City, of counsel), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GUY, J. This action was brought to recover for damages to plaintiff's motor cab, caused by a collision with a furniture van belonging to defendant. Plaintiff made out a good cause of action, but failed to introduce proper proof of damage. The true measure of damage for loss of usable value of plaintiff's machine would be the cost of hiring such a machine in the market for the period during which plaintiff was deprived of the use of his machine. In the absence of proof that such a machine could not be hired in the market at that time, the evidence of the profits derived by plaintiff from the use of his machine was incompetent, and its admission constituted reversible error.

The judgment must therefore be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

SCHANZ v. BRAMWELL.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

SALES (§ 161*)—DELIVERY—LIABILITY FOR LOSS.

Where defendant ordered a suit of clothes from plaintiff, and telephoned him to ship them to a certain point, without designating any carrier, defendant is liable for the price of the goods, upon their loss in route, under the general rule of law, as well as under Sales Law (Personal Property Law [Consol. Laws 1909, c. 41]) § 127, subd. 1, as added by Laws 1911, c. 571, making delivery to a carrier, whether named by the buyer or not, a delivery to the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377–380; Dec. Dig. § 161.*]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Joseph Schanz against William Bramwell. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Herman Goldman, of New York City (Joseph T. Weed, of counsel), for appellant.

Julius Offenbach, of New York City, for respondent.

BIJUR, J. Defendant ordered a suit of clothes to be made for him by plaintiff. Subsequently he telephoned plaintiff to ship them to him at Long Beach, without designating any carrier. Plaintiff delivered the clothes to a carrier for shipment to Long Beach, but they appear to have been lost. Defendant is liable for the goods, not only on general principles of law, but under Sales Law, § 127, subd. 1. It is quite clear from the evidence that this case does not fall within the exception contained in section 100, rule 5.

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

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PERSONALTY LIQUIDATING CO. v. WILSON.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

COURTS (§ 190*)—MUNICIPAL COURTS—DEFAULT JUDGMENT—ABSENCE OF PROCESS.

It being shown, on appeal from a default judgment of the Municipal Court, that there was no service of process, the judgment will be reversed, and the complaint dismissed.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190.*]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by the Personalty Liquidating Company against Ralph Wilson. From a judgment for plaintiff, entered on a default, defendant appeals. Reversed and dismissed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

David Ross, of New York City, for appellant.

Jacob S. Gross, of Binghamton, for respondent.

BIJUR, J. The affidavits submitted upon the hearing of the appeal, and the further affidavits submitted in accordance with a subsequent direction of the court, show sufficiently that the defendant was not personally served with process.

Judgment reversed, with costs, and complaint dismissed, with costs, without prejudice. All concur.

SCHMITT v. BRADFORD WOOLEN MILLS et al.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

COURTS (§ 189*) — MUNICIPAL COURT — DEFAULT JUDGMENT — CONDITIONS FOR OPENING.

The condition, that defendant consent to admission in evidence of a copy of a letter without proof of the writing and sending of it, not being among those mentioned in Municipal Court Act (Laws 1902, c. 580) § 256, prescribing the terms which may be imposed as a condition for opening a default, imposition of it is without authority.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. § 189.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Henry M. Schmitt against the Bradford Woolen Mills and another. From an order, defendants appeal. Modified and affirmed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Morris & Samuel Meyers, of New York City (Herman Druck, of New York City, of counsel), for appellants.

Myers & Goldsmith, of New York City (Josiah Canter, of New York City, of counsel), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. The defendants appeal from an order denying a motion to open their default unless they comply with certain conditions; one of such conditions being that they shall—

"deliver to plaintiff's attorney a written and signed consent by the defendants' attorneys that the plaintiff may offer in evidence at the trial of this action without objection on the part of the defendants a copy of the letter dated August 13, 1912, sent to the defendant the Bradford Woolen Company by the Mystic Manufacturing Company, without the plaintiff being put to the necessity of calling any witness to prove the writing and sending of the said letter to the defendant."

Section 256 of the Municipal Court Act prescribes the terms which may be imposed as a condition for opening a default, and when that section is followed no appeal from an order made in accordance therewith will lie. Section 257, Municipal Court Act. The condition above mentioned is, however, not one of those enumerated in said section 256, and the court below had no authority to require it.

Order modified, by striking therefrom the condition aforesaid, and, as modified, affirmed, without costs of this appeal to either party, and defendants' default opened upon compliance with the other terms imposed by said order within 10 days after service of a copy of the order entered herewith, with notice of entry thereof.

ROSEN v. BONAGUR et al.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. CONTRACTS (§ 214*)—CONSTRUCTION—TIME OF PAYMENT.
   When a building contract specifies no time for payment, nothing is earned until performance is completed.
   [Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 980–995; Dec. Dig. § 214.*]

2. CONTRACTS (§ 319*)—PERFORMANCE—ABANDONMENT.
   Where a subcontractor, though his contract specified no time for payment, refused to go on with the work unless paid more than he had earned, he abandoned the contract, and could not recover for the work performed.
   [Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493–1507; Dec. Dig. § 319.*]

3. CONTRACTS (§ 319*)—PARTIAL PERFORMANCE—RECOVERY.
   A partial recovery cannot be had under an entire contract, where the contract has not been substantially performed.
   [Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493–1507; Dec. Dig. § 319.*]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Nathan Rosen against Antonio Bonagur and another. From a judgment for plaintiff, defendant Bonagur appeals. Reversed, and complaint dismissed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Menken Bros., of New York City, for appellant.
Arthur L. Davis, of New York City, for respondent.

GUY, J. The action is brought upon a mechanic's lien for $246, filed against Bonagur as contractor and Levy as owner. Plaintiff was a subcontractor.

[1] The contract was an accepted proposal to do certain repairs for $246. No time of payment was specified. When a building contract specifies no fixed time for payment, nothing is earned until performance is completed. Gurski v. Doscher, 112 App. Div. 345, 346, 98 N. Y. Supp. 588, affirmed 190 N. Y. 536, 83 N. E. 1125.

[2] The work was not diligently prosecuted, and the contractor gave plaintiff notice to complete it, which he disregarded, and filed a lien for the entire contract price, of which he has recovered less than a third. There is no sufficient proof of any modification of the contract as to time of payment.

There was no justification for the plaintiff's refusing to go on with the work unless he was paid $100, which was $25 more than the court found he had earned, and was also in disregard of his agreement, in legal effect, to complete the work before receiving any payment. Plaintiff abandoned his contract without any justification. Steiger v. London, 141 App. Div. 382, 383, 126 N. Y. Supp. 256; Borkstrom v. Ryan, 138 App. Div. 185, 186, 122 N. Y. Supp. 878. Appellant then completed the work through another subcontractor, said work costing more than he had agreed to pay plaintiff.

[3] A partial recovery cannot be had under an entire contract, where it appears that there has been no substantial performance of the contract. Kimball v. Economopoulos (Sup.) 110 N. Y. Supp. 350; Hogg v. Larchmont Yacht Club (Sup.) 134 N. Y. Supp. 1079; Seligman v. Linder (Sup.) 117 N. Y. Supp. 192, 193; Enskew v. Reise (Sup.) 117 N. Y. Supp. 906.

Judgment reversed, with costs, and complaint dismissed, with costs. All concur.

SCHMIDT v. UNGRICH.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

BROKERS (§ 73*)—COMMISSIONS—WORK.

Where several brokers were employed to sell or exchange real estate on a contract for 1 per cent. commission, only the broker whose services were the procuring cause of the sale earned the commission, and he was entitled to the full amount thereof.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 59–61; Dec. Dig. § 73.*]

Appeal from City Court of New York, Trial Term.

Action by Charles V. Schmidt, Jr., against Martin Ungrich. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Thomas J. Brady, of New York City (Nathan D. Levy, and Morris A. Vogel, both of New York City, of counsel), for appellant.

William B. Dressler, of New York City, for respondent.

GUY, J. The action was brought to recover broker's commissions at the rate of 1 per cent. upon a sale or exchange of real property, as well as of a mortgage thereon, for the amount of $136,000. The answer denied that plaintiff was the procuring cause of the sale. There was proof of an employment, and a sale, as well as of the activities of other brokers. The evidence as to who was the procuring cause of the sale was conflicting.

The court properly charged that plaintiff was entitled either to a full commission of 1 per cent. or to nothing. No other issue is raised by the pleadings, and plaintiff does not support his recovery on any other theory. But the court nowhere charged the jury that plaintiff could not recover unless he was the procuring cause of the sale, and it refused to charge that plaintiff must show that it was his services that induced the sale. Defendant excepted. The court also charged that the jury need not concern themselves with what a broker is compelled to do in order to earn his commissions. Defendant excepted. Unless a real estate broker is the procuring cause of sale, he earns no commission thereon. Phinney v. Chesebro, 87 App. Div. 409, 412, 84 N. Y. Supp. 449; Hamilton v. Gillender, 26 App. Div. 156, 157, 49 N. Y. Supp. 663.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

McGINLEY v. INTERBOROUGH RAPID TRANSIT CO.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. MASTER AND SERVANT (§ 118*) — INJURIES TO SERVANT — SAFE PLACE TO WORK.

That a bar, placed in the roof of a subway for other purposes, was negligently used by workmen under the direction of a foreman to suspend a battering ram, did not render the place unsafe to work, where proper appliances for that purpose were provided.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

2. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—FELLOW SERVANTS.

Where workmen were directed by the foreman to suspend a battering ram from a bar designed for a different purpose, other and proper means having been provided by the master, a servant cannot recover for injuries resulting from the falling of the ram; the failure to use the appliances provided being the fault of the foreman, for which the master was not responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from City Court of New York, Trial Term.

Action by Michael McGinley against the Interborough Rapid Transit Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Lyman A. Spalding, of New York City (Theodore H. Lord, of New York City, of counsel), for appellant.

Michael J. Horan, of New York City, for respondent.

BIJUR, J. This action was brought at common law for damages for injuries sustained by the plaintiff while working in the subway. Plaintiff and some fellow workmen were removing columns, and for the purpose of driving them out of place used an iron beam as a sort of battering ram. At the direction of their foreman, this battering ram was suspended by a rope slung over an iron bar in the subway roof. When the ram was used, the bar fell, and struck and injured the plaintiff. On this statement of facts it is evident that no issue was presented to submit to the jury, and defendant's motion to dismiss the complaint at the close of plaintiff's case should have been granted.

[1, 2] The doctrine that the master must furnish the servant with a safe place to work has no application, because there is no claim that there was a lack of safety in the place. The fact that a bar which was placed in the roof of the subway for concededly other purposes was improperly and negligently used by workmen under the direction of a foreman does not constitute a "place unsafe." It was conceded on the trial that defendant had furnished for this job "dogs" or clamps to sustain the weight of these battering rams in a safe way. The failure to use these was the act of the foreman in a detail of the work, or the negligence of the foreman, for neither of which, under the circumstances, defendant could in the present state of the law be charged. See Vogel v. American Bridge Co., 180 N. Y. 378, 73 N. E. 1, 70 L. R. A. 725. The motion to dismiss was renewed at the close of the defendant's case, and due exception was taken to refusals of the learned judge below to charge in accordance with requests of defendant's counsel instructing the jury as to the correct rule of law applicable to the case.

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

SEABURY, J., concurs. GUY, J., taking no part.

KUBERSKY v. SOHON.

(Supreme Court, Appellate Division, First Department. November 13, 1913.)

SALES (§ 316*)—SALE BY SAMPLE—REJECTION—OWNERSHIP.

Where plaintiff sold defendant certain belts by sample, part of which were accepted, and the balance rejected, as not conforming to the sample, and left in the hands of an express company, and plaintiff recovered only

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the belts accepted, he was entitled to receive back those in the hands of the express company, and it was error to award them to defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 890–895; Dec. Dig. § 316.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Max Kubersky against Benjamin Sohon. From a Municipal Court judgment in favor of defendant, plaintiff appeals. Modified and affirmed.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Samuel Perlo, of New York City, for appellant.

Bershad & Gossett, of New York City, for respondent.

SEABURY, J. Plaintiff sues to recover damages for breach of contract. Part of the goods which the plaintiff sold to the defendant was received by the defendant, and it is conceded that for these goods the defendant is indebted to the plaintiff in the sum of $3.75. The balance of the goods, which the plaintiff claims the defendant ordered and refused to accept, was proven not to conform to the sample according to which they were sold. The court should therefore have awarded judgment for the plaintiff for $3.75.

The court below, however, not only awarded judgment for the plaintiff for $3.75, but provided in the judgment that the "defendant is entitled to the belts now in the possession of [the express] company." The court had no authority to provide as to the ownership of the belts, and if the plaintiff was not entitled to recover from the defendant the damages alleged to have been sustained by the failure of the defendant to accept the goods, it follows as a matter of course that the plaintiff was entitled to receive back from the express company the goods which the plaintiff attempted to deliver to the defendant.

Judgment modified, by striking out the words "defendant is entitled to the belts now in the possession of company," and, as modified, affirmed, with $10 costs to appellant. All concur.

(158 App. Div. 682)

GORMAN v. METROPOLITAN LIFE INS. CO.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

1. INSURANCE (§ 645*)—ACTION ON POLICY—ISSUES AND PROOF.

Where, in an action on a life policy, the complaint made the entire policy a part thereof by reference, alleging that plaintiff had performed all the conditions and obligations required by the contract, the application for which contained a warranty that the declarations made to the medical examiner were correct and wholly true, and it was admitted that the insured at the time of the application had been under treatment for epilepsy, and a year after the policy was issued was adjudged a lunatic, and shortly thereafter died, plaintiff was not entitled to prove under the pleadings that she and insured did not answer any of the questions involving

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the health and mental condition of the latter, and that such noninsurability was known to defendant's agents who procured the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632–1644; Dec. Dig. § 645.*]

2. INSURANCE (§ 378*)—HEALTH OF APPLICANT—NONINSURABILITY.

Since notice to an agent is not notice to the principal, unless the agent's knowledge is acquired in connection with his acts as agent, notice to a soliciting agent of a life insurance company of the physical condition of an applicant, which was such that the contract could not have been consummated without operating as a fraud on the insurer, was not notice to it; all inquiries concerning the applicant's physical condition being within the exclusive jurisdiction of the medical examiner.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 968–997; Dec. Dig. § 378.*]

Appeal from Albany County Court.

Action by Mary Gorman against the Metropolitan Life Insurance Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed, and new trial granted.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Martin T. Nachtmann, of Albany, for appellant.

Robert W. Scott, of Albany (Nathaniel Niles, of Albany, of counsel), for respondent.

WOODWARD, J. [1] The plaintiff brings this action to recover the sum of $500 upon a policy of insurance issued by the defendant upon the life of Thomas P. Gorman, payable to the plaintiff. The policy bears date of May 17, 1910, and the insured died on the 16th day of November, 1911. The complaint, in addition to the formal allegations, avers on information and belief that "on or about the 17th day of May, 1910, the said defendant, Metropolitan Life Insurance Company, entered into a contract with Thomas P. Gorman, and issued a policy of life insurance upon the life of said Thomas P. Gorman in the sum of $500, which policy is known as No. 1371924 C, and plaintiff refers to said original policy for all the conditions and qualifications therein expressed, and makes it a part of this complaint;" that the plaintiff is the mother of said Thomas P. Gorman, and the beneficiary named in the policy, and that "on or about the 16th day of November, 1911, the said Thomas P. Gorman died, and proofs of his death were duly received and accepted by the said defendant as required by said contract and policy, and that the said Thomas P. Gorman and the plaintiff have performed all the conditions and obligations required of them, or either of them, in and by the said contract and policy." The complaint then alleges the nonpayment of the same, and demands judgment.

The answer admits the incorporation of the defendant and the refusal to pay the sum of $500, and denies knowledge or information sufficient to form a belief as to the remaining allegations of the complaint, with some immaterial exceptions so far as any question here involved is concerned. The defendant sets up as a defense that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

policy in suit was issued upon the basis of the answers, statements, and representations contained in the printed and written application for said policy, signed by said Mary Gorman and Thomas P. Gorman, which application was a part of said contract of insurance, and all of which statements, answers, and representations therein referred to were made to induce the defendant to issue the said policy, and as a consideration therefor and said policy was issued and accepted upon the declaration and agreement that the statements, answers, and representations in said application, and those made to the medical examiner, were correct and wholly true, and that they should form the basis of the contract of insurance, if one be issued. It then alleges that the contract never became operative because of the falsity of the statements made in reference to the previous physical condition of the insured, setting out various specific matters.

Upon the trial the plaintiff proved the formal facts in relation to the policy and death of the insured, and rested. It was stipulated that the policy of insurance was issued, and that such policy might be admitted in evidence; that the said Thomas P. Gorman, the insured mentioned in said application and policy, was an inmate of, and under treatment for fits or epilepsy in, an institution under the supervision of the state of New York, known as the Craig Colony, from the 4th day of October, 1909, to the 7th of October, 1909; that the physician's certificate necessary to obtain admission to said institution was signed by Dr. M. D. Stevenson, of Albany, N. Y.; that thereafter and upon a verified petition of the plaintiff herein, dated July 18, 1911, the said Thomas P. Gorman was duly adjudged a lunatic, and was confined in a state institution up to the time of his death.

The stipulated facts practically established the defendant's defense, but upon a motion to dismiss the complaint the learned trial court permitted the plaintiff to reopen the case for the purpose of establishing that the soliciting agents of the defendant company knew of the facts as they then appeared in the case before the policy was issued. There was no amendment of the pleadings; the complaint alleged a full compliance with the terms and conditions of the policy; the policy being made a part of the complaint. The policy, with the application constituting a part of the same, contains statements, purporting to have been made by the insured to the medical examiner, which are directly contradictory of the stipulation above referred to, and which, if disclosed to the defendant's officers would undoubtedly have prevented the issuing and delivery of the policy, and just how the plaintiff, under her pleadings, could be heard to say that the policy under which she claimed was not the real contract entered into by the insured we are unable to understand. No fraud or bad faith is alleged in the complaint. It sets forth a valid policy upon its face, based upon statements alleged to have been made by the insured to the medical examiner, and which are set forth in the policy under which the claim is made, and without which the policy would not have been issued. Conceding upon the trial that these statements were false, what possible right, under her pleadings, had she to show that the policy, with its applica-

tion constituting a part of the contract, was not in fact the contract which was made? She claimed the right to recover upon the policy just as it appeared upon its face; there was no suggestion of any excuse for nonperformance of any of the conditions, but an allegation that both she and the insured had performed all of the conditions imposed by the contract, one of which was that the insured had agreed—

"that the foregoing statements and answers, and also the statements and answers to the medical examiner, are correct and wholly true, and that they shall form the basis of the contract of insurance if one be issued."

This condition of the policy, according to the plaintiff's subsequent testimony, has not been performed because she says that the insured did not answer any of these questions involving his health and mental condition. If he did not, then the contract, as alleged in the complaint as having been fully performed on the part of the insured, has not been performed in this particular; the insured has never made truthful answers to the questions asked, and which it is agreed in the application shall form the basis of the contract. The defendant was not called upon to anticipate a claim which had not been pleaded; the plaintiff alleged the making and delivery of the contract set forth as a part of the complaint, and she has been permitted to recover upon an entirely different theory—upon the theory that some other and different contract was made. The principle still remains that the judgment to be rendered by any court must be "secundum allegata et probata;" and this rule cannot be departed from without inextricable confusion and uncertainty and mischief in the administration of justice. Parties go to court to try the issues made by the pleadings, and courts have no right impromptu to make new issues for them, on the trial, to their surprise or prejudice, or found judgments on grounds not put in issue, and distinctly and fairly litigated. Wright v. Delafield, 25 N. Y. 266, 270. No suggestion is made in the pleadings of a waiver on the part of the defendant; the contract is pleaded as it stands, with the alleged answers of the insured constituting a part of the contract, and the court has permitted the plaintiff to recover upon the theory that the defendant, through its agents, has waived this part of the contract, because of the alleged knowledge of these agents that the answers were not true. Such proof was clearly inadmissible, and there was error in receiving the same over the objection of the defendant. Garlick v. Metropolitan Life Ins. Co., 109 App. Div. 175, 95 N. Y. Supp. 645.

[2] We are of the opinion that the court erred in refusing to charge, as requested, that:

"If the jury believe the statements of the plaintiff and her witnesses that the insured or the plaintiff disclosed to the soliciting agent or soliciting agents of defendant the true state of his health and physical condition before going before the medical examiner, or of his having been an inmate of Craig Colony for epilepsy, such evidence is not binding on the defendant, and any such notice or information as to the health or physical condition of the insured given to such soliciting agents is not knowledge chargeable to the defendant."

There can be no doubt that under a proper pleading it might be shown that the medical examiner had failed to report correctly the answers given him upon the examination, and that such answers were in fact truly made, and such a mistake or fraud would be chargeable to the defendant, but that the knowledge of mere soliciting agents, who have nothing to do with the issuing of the policy or with the inquiry into the physical condition of the insured, is notice to the company is not supported by reason or authority. Notice to an agent is not notice to the principal unless the agent's knowledge is acquired in connection with his acts as agent, and it clearly appears in this case that the soliciting agents were not called upon to know anything of the physical condition of the applicant; all inquiries in this regard being made by the medical examiner. This is clearly the doctrine of the court in Butler v. Michigan Mutual Life Insurance Co., 184 N. Y. 337, 77 N. E. 398, and the defendant was entitled to have the law stated to the jury, though the error of admitting the testimony could not have been cured by the charge if made as requested. The refusal of the court merely emphasizes the original error.

It is clear that Thomas P. Gorman was not a legitimate risk at any time involved in this transaction; the contract could not have been consummated without operating as a fraud upon the defendant, and, while it is probably true that the defendant would be liable if the fraud was perpetrated by the medical examiner, the pleadings in this case did not, and do not now, open the way for any such proof. The cause of action alleged assumes a legitimate policy just as it stands, and the proof offered shows that the policy pleaded never had any existence, accepting the plaintiff's own version, for the insured made none of the answers which are accredited to him, and he has not performed the conditions precedent to the issuing of the policy on which the action is predicated.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

(159 App. Div. 24)

WITHERBEE, SHERMAN & CO. v. WYKES.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

1. LANDLORD AND TENANT (§ 303*)—SUMMARY PROCEEDINGS FOR POSSESSION—PETITION.

Under Code Civ. Proc. § 2236, providing that, where the person to be removed from real property by a summary proceeding is a tenant at will or at sufferance, the petition must state the facts showing that the tenancy has been terminated by giving notice as required by law, a petition merely alleging that notice in writing was served, requiring the tenant to remove from the premises, was insufficient to give jurisdiction to the justice of the peace, since it did not show whether the notice was given in any of the methods prescribed by statute.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1303–1309; Dec. Dig. § 303.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. LANDLORD AND TENANT (§ 116*)—TENANCY FROM MONTH TO MONTH—TERMINATION—SERVICE OF NOTICE.

A notice to a tenant for an indefinite period at a monthly rental to surrender possession at the end of 30 days, when served by mail, is insufficient to terminate the tenancy.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 382–388, 395–400; Dec. Dig. § 116.*]

3. LANDLORD AND TENANT (§ 116*)—TENANCIES FROM MONTH TO MONTH—TERMINATION—NOTICE.

Where premises were rented August 1, 1904, at a specified rate per month for no fixed period, an indefinite tenancy from month to month was created which could be terminated only by notice to surrender at the end of the month, and a notice given January 20, 1913, requiring the tenant to remove within 30 days, was insufficient.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 382–388, 395–400; Dec. Dig. § 116.*]

4. LANDLORD AND TENANT (§ 317*)—SUMMARY PROCEEDINGS FOR POSSESSION—RESTITUTION.

Under Code Civ. Proc. § 2263, providing that the final order in a summary proceeding for the possession of land is reversed on appeal, the Appellate Court may award restitution to the party injured, and that the person dispossessed may also sue for the damages sustained by the dispossession, the awarding of restitution is discretionary and would be denied where the landlord had a clear right to terminate the tenancy by a proper notice, but a final order in his favor was reversed on the sole ground that the notice was insufficient and not properly served, since it would not be profitable to either party to restore the tenant's possession of premises from which he must be ousted as soon as the regular notice could be served, and he would therefore be remitted to his remedy for damages.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1344; Dec. Dig. § 317.*]

Appeal from Essex County Court.

Summary proceeding for the possession of leased premises by Witherbee, Sherman & Co. against Harry B. Wykes. From an order of the county court (81 Misc. Rep. 474, 143 N. Y. Supp. 95), reversing a final order of a justice of the peace in favor of the landlord, petitioners appeal. Modified.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Stokes & Owen, of Port Henry, for appellant.

Robert W. Fisher, of Mechanicville, for respondent.

SMITH, P. J. [1] By the final order of the justice the petitioner as landlord was awarded possession of certain premises rented by the respondent. In the petition it is stated:

"That on or about the 1st day of August, 1904, your petitioner as landlord let and rented said premises unto Harry B. Wykes at the rate of $4 per month from the said 1st day of August, 1904, for no fixed period, which said term has expired.

"IV. That your petitioner caused, on the 20th day of January, 1913, a notice in writing to be served on said tenant, requiring him to remove from said premises within 30 days from the date of the service thereof. That the time within which said tenant was required to remove from said premises has ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pired. That the said tenant holds over and continues in possession of said premises after the expiration of his said term without the permission of your petitioner, his said landlord."

[2] The county judge has reversed the final order awarding possession to the petitioner, upon the ground that the petition did not state facts sufficient to give jurisdiction to the justice to make the order. By section 2236 of the Code of Civil Procedure the petitioner is required to "state the facts showing that the tenancy has been terminated by giving notice as required by law." The statute prescribes certain methods by which this notice to surrender may be given. The petition does not show that any one of those methods so prescribed was adopted. For anything that appears in the petition the notice may have been served by mail, which would not be sufficient to terminate this tenancy. The county judge was therefore right in holding that a mere allegation of service of notice, without alleging the manner of service, or alleging that the same was duly made, was insufficient to give jurisdiction to the justice to grant the order of removal.

[3] The county judge might well have put his decision also upon the ground that the notice was not sufficient, even though properly served. The tenancy is clearly an indefinite tenancy from month to month, and under the authorities a notice terminating such tenancy must give notice to surrender at the end of the month. People ex rel. Botsford v. Darling, 47 N. Y. 666.

[4] By section 2263 of the Code of Civil Procedure the court is authorized to award restitution, and such restitution was directed in the order here appealed from. The contention of the petitioner is that such restitution cannot be directed except upon six days' notice under section 3058 of the Code of Civil Procedure. As I view the case, it is not necessary to decide that question here. The right to award restitution is discretionary. The landlord has the clear right, by serving proper notice, to terminate that tenancy. I cannot conceive that it would be profitable, either for the landlord or for the tenant, to restore possession of the premises to the tenant in this case, from which he must be ousted as soon as the regular notice could be served. Under section 2263 the tenant has the right to recover such damages as he has sustained by the unauthorized order of the justice, and in my judgment he should be remitted to this remedy, by which he can get full compensation for any injury which he has suffered. The order of the county judge should therefore be modified so as to strike therefrom direction as to restitution, and, as modified, should be affirmed with costs to respondent.

Order modified so as to strike therefrom the direction as to restitution, and, as so modified, affirmed, with costs to respondent. All concur.

(158 App. Div. 840.)

In re FARLEY et al.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

INTOXICATING LIQUORS (§ 38*)—SALE—LICENSE—SUBMISSION TO VOTE—RESUBMISSION.

The Liquor Tax Law as originally passed (Laws 1896, c. 112) contained no authority for resubmission to the town meeting of the propositions in a case of irregularities in the election, whereupon Laws 1897, c. 312, was passed providing that, if for any reason the four propositions should not have been properly submitted at any biennial town meeting, the propositions should be submitted at a special town meeting duly called on filing with the town clerk an order of the court or justice or judge thereof; sufficient reason being first shown therefor. *Held* that, as the court has no inherent power in the premises, its authority being limited to that expressly given by the act, where a resubmission had been once ordered for irregularity in the submission of local option questions at a general town meeting, the court had no jurisdiction to order a second resubmission, but the result of the special election was final until the next biennial election.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 38.*]

Howard, J., dissenting.

Appeal from Special Term, Chenango County.

Application of Michael J. Farley and others for a special town meeting to be called in and for the Town of Sherburne, New York, for a resubmission of Liquor Tax Law questions, under section 13 thereof. From an order denying the motion for want of jurisdiction, petitioners appeal. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Edward H. O'Connor, of Sherburne (Follett & Flanagan, of Norwich, of counsel), for appellant.

Ward N. Truesdell, of Sherburne, for respondent.

LYON, J. The four propositions specified in the Liquor Tax Law (Consol. Laws 1909, c. 34) § 13, were submitted to the electors of the town of Sherburne, Chenango county, at the biennial town meeting held in February, 1913. The result was in the affirmative as to the fourth proposition relating to sales by hotel keepers only. Upon an application to the county judge, alleging improper submission, an order was granted by him directing a resubmission, which was had May 10, 1913, and resulted in a tie vote, and hence a negative decision upon the fourth proposition. Application was then made to a justice of this court by petition and affidavits, alleging certain irregularities in the resubmission at the special town meeting, and alleging that by reason thereof the four propositions had not been legally resubmitted, and asking that it be so determined by the court and that an order be granted directing that the propositions be again submitted at a special town meeting to be called for that purpose. This application was opposed by certain taxpayers of the town in the capacity of interveners, who filed opposing affidavits. The justice denied the application, solely upon the ground that the Liquor Tax Law did not authorize the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

granting of the relief asked, and stating that the decision was not made upon the merits. It is from the order entered upon such denial that this appeal has been taken.

We think the decision of the learned justice was correct. The Liquor Tax Law as originally passed (chapter 112, Laws of 1896) contained no provision for a resubmission of the propositions, and, no matter what irregularities might have existed in the election, the result of the submission at the regular town meeting was final. The following year the Legislature saw fit, by enacting chapter 312, Laws of 1897, to provide for a resubmission of the propositions at a special town meeting in case the propositions had not been properly submitted at the regular town meeting.

This provision has been the subject of amendment until the statute now provides:

"If for any reason * * * the four propositions * * * shall not have been properly submitted at such biennial town meeting, such propositions shall be submitted at a special town meeting duly called. But a special town meeting shall only be called upon filing with the town clerk * * * an order of the * * * court or a justice or judge thereof, * * * sufficient reason being shown therefor."

The statute does not authorize a second resubmission in case the propositions shall not have been properly submitted at the biennial town meeting, nor authorize a resubmission in case they shall not have been properly submitted at the special town meeting, but authorizes only the single resubmission in case the propositions shall not have been properly submitted "at such biennial town meeting." A court or a justice thereof cannot exercise any power in the premises not expressly conferred upon him by the statute. In the absence of a provision granting to the court or judge authority to order a second special election in case, in his judgment, the propositions were not properly submitted at the special election, it must be presumed to have been the intention of the Legislature that but a single resubmission should be had, and that the result at the special election should be final until the next biennial election. As was said in the case of People ex rel. Brink v. Way, 179 N. Y. 174, 71 N. E. 756:

"The rules of construction of statutes require this court to hold that when the Legislature attempts to confer upon the court power to order examination of the ballots the grant of power does not extend one iota beyond its terms."

As was also said in Matter of Tamney v. Atkins, 209 N. Y. 202, 102 N. E. 567, the opinion referring to the exercise by the court of power not expressly given it by statute:

"It is well settled that this proceeding may not be entertained by virtue of any inherent powers of the court, but must find authorization and support in the express provisions of the statute. * * * In such a case as this the right to the writ depends on legislative enactment, and if the Legislature, as the result of fixed policy or inadvertent omission, fails to give such privilege, we have no power to supply the omission."

The order appealed from must be affirmed, with costs. All concur, except HOWARD, J., who dissents.

(159 App. Div. 21)

In re SUTTON'S ESTATE.

WILLIAMS v. LAKIN.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

1. WORK AND LABOR (§ 7*) — PERSONAL SERVICES — TRANSACTIONS BETWEEN RELATIVES.
   There is no presumption that services rendered by a niece of intestate's husband to intestate were gratuitous.
   [Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½–22; Dec. Dig. § 7.*]

2. LIMITATION OF ACTIONS (§ 153*)—PARTIAL PAYMENT.
   For a partial payment to take a case out of the statute of limitations, the payment must have been made under circumstances indicating an intention by the debtor to recognize the existence of a debt.
   [Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 153.*]

3. LIMITATION OF ACTIONS (§ 197*)—PARTIAL PAYMENT—SUFFICIENCY OF EVIDENCE.
   Evidence in an action on a claim against an estate *held* to show that certain money, given to claimant by another, acting for intestate, was intended as a gift and not as a recognition of an indebtedness between claimant and intestate.
   [Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 722–726; Dec. Dig. § 197.*]

4. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.
   Where, in proceedings to establish a claim against an estate for services rendered to intestate, in which defendant pleaded limitations, there was nothing to show that the giving of a certain sum by intestate to claimant was in payment of any indebtedness, but the evidence showed that it was a gift, the rejection of evidence as to what instructions were given by intestate to the person giving the money to claimant was harmless to defendant.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. § 1056.*]

Appeal from Surrogate's Court, Delaware County.

In the matter of the judicial settlement of the estate of Esther J. W. Sutton. From a decree in favor of Mary Sutton Lakin establishing a claim against the estate, the administrator, Henry J. Williams, appeals. Affirmed as modified.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Edward E. Conlon, of Downsville, for appellant.

Alexander Neish, of Walton, for respondent.

SMITH, P. J. [1] The claimant presented to the administrator a claim for $790 as a balance due for labor and services performed for the defendant between January 18, 1898, and February 10, 1903. Upon January 10, 1898, the intestate's husband was afflicted with a shock of paralysis and died in May of the same year. At the time he was so afflicted the claimant was sent for by the intestate to come to her house and assist her. This she did and remained there until she was married upon the 10th of February, 1903, with a few intermissions.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The services that she performed were domestic services, and also in caring for stock and milking cows, outside of the house. Part of the period between 1898 and 1903 she was away teaching school, and for that part she is allowed nothing. Part of this period she was teaching school in the same hamlet. During this part, however, she performed domestic service and also the outside service, and has been allowed therefor $2 a week. While she gave all of her time to the intestate she has been allowed $4 a week. She was a niece of the intestate's husband. As such, however, there is no presumption that her service was gratuitous. Greenwood v. Judson, 109 App. Div. 398, 96 N. Y. Supp. 147. While there was evidence of the claimant's stepmother of an acknowledged settlement in 1903 between the claimant and the intestate, it appeared that there was bad feeling on the part of the witness toward the claimant, and the surrogate was authorized to disbelieve that statement in view of the other evidence in the case. We are of the opinion, therefore, that the finding of the learned surrogate that the services were rendered at the request of the intestate and were of the value as found by him should not be disturbed.

[2-4] The administrator, however, contends that part at least of this claim is barred by the statute of limitations. The contention is confessedly good unless the claim has been revived by the payment of $50, which the claimant contends was paid to her upon the 30th of March, 1907. As to that $50 the evidence shows that one Jerome Bolton gave to the claimant $50 and told her that the intestate wanted him to give it to claimant. The claimant hesitated about taking the same, and Bolton swears that he then said, "You better take it, because Aunt Esther wanted you to have it." There was nothing then said that the $50 was in payment of any indebtedness, and there was nothing said that was in any way in recognition of the existence of any indebtedness. Mr. Bolton was asked by the attorney for the administration what instructions were given by the intestate in reference to this money. To this the claimant objected and the objection was sustained. It is settled law that a payment to take a case out of the statute of limitations must be made under such circumstances as to indicate an intention on the part of the person paying the same to recognize the existence of a debt. Crow v. Gleason, 141 N. Y. 493, 36 N. E. 497. There is nothing in the circumstances surrounding the giving of this money to the claimant by Mr. Bolton to indicate in any way a recognition of an indebtedness either by Bolton or by the intestate. If any such inference could arise from the mere fact of the gift, it would have been competent to show the instructions given by the intestate to Bolton, which would rebut any such inference and show that he was simply authorized to make a gift and not to make a payment upon any indebtedness, and the rejection of such testimony would have been error. If, as we believe, no such inference is legitimate from the facts as testified to, the rejection of the evidence is harmless.

The intestate died upon the 8th of September, 1907. The claimant was entitled to be paid for all services rendered from the 8th of September, 1901. From that time to February 10, 1903, there were 72 weeks. But during that time the claimant was away from the house

for 38 weeks at school. During 34 weeks of that time claimant was working for the intestate, and the value of her services at $4 a week would amount to $136. The decree should therefore be modified so as to reduce the amount payable to the claimant to the sum of $136. The finding that the $50 given by Bolton to the claimant was a payment upon an existing indebtedness is disapproved, and this court finds that said $50 was not a payment upon any indebtedness, but was a gift by the intestate to the claimant and should not be deducted from the amount found due. No costs to either party.

Decree modified so as to reduce the amount payable to the claimant to $136, and as so modified unanimously affirmed, without costs of the appeal to either party. The finding that the $50 given by Bolton to the claimant was a payment upon an existing indebtedness is disapproved, and this court finds that the said $50 was not a payment upon any indebtedness, but was a gift by the intestate to the claimant and should not be deducted from the amount found due.

(82 Misc. Rep. 444)

CURTIS-BLAISDELL CO. v. LEDERER.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. SALES (§ 355*)—ACTION FOR PRICE—FAILURE OF PROOF.
A suit for coal sold and delivered was properly dismissed, where the sale and delivery were not proved.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1025–1043; Dec. Dig. § 355.*]

2. ACCOUNT STATED (§ 20*)—QUESTION FOR JURY.
On proof that daily bills had been sent to the defendant as each lot of coal was delivered, and that monthly bills were sent on the 1st of each month, one of them on June 1, 1912, the question of an account stated as of that date was for the jury.
[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 9, 40, 94, 95, 97–99; Dec. Dig. § 20.*]

3. PLEADING (§ 345*)—JUDGMENT ON PLEADINGS—WHEN PROPER.
Where plaintiff sued on an account stated, the denial of knowledge or information sufficient to form a belief was not a denial of facts of which defendant's personal knowledge must necessarily be predicated, so that plaintiff was not entitled to judgment on the pleadings.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055–1059; Dec. Dig. § 345.*]

Appeal from City Court of New York, Trial Term.

Action by the Curtis-Blaisdell Company against George W. Lederer. From a judgment dismissing the complaint at the close of plaintiff's case, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1913, before SEABURY, GUY and BIJUR, JJ.

William C. Relyea, of New York City, for appellant.
Franklin Bien, of New York City, for respondent.

BIJUR, J. [1] Plaintiff sued on what it calls two causes of action, one for coal sold and delivered, and the other on an account stat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed, June 1, 1912, for the same coal. The sale and delivery were not proved, so that the first cause of action was properly dismissed.

[2] As to the second cause of action plaintiff failed to prove an express promise to pay. It did prove, however, that daily bills had been sent to the defendant as each lot of coal was delivered, and that monthly bills were sent on the 1st of each month, one of them on June 1, 1912. Plaintiff was erroneously prevented from proving that no objection had ever been made to these bills. Upon this state of facts, an account stated as of June 1, 1912, would have been made out, or at least the evidence would have warranted the submission of that issue to the jury. See Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Spellman v. Muehlfeld Piano Co., 166 N. Y. 245, 59 N. E. 817.

[3] Appellant has made a point which may arise on the new trial, and should therefore be disposed of. It moved at the opening for judgment on the second cause of action, on the ground that its plea of account stated had been denied by the defendant in the form of denial of knowledge of information sufficient to form a belief, and that such denial, as to a matter which must have been within defendant's personal knowledge, was a sham, citing Kirschbaum v. Eschmann, 205 N. Y. 127, 132–133, 98 N. E. 328. It is evident, without further argument, from a recital of the facts upon which the inference of an account stated is based, that the allegation is not one of the character referred to in the Kirschbaum Case, of which personal knowledge on the part of the defendant must necessarily be predicated.

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

(82 Misc. Rep. 446)

WATERS v. THOMPSON-STARRETT CO.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

MASTER AND SERVANT (§ 287*)—INJURIES TO SERVANT—METHODS OF WORK—NEGLIGENCE.

Where plaintiff was injured in assisting his fellow servants in handling iron beams, and there was testimony that in handling such beams experienced iron workers should be employed, whether the foreman was negligent in directing that the work be done in an unsafe manner by inexperienced men without warning, or instructions, and whether this was not an act of superintendence on the part of an employé, within Labor Law (Consol. Laws 1909, c. 31) § 200, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054–1067; Dec. Dig. § 287.*]

Appeal from City Court of New York, Trial Term.

Action by Felix Waters against the Thompson-Starrett Company. From a City Court judgment dismissing the complaint at the close of plaintiff's case, he appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William C. Abercrombie, of New York City (Wm. Edgar Weaver, of Whitestone, of counsel), for appellant.

William Butler, of New York City (R. Waldo MacKewan, of counsel), for respondent.

BIJUR, J. Plaintiff showed that he was a bricklayer's helper, employed in wheeling cement, which was put in pier holes for building a foundation. He was working under a foreman employed by the defendant, who was the contractor on the building. During the course of the day a number of iron beams about 25 feet long, 6 inches wide, and 18 inches high, weighing from 800 to 1200 pounds, had been placed in such position that they obstructed the gangway used by plaintiff and his fellow workmen. They had been lowered and placed in this position by an adjacent derrick. Plaintiff's foreman called his gang together to move these beams in a hurry. They were lying close together. The men pushed the beams lengthwise out of their way. In pushing one of them, it toppled over, and plaintiff's thumb was caught between that beam and the one against which it fell, causing the injury of which he complains. The action was brought under the Employers' Liability Act (Consol. Laws 1909, c. 31, §§ 200–204).

The testimony of an inexperienced iron worker was given, without objection, to the effect that in handling such beams experienced iron workers should be employed, and that they should be moved either with a derrick or on rollers and with a bar. On this state of facts, even without according to plaintiff the favorable inferences to which, on a motion to dismiss, his testimony is entitled, it seems to me that the question should have been submitted to the jury whether the foreman had not acted negligently in directing this work to be done in an unsafe manner by inexperienced men without warning or instructions, and whether this was not an act of superintendence on the part of an employé "intrusted with and exercising superintendence whose sole or principal duty is that of superintendence," as described in Labor Law, § 200. Lopisi v. Degnon Cons. Co., 76 Misc. Rep. 279, 134 N. Y. Supp. 927; Tribastoni v. Rodgers & Hagerty, Inc., 72 Misc. Rep. 77, 129 N. Y. Supp. 402.

The respondent cites in support of the judgment Ozogar v. Pierce, etc., Mfg. Co., 134 App. Div. 800, 119 N. Y. Supp. 405, in which the court holds that changing the position of a heavy iron casting weighing some 1,300 pounds was a simple act that required no apparatus, but that, in any event, the evidence that the casting had been, or that such castings were usually, moved by a derrick in the establishment, was immaterial, in view of the fact that the necessity for changing its position at the time of the accident was due to the need of getting it through a door to an elevator, where a derrick would not have been available. This case is distinguishable in a marked degree from the one at bar, where the evidence was that the very operation which caused the accident was usually performed with the apparatus named, and could not safely be performed otherwise.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

(159 App. Div. 27)

IVESON v. UNITED TRACTION CO.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

1. STREET RAILROADS (§ 81*)—CARE REQUIRED—STREET INTERSECTION.
Where the centers of two streets which intersected another street from opposite sides were only 35 feet apart, the point at which they intersected the street may be deemed an intersection, within the rule that the street car company must use additional care at all intersections of streets or where the crossing of the track is necessarily incident to the use of streets.
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172–177; Dec. Dig. § 81.*]

2. STREET RAILROADS (§ 114*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.
Evidence, in an action for injuries by being struck by a street car while plaintiff was crossing the track with a grocery wagon, *held* to sustain a finding that plaintiff was not guilty of contributory negligence.
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239–250; Dec. Dig. § 114.*]

3. WITNESSES (§ 254*)—REFRESHING RECOLLECTION.
Where, in an action for injuries by being struck by a street car, the evidence had been that the south-bound car had not stopped when the car causing the injury passed, and plaintiff testified that he did not know whether the south-bound car had stopped, he was properly asked by his counsel, for the purpose of refreshing his recollection, if he had not stated about the time of the accident that the south-bound car had stopped and passengers were alighting, which fact he then remembered.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 868–873; Dec. Dig. § 254.*]

4. TRIAL (§ 296*)—CURING ERROR—INSTRUCTIONS.
Any error in instructions that a street car company must have its cars under such control as to avoid accidents was corrected by a charge that, if the motorman had his car under reasonable control as he approached a street intersection and attempted to stop as soon as the danger became apparent, the company would not be liable.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. § 296.*]

5. TRIAL (§ 296*)—CURING ERROR—INSTRUCTIONS.
Any error in charging, in an action for injuries by being struck by a street car, that the failure of one crossing a street railway track to see would not per se constitute negligence was not reversible where the court also charged that, where the plaintiff could see the approaching car, he had no right to cross in front of it and was negligent if he did so.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. § 296.*]

6. STREET RAILROADS (§ 85*)—RIGHTS AT STREET INTERSECTIONS.
A passing vehicle had an equal right of way with a street car at a street intersection.
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

Appeal from Trial Term, Rensselaer County.

Action by Edgar A. Iveson, an infant, by Henry T. Iveson, his guardian ad litem, against the United Traction Company. From a judgment for plaintiff and an order refusing to set aside the verdict, defendant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Patrick C. Dugan, of Albany, for appellant.
Thomas S. Fagan, of Troy, for respondent.

SMITH, P. J. Pawling avenue in the city of Troy runs north and south. To the east and out of Pawling avenue runs Gregory avenue. To the west and about 30 feet south of the center line of Gregory avenue runs Monroe court, which is another avenue. Upon the day in question plaintiff, a boy 19 years of age, was driving a grocery wagon south on Pawling avenue. Upon reaching Gregory avenue he attempted to cross the track and was struck by one of the defendant's cars. It is contended by the plaintiff that the defendant was negligent in failing to give warning of the approach of that car and in failing to keep the car under reasonable control, and that the plaintiff was free from contributory negligence.

[1, 2] Without discussing in detail the evidence of defendant's negligence, it seems clear to me that a case was made for the jury thereupon. Gregory avenue is so near a continuation of Monroe court, with the centers of the streets only 35 feet apart, that this may well be deemed an intersection, even if the conjunction of Gregory avenue itself with Pawling avenue, irrespective of Monroe court, might not be so deemed. At all intersections, or wherever in the use of the streets a crossing of the track is a necessary incident to such use, the duty of additional care is imposed upon the defendant in the running of its cars, and, irrespective of the question whether or not the car going south had stopped at Monroe court, the jury had the right to find that the defendant did not exercise reasonable care in keeping its car under control as it approached Gregory avenue, where the plaintiff was required to cross the defendant's tracks. The evidence further is to the effect that no warning was given by bell or other signal of the approach of the car and no light shown, though after dark, which only strengthens the claim of the plaintiff that sufficient evidence was introduced to authorize the jury to find that the defendant had not performed its full obligation to the plaintiff in approaching this crossing. The evidence as to plaintiff's contributory negligence was also sufficient to support the conclusion of the jury thereupon. Before crossing the tracks to enter Gregory avenue, plaintiff had looked back and found the car going south approaching him. After that car had passed he again looked back to see if another car was following and claims that he also looked to the south, where his vision to an extent was obstructed by the south-bound car. There is some evidence to the effect that there was no light upon the car. Without warning of the approach of the car and with the exercise of such care as was testified to, the jury was authorized to find the plaintiff's freedom from contributory negligence.

[3-6] Defendant also seeks the reversal of this judgment upon exceptions to rulings at the trial and to the charge of the trial court. The plaintiff was upon the stand and had sworn that he did not know

whether the south-bound car had stopped at Pawling avenue. This had become an important question, because it was in evidence in the case that, under the defendant's rule where a car had stopped, a car going in the other direction must also stop before passing. Up to this time the evidence was quite conclusive that the south-bound car had not stopped at the time that the car had passed which caused the accident. Plaintiff upon the stand had sworn that he did not remember the fact and was asked by his counsel if he had not made a statement of the facts of the case at or near the time of the accident in which he had stated that this car was stopped and passengers were alighting therefrom. This was asked for the purpose of refreshing his recollection. He answered that he had, and, upon his recollection being refreshed, he swore upon this trial that the car had in fact stopped and passengers were alighting therefrom at the time he started to cross the defendant's tracks. This ruling would seem to be justified by the case of Bullard v. Pearsall, 53 N. Y. 230. Again, the charge of the trial court as first made seemed to impose upon the defendant the duty of having the car under such control as to avoid accident. To this an exception was taken. If the attention of the court had been specifically called to the rule that the motorman was only required to exercise reasonable care to that end, the charge would undoubtedly have been modified to meet the objection. In fact the defendant's counsel asked the court to charge "that if the jury find that the motorman had his car under reasonable control as he approached Gregory avenue, and that he attempted to stop as soon as the danger of a collision became apparent, then the verdict must be for the defendant," and this request the court granted. If the rule had been too strictly stated in the charge of the court before this time, the error was corrected by the granting of this request, and, had the defendant desired a more explicit statement of the rule of reasonable care, he should have asked it. The further criticism is made that the court differentiated between the care required in the crossing of a steam railroad and of a street railroad, charging that the failure of a passenger crossing a street railway to look did not per se constitute contributory negligence. But the court did charge, however, in response to defendant's request, that if the plaintiff could have seen the lighted car approaching he had no right to take any chance to cross in front of the car, and if he did take a chance he was guilty of contributory negligence as matter of law. The refusal of the court to charge that at this point the defendant's car had the paramount right of way was not error, as this was in fact an intersection at which the passing vehicle had an equal right of way. Other objections are made to this recovery, which we have examined and find insufficient to cause a reversal of this judgment. No criticism is made as to the amount of the verdict. The plaintiff's horse was upon a walk and had gotten over the track, so that the car struck the wagon. This fact would seem to indicate that the car might have been a long distance from the intersection at the time plaintiff started to cross the track and if under control might well have been stopped in time to have avoided the accident. I am satisfied that another trial would

only result in another verdict for the plaintiff and find no substantial error which in my judgment is sufficient to cause a reversal of the judgment. The judgment and order should therefore be affirmed, with costs.

Judgment and order unanimously affirmed, with costs. All concur.

(82 Misc. Rep. 419)

CRUM v. WRIGHT et al.

(Supreme Court, Appellate Term, First Department. November 10, 1913.)

1. MUNICIPAL CORPORATIONS (§ 706*) — INJURY TO PEDESTRIAN — BURDEN OF PROOF.

In an action for damages for injuries received by plaintiff on being run down by defendants' wagon, the burden is on plaintiff to prove that the wagon which struck him was owned by defendants, and that the proximate cause of the injury was the negligence of defendants' driver.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. DISCOVERY (§ 38*)—EXAMINATION OF PARTY BEFORE TRIAL.

While the rules governing the examination of an adverse party before trial are liberal, and the examination is granted where it is shown that it is sought in good faith, such examinations are not allowed for the purpose of enabling a party to pry into his adversary's case; hence, in an action for damages for injuries received by plaintiff on being run down by defendants' wagon, defendants, who denied on information and belief any knowledge as to whether the wagon was theirs, are not entitled to an examination of plaintiff before trial on that issue, there being no showing as to why they were ignorant.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 51; Dec. Dig. § 38.*]

Appeal from City Court of New York, Special Term.

Action by Richard Crum against Claude C. Wright and another. From an order denying plaintiff's motion to vacate an order for his examination before trial as an adverse party, plaintiff appeals. Order reversed, and motion granted.

Argued November term, 1913, before LEHMAN, PAGE, and WHITAKER, JJ.

Joseph H. Freedman, of New York City (Samuel Deutsch, of New York City, of counsel), for appellant.

Samuel Greason, Jr., of New York City, for respondents.

PAGE, J. This is an action to recover damages for personal injuries. The complaint states that on May 1, 1912, at or near Second avenue and Ninety-Fourth street, in the borough of Manhattan, through the negligent and reckless driving of the defendants' employés, a horse and wagon owned and controlled by the defendants and bearing their firm name upon its sides ran into the plaintiff. The answer denies any knowledge or information sufficient to form a belief as to the fact that the defendants were the owners of a horse and wagon with their firm name painted or attached to the side there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of, and on information and belief denies the other allegations of the complaint.

[1] The defendants obtained a physical examination of the plaintiff, and thereafter the order now under review was signed, directing the plaintiff to appear and be examined as to the matters set forth in the complaint. The ground stated in the moving papers, and upon which the examination was apparently granted, is that the defendants do not know whether or not they owned such a wagon and whether or not it was their wagon which ran into the plaintiff. The burden is upon the plaintiff to prove that the wagon which struck him was owned and controlled by the defendants and that the proximate cause of the injury was the negligence of the defendants' driver. These facts he must prove in order to establish his case, and they are not matters of defense.

[2] Though the rules governing examination of an adverse party before trial have been greatly relaxed in this department, and the examination is granted without regard to technicalities, where it is shown that it is sought in good faith, such examinations are not allowed for the purpose of enabling a party to pry into his adversary's case. They are only granted where the object is to obtain evidence essential to the moving party's case, and where it is apparent or probable that the testimony of his opponent will be used upon the trial in order to prove or corroborate the cause of action or defense of the party seeking the examination. Hartog & Beinhauer C. Co. v. Richmond Cedar Works, 124 App. Div. 627, 109 N. Y. Supp. 113; Wood v. Hoffman Co., 121 App. Div. 636, 106 N. Y. Supp. 308.

In the case at bar it is not likely that the defendants desire in good faith to prove by the testimony of the plaintiff that the wagon in question was not their wagon. They profess total ignorance of the accident, but no reason for their ignorance is shown. If the allegations made in the complaint are so general in their nature as to the time and place of the accident and the description of the wagon that the defendants cannot tell whether they were the owners of it and responsible for the injury or not, a motion for a bill of particulars would afford them all the relief to which they are entitled.

In the case of Koplin v. Hoe, 123 App. Div. 827, 108 N. Y. Supp. 602 (Second Department), relied upon by the respondents, an examination of the plaintiff was allowed in a negligence case as to the circumstances of the accident, on the ground that the defendant showed that his employés who were alleged to have witnessed the accident denied any knowledge of it, and he had no means of discovering what occurred, except through the testimony of his adversary. This is an extreme case, and one which has never been followed in this department. Furthermore it is distinguishable from the present case, in that here it is not shown that the defendants' employés deny knowledge of the accident. The ignorance of the defendants as to matters which would ordinarily be available to them cannot be regarded as established by their bare disclaimer, in the absence of some explanation. Their denial of knowledge or information sufficient to form a belief as to whether or not they owned and controlled such a wagon

is clearly frivolous. I am of the opinion, therefore, that the moving papers fail to demonstrate that the examination was sought in good faith.

Order reversed, with $10 costs and disbursements, and the motion to vacate the order of examination granted, with $10 costs, and order vacated. All concur.

(158 App. Div. 687)

VAN DER BENT v. GILLING.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

1. SPECIFIC PERFORMANCE (§ 29*)—CONTRACTS—DESCRIPTION—CERTAINTY.
Plaintiff owned three adjacent parcels of land, containing 70 acres, each of which was practically a parallelogram extending northwest and southeast; the easterly parcel being the longest and the northwest end of the land being wooded. Thereafter defendant entered into a contract to sell plaintiff 40 acres of her property, including the woods and pond on the northwest side, further to be described in proper form. *Held*, that the description in the contract was sufficient to warrant specific performance of the contract, as the wooded portion and that in which the pond lay might be severed from the remaining 30 acres by drawing a straight line across the land parallel to the southern boundary; that being the obvious intent of the parties.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69–82; Dec. Dig. § 29.*]

2. SPECIFIC PERFORMANCE (§ 13*)—CONSTRUCTION OF CONTRACT.
Where defendant could convey good title to the land, a contract of sale, which required a conveyance in case no difficulty arose to make the transfer impossible, may be specifically enforced, even though defendant's husband objected to the sale, and it was not for her interest.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 30–32; Dec. Dig. § 13.*]

3. SPECIFIC PERFORMANCE (§ 127*)—DENIAL OF RELIEF—LIEN.
Where plaintiff, who sought specific performance of a contract to convey land, showed that he had paid the consideration therefor and had not received a conveyance, his complaint, although not showing him entitled to specific performance, should not be dismissed, but should be retained, and a lien impressed on the property.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 406–411; Dec. Dig. § 127.*]

Appeal from Special Term, Ulster County.

Action by Teunis J. Van Der Bent against Emma W. Gilling. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Van Etten & Cook, of Kingston, for appellant.

Coulter, Bond & McKinney, of New York City, for respondent.

LYON, J. The complaint demanded the specific performance by defendant of the following agreement:

"Shokan, September 14, 1912.

"For the sum of twelve hundred dollars ($1,200) received, I, Emily Wilhemia Gilling, hereby sell to Teunis J. Van Der Bent 40 acres of my property,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

including woods and pond on the northwest side of my property, further to be described in proper form, when of the sum received I have paid the mortgage and interest owing to Alvah Bogart and I legally can dispose of this property by sale. And until this transfer of property has been legally made, I undersign this document as proof of having received the full sum of twelve hundred dollars ($1,200). In case any difficulty in title or otherwise may arise which would make this transfer of property impossible, I agree to return and pay back this amount on September 14, 1913, with interest at 6 per cent. per annum. Emily W. Gilling.

"In presence of A. Van Der Hook."

The respondent's property referred to in this agreement consisted of 70 acres of land, situated in the town of Olive, Ulster county, N. Y. The conveyance thereof to respondent, in 1901, described it in three parcels, lying side by side, extending northwest and southeast, each of which was practically a parallelogram, having the northerly and southerly lines parallel, and the easterly and westerly lines nearly so. The southern boundaries of the three parcels formed a straight line about 20 chains long. The easterly parcel was about 44 chains in length. The two westerly parcels were about 29 chains long, with their northern boundaries in the same straight line, excepting that there had been sold to one Coons in 1853, out of the northwest corner of the westerly parcel, a triangular piece containing about 1½ acres.

The survey which the appellant and respondent had agreed to have made in order to definitely locate the 40 acres called for by the agreement was established by a surveyor in October by running a dividing line northeasterly and southwesterly across the farm, parallel to the northerly and southerly boundary lines, save as to the small triangular piece. This dividing line, therefore, created two parcels, one of 40 acres, which was to be conveyed to the appellant, and one of 30 acres, which was to be retained by the respondent. Both were compact, well-proportioned parcels, with the public highway running in a generally northwesterly direction through each.

The 30-acre parcel was practically a parallelogram, the northerly and southerly lines being parallel and each about 15 chains in length, and the easterly and westerly lines nearly parallel and each about 19 chains in length. The house was situated upon this 30-acre piece, easterly and not far from the center of the parcel. The 40-acre parcel as thus laid out included the pond and big woods, and in fact all the woods, except an irregular area of about 1½ acres referred to in the testimony as light woods, which extended south of the dividing line and in places into the northwest corner of the 30-acre parcel about 200 feet.

[1] The defense mainly relied upon, at the trial and on this appeal, was that the agreement of September 14th did not constitute a contract which was subject to specific performance, in that the property was so indefinitely and insufficiently described as not to warrant a court of equity in granting specific performance. The quantity of land to be taken out of the 70 acres was definitely stated, and the single question is whether the agreement specified the location of the 40 acres with sufficient definiteness to permit it to be located with at

least reasonable certainty. It would seem that it did. People ex rel. Myers v. Storm, 97 N. Y. 364.

Had the agreement provided for conveying 40 acres to be taken off the east or south side of the 70-acre farm, extending due north and south and forming a parallelogram, there would be no hesitancy in holding that the division must be made by running a line parallel to the side or end lines of the lot and a sufficient distance therefrom to inclose 40 acres. Had the farm extended due northwest, and hence its northerly boundary line run due northeast and southwest, and the 40 acres was to be taken off the northwest side of the farm, the southerly line of the 40 acres must be beyond question run due northeast and southwest, or parallel to the northern boundary lines of the lot; otherwise, land would be included which was not in the northwest side and land excluded which was in the northwest side.

In the case at bar the 70 acres extended not quite due northwest, but northwesterly, all the northerly boundary lines, except as to the small triangular piece, running north 47 degrees east. It may fairly be assumed that the intention of the parties, in providing in the contract that the 40 acres should be taken off the northwest side of the 70 acres, was that the southerly line of the 40 acres should run the same course as the northerly boundary lines of the 70 acres, and sufficiently far therefrom to inclose 40 acres, and that the line should be a straight line, disregarding the irregularities, and run in the same northeasterly and southwesterly direction.

While the northerly line of the 70 acres was irregular, by reason of the long rectangular extension of the easterly parcel, and by the conveyance of the Coons piece, yet it is not reasonably to be inferred that it was the intention of the parties to follow the contour of the northwesterly boundary of the tract in creating a dividing line between the 40-acre and the 30-acre parcels. Such a line would not only have been very long and irregular, having four courses, but would have excluded a portion of the pond from the 40-acre parcel, and thus have been contrary to the agreement, which provided that the woods and pond should be included in the parcel. But, if a deflection of the dividing line to the south should have been made at the westerly end by reason of the sale of the Coons piece, as seems to be suggested by respondent in his brief, then the dividing line near the easterly end should have been run northwesterly and then northeasterly to correspond with the rectangular extension of the easterly parcel. Not only was the straight dividing line shorter than any other, but it was the only line which could be located between the two properties to the advantage of each. At the time the agreement was executed, neither party knew just where the dividing line would come; hence the words were inserted in the agreement, "further to be described in proper form," and it was practically agreed that the surveyor should run out the 40 acres and locate the dividing line.

[2] Respondent's son assisted in making the survey, and when the proposed deed was read to the defendant about November 27th, and she was requested to sign it, she made no objection to doing so, based upon an improper division of the property, but refused to execute

the deed solely upon the ground that her husband thought she had better not sell it. It also appears that subsequent to the execution of the agreement she had been offered a better price for the property. The fact of the extension of the acre and a half of light woods south of the dividing line does not materially affect the question of the location of such line. Irregularity of contour of forests is usual, and neither party intended that such irregular line should be followed as the dividing line between the properties. Plainly the woods referred to by the parties in making the agreement were the woods known as the "big woods."

Under the evidence, we think the description contained in the writing of September 14th was sufficiently definite to warrant a decree for specific performance. A contract being a much less formal document than a deed, the same particularity of description was not required in the agreement, although doubtless the description must be sufficiently definite to permit of the property being located with reasonable certainty. We think that the dividing line established by the surveyor and agreed upon by the parties accorded with the intention of the parties at the time the agreement was executed. It was conceded by the answer that the respondent could convey a legal title to the 40 acres; hence making a transfer thereof had not become impossible within the meaning of that term used in the agreement.

[3] But, even under the holdings of the learned trial court as to the insufficiency of the contract, we think the complaint should not have been dismissed, but that a lien should have been impressed upon the property to secure the repayment to the appellant of the moneys so paid by him to respondent, which apparently were used by respondent in removing the mortgage lien upon the 70 acres, and which, so far as the record discloses, the respondent has never offered to repay. Respondent's attorney stated upon the argument that the appellant had in good faith and in reliance upon the agreement of September 14th expended several hundred dollars in improvements upon the 40-acre parcel, but the present record contains no evidence upon that subject.

We think that the judgment should be reversed, and a new trial granted. The findings of fact disapproved of are the fifth, sixth, seventh, eighth, and ninth. Judgment reversed, and new trial granted, with costs to appellant to abide the event.

Judgment reversed on law and facts, and new trial granted, with costs to appellant to abide event. The findings of fact disapproved of are the fifth, sixth, seventh, eighth, and ninth. All concur, except KELLOGG, J., who concurs in reversal on the ground that a lien should be impressed upon the entire property for the amount paid, with interest.

(158 App. Div. 642)

PEOPLE ex rel. HUTCHINSON v. SOHMER, State Comptroller.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

1. STATES (§ 184*)—CLAIMS—INTEREST.

Laws 1911, c. 856, effective July 29, 1911, created the board of claims, in effect abolishing the Court of Claims, and provided that, whenever reference is made in any statute to the Court of Claims, it should be deemed to refer to the board of claims, and that the determination of the board upon a claim should be known as a determination, instead of a judgment. The board organized, and on October 20th appointed a clerk. Code Civ. Proc. § 269, provides that interest shall be allowed on each judgment of the Court of Claims from its date until the twentieth day after the comptroller is authorized to issue his warrant for its payment, or until payment, if made sooner, and that no such judgment shall be paid until there shall be filed with the comptroller a copy thereof, duly certified by the clerk of the board of claims. On November 29, 1911, an owner of land condemned by the state received a copy of a judgment of the Court of Claims in his favor, dated November 14, 1911, signed and certified by the clerk of the Court of Claims, awarding him $9,000, with interest from August 10, 1910, the date of the appropriation, to November 14, 1911, and costs. This was filed with the comptroller, and a receipt executed by the owner; but the comptroller refused to issue his warrant, on the ground that the judgment, being a judgment, instead of a determination, was irregular, and that the clerk of the Court of Claims had no power to certify it. On March 7, 1912, the comptroller obtained a certification of the judgment by the clerk of the board of claims, and on March 9th issued his warrant. *Held* that, if the clerk of the Court of Claims had no authority to certify the judgment or determination, he had no authority to enter, sign, and certify it, as was required by law to constitute the decision a judgment or determination, and hence no judgment existed until the certification thereof by the clerk of the board of claims on March 7, 1912, and under section 269 the owner was entitled to interest on the award from August 10, 1910, to March 9, 1912, and not merely until 20 days after November 14th.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 172–175; Dec. Dig. § 184.*]

2. STATES (§ 184*)—CLAIMS—BOARD OF CLAIMS—POWERS.

Under Laws 1911, c. 856, creating the board of claims, and providing that judges of the former Court of Claims then serving should be commissioners of claims, and constitute the board until their successors took office, the judges of the Court of Claims constituted the board of claims until the organization of the new board, and had all the authority later possessed by the new board, including the power to appoint a clerk.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 172–175; Dec. Dig. § 184.*]

Appeal from Special Term, Albany County.

Mandamus by the People of the State of New York, on relation of Samuel Hutchinson, against William Sohmer, as Comptroller of the State of New York. From an order denying his application for a peremptory writ, directing the Comptroller to pay his claim for interest upon an award for land appropriated by the state for barge canal purposes, relator appeals. Reversed, and writ granted.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Lynn Bros., of Rochester, for appellant.
Thomas Carmody, Atty. Gen. (James A. Parsons, of Albany, of counsel), for respondent.

LYON, J. August 10, 1910, lands of the relator, situate in the county of Monroe, were appropriated by the state for barge canal purposes. A claim on account thereof was duly presented, and in May, 1911, was heard by the Court of Claims. July 29, 1911, chapter 856 of the Laws of 1911, restoring the board of claims, and in effect abolishing the Court of Claims, went into effect. July 31, 1911, the claimant received notice from Charles E. Palmer, the clerk of the former Court of Claims, that an award had been made upon said claim. The new board of claims, consisting of the appointed commissioners, was organized early in October, 1911, by the appointment and qualification of three commissioners, and on October 20th the board appointed John V. Sheridan its clerk. November 29, 1911, the relator received from said Palmer a certified copy of the judgment of the Court of Claims, dated November 14, 1911, noted as decided July 29, 1911, signed "Charles E. Palmer, Clerk," and certified by him as clerk of the Court of Claims, awarding the relator $9,000, with interest from August 10, 1910, to November 14, 1911, and $40 costs, amounting in all to $9,721.

December 15, 1911, the relator filed with the respondent comptroller said certified copy of judgment, and the certificate of the Attorney General that no appeal would be taken from the judgment, and December 19, 1911, the relator received from the Attorney General a notice that the title, abstracts of which had been furnished by relator, was approved and in the hands of the comptroller. January 17, 1912, relator received from the comptroller a blank attorney's release, and an undated blank receipt, acknowledging receipt from the comptroller of his warrant on the treasurer of the state for the sum of $9,753.40, being the said amount of the award with $32.40 interest for the 20 days from November 14th to December 4th, "in payment of a determination of the board of claims made at a session of said board held on the 14th day of November, 1911." Said blanks were accompanied by a letter from the comptroller, stating: "On receipt of these papers in proper form, prompt payment of the claim will be made." On the day of the receipt of said blanks the relator, without having made any computation of interest, duly executed said receipt and release and returned the same, with waiver of attorney's lien for services, to the comptroller.

January 21, 1912, relator received from the comptroller a letter saying that he could not pay the judgment until he had received the opinion of the Attorney General relative to the jurisdiction of the Court of Claims and the board of claims. Thereafter the Attorney General informed the relator that the judgment, being certified by the clerk of the Court of Claims, and being a judgment, instead of a determination, was irregular, and could not be recognized and paid. February 27, 1912, the Court of Appeals, in the case of People ex rel. Swift v. Luce, 204 N. Y. 478, 97 N. E. 850, Ann. Cas. 1913C, 1151, af-

firmed, by a closely divided court, the lower courts in holding that chapter 856, Laws of 1911, abolishing the Court of Claims and reestablishing the board of claims, was constitutional. The Attorney General thereupon advised the comptroller that the former clerk of the Court of Claims had no power to certify a judgment or determination after the appointment of his successor as clerk of the board of claims. March 7, 1912, the state comptroller obtained a certification of the said judgment by the clerk of the board of claims, and on March 9th, inserting that date in said undated receipt, issued his warrant for the said sum of $9,753.40, which was received by the claimant March 12th, and which, as has been stated, included interest for 20 days after November 14th, the date of the entry of judgment, or to December 4th. The judgment amounted March 9, 1912, with interest thereon from the date thereof, to $9,907.30, and it is to compel the payment by the comptroller of the balance of $153.90, being the amount of the interest on the judgment from December 4, 1911, to March 9, 1912, that this proceeding has been instituted. The Special Term denied the application for a writ of mandamus, and it is from the order of denial that this appeal has been taken.

[1] The contention of respondent that relator is not entitled to interest is based mainly upon the alleged failure of relator to file a duly certified copy of the judgment with the comptroller prior to March 7, 1912. Respondent contends that Clerk Palmer was legislated out of office July 29th, and that therefore the certificate made by him and attached to the judgment or determination was invalid, and hence that the comptroller was not authorized to pay the judgment. Section 269 of the Code of Civil Procedure provides, the words "Court of Claims" being construed "board of claims," as provided by said act of 1911, that no judgment or determination shall be paid until there shall be filed with the comptroller a copy thereof duly certified by the clerk of the board of claims, and that the determination of the court shall be by a judgment or determination to be entered in a book to be kept by the clerk for that purpose and signed and certified by him. But, if Palmer had no authority to certify the judgment or determination, he had no authority to enter, sign, and certify it, as was required by law in order to constitute the decision a judgment or determination. Hence no judgment had been entered, and none existed until the certification by Clerk Sheridan, which act the state recognized and accepted as creating a valid determination and certification, and thereupon paid the amount specified in the warrant, which it had no authority to do prior to that time.

Relator was therefore entitled to interest upon the award from the time of the appropriation of the property, August 10, 1910, to the time of issuing the warrant therefor, March 9, 1912, pursuant to section 269 of the Code of Civil Procedure, providing that interest shall be allowed on each judgment from the date thereof until the twentieth day after the comptroller is authorized to issue his warrant for the payment thereof, or until payment, if payment be made sooner.

[2] If, perchance, Palmer had authority to sign the judgment or determination, he had authority the same day to certify it. Whether

Palmer was the clerk of the board of claims from July 29th until the appointment of Sheridan, October 20th, may not be very material; but in view of the statement made in one of the briefs it may be observed that the judges of the Court of Claims, having become commissioners of the board of claims July 29th, constituted the board of claims until the organization of the new board in October, and during that period had all the authority later possessed by the new board, included in which was the power to appoint a clerk.

The case of People ex rel. Evers v. Glynn, Comptroller, 126 App. Div. 519, 110 N. Y. Supp. 405, a decision of this court, is cited by respondent as authority for the contention that relator is entitled to interest for not exceeding 20 days after the date of entry of judgment, November 14th. But, in order that this decision shall be applicable, the judgment or determination so entered by Clerk Palmer must have been legally entered, which respondent claims was not the fact. Moreover, the facts in that case were very different from those in the case at bar. In that case a valid judgment had been entered, from which claimant had appealed. The comptroller was prepared and willing to meet the obligation from the time of the entry of the judgment, but the relator delayed presenting the necessary vouchers and other papers which would authorize the comptroller to make the payment, until after the determination of the appeal. The relator had not been prejudiced by the failure of the clerk of the court to furnish her a duly certified copy of the judgment, as section 269 of the Code of Civil Procedure required him to do within 10 days after the entry thereof. As the court remarked, all the delays were chargeable to the relator. In the case at bar, the relator has been guilty of no delay and has acted in good faith. The certified copy of the judgment which he furnished the comptroller was the identical paper which had been served upon him by a state official as in compliance with a statutory requirement, and he promptly furnished all other papers required to be furnished by him, all of which were retained by the comptroller.

We think the relator is entitled to be paid the balance of the interest from the time of the appropriation of his property by the state to the time of issuing the warrant, but interest should be computed, not upon the judgment, but upon the award of $9,000, from August 10, 1910, to March 9, 1912, to which should be added the costs of $40, and from which should be deducted the amount paid to the relator by the state, leaving a balance due the relator of $140.12, for the payment of which the relator is entitled to an order directing the issuance of a writ of mandamus requiring the comptroller to issue his warrant therefor.

Final order reversed, with costs, and mandamus directed as per opinion, with $10 costs and disbursements. All concur.

(159 App. Div. 10)

MILHOLLAND v. PAYNE.

(Supreme Court, Appellate Division, Third Department. November 12, 1913.)

1. CONTRACTS (§ 56*)—CONTRACT TO CONVEY—CONSIDERATION.
An agreement, whereby defendant was to purchase land and convey it to plaintiff in consideration of plaintiff's promise to pay him the moneys which he had paid therefor and a reasonable commission, is supported by consideration.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 344, 349–353; Dec. Dig. § 56.*]

2. FRAUDS, STATUTE OF (§ 152*)—PLEADING.
The statute of frauds must be pleaded, and, if not, cannot be taken advantage of to defeat an action to compel specific performance of an oral contract to convey land.
[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 363–366, 371, 372; Dec. Dig. § 152.*]

Appeal from Special Term, Essex County.

Action by John E. Milholland against Daniel F. Payne. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Adelbert W. Boynton, of Keeseville (Edgar T. Brackett, of Saratoga Springs, of counsel), for appellant.

Smith & Wickes, of Elizabethtown (Francis A. Smith, of Elizabethtown, of counsel), for respondent.

SMITH, P. J. The action is brought in equity to compel the defendant to deed to the plaintiff certain land theretofore purchased by the defendant, on the ground that the defendant had agreed to purchase the same for the plaintiff, and upon the promise of the defendant to make such conveyance to plaintiff. The case was tried before the court without a jury. The court refused to make findings of fact, but dismissed the complaint on two grounds; one, that the contract under which plaintiff claimed was void by the statute of frauds, and the other that it was without consideration.

[1] I cannot agree with the learned trial judge that the contract was without consideration. It might have been found from the evidence that the defendant agreed to purchase the land and convey to plaintiff in consideration of the promise of the plaintiff to pay him the moneys which he paid therefor and a reasonable commission for his services. These mutual promises furnish consideration one for the other; and, if the plaintiff is to be denied the right to recover, such denial must rest upon the invalidity of the contract as made void by the statute of frauds.

[2] The trial judge rested his decision as to the invalidity of the contract upon the case of Wheeler v. Reynolds, 66 N. Y. 235. This case would seem to authorize the judgment made if the defendant were in a position to avail himself of the objection of the invalidity of the contract. It is now settled law that a failure to plead the stat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ute of frauds precludes the party from claiming the invalidity of an oral contract thereunder. Crane v. Powell, 139 N. Y. 379, 34 N. E. 911; Matthews v. Matthews, 154 N. Y. 288, 48 N. E. 531. It would appear then that under a contract for a valuable consideration the defendant promised to purchase this land for the plaintiff and convey to him, and, having waived the defense of the statute of frauds, plaintiff was entitled to enforce the contract.

The judgment should be reversed, and a new trial granted, with costs to appellant to abide the event.

Judgment reversed, and new trial granted, with costs to appellant to abide event. All concur.

(82 Misc. Rep. 411)

BERNSTEIN v. TRAVERSO et al.

(Supreme Court, Appellate Term, First Department. November 10, 1913.)

1. EXECUTION (§ 414*)—SUPPLEMENTARY PROCEEDINGS—ORDERS.
In a proceeding supplementary to execution, where defendant sought to subject to his execution for costs a deposit of money made by him in the City Court to keep his tender good, the determination of an attorney's lien on the money cannot be made on a summary order, under Code Civ. Proc. § 2447, where the attorney objected to the summary adjudication of his lien without notice, for such orders can be made only when a judgment debtor's rights to the possession of the money is not substantially disputed, and if there is a real controversy it must await determination in an appropriate action.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1193; Dec. Dig. § 414.*]

2. ATTORNEY AND CLIENT (§ 182*)—TENDER (§ 26*)—PAYMENT INTO COURT—EFFECT.
Where money is paid into court by a defendant to keep a tender good, it becomes the property of the plaintiff, regardless of the final outcome of the action, and the plaintiff can withdraw it at any time; hence his attorneys immediately acquire a lien on such funds under an agreement that they shall receive one-half of the recovery.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 315, 399–406; Dec. Dig. § 182;* Tender, Cent. Dig. §§ 88–92, 95; Dec. Dig. § 26.*]

Appeal from City Court of New York, Special Term.

Action by Benjamin Bernstein against Pietro Traverso, in which Morris & Samuel Meyers, as plaintiff's attorneys, appeal from an order in supplementary proceedings directing the chamberlain of the city of New York to pay to defendant, on execution for costs, the sum previously tendered by defendant and paid into court. Order reversed.

Argued November term, 1913, before LEHMAN, PAGE, and WHITAKER, JJ.

Morris & Samuel Meyers, of New York City (Samuel Meyers, of New York City, and Albert D. Schanzer, of Brooklyn, of counsel), for appellants.

Palmieri & Wechsler, of New York City, for respondent.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PAGE, J. The appellants, as attorneys for Benjamin Bernstein, brought an action against the respondent for breach of an agreement to give a lease. The respondent, as defendant in the said action, tendered to the plaintiff a return of $50 which he had paid as earnest money, and denied the agreement. On the plaintiff's refusal to accept the $50, it was paid into court for the purpose of keeping the tender good, and was deposited with the city chamberlain. Upon the trial of the action the complaint was dismissed, with costs, and a judgment was entered in favor of the respondent against the plaintiff for $70.88 costs.

The defendant issued execution upon the judgment and obtained an order for the examination of the plaintiff in supplementary proceedings in aid of execution. Upon the examination had pursuant to this order the plaintiff, Bernstein, testified that he had $50 on deposit with the city chamberlain, which was the money paid into court by the defendant, and that he had made an agreement with his attorneys, Morris & Samuel Meyers, to pay to them, for their services in prosecuting the action, "a sum equal to 50 per cent. of the amount recovered, or the amount obtained by way of compromise, settlement, or otherwise." Upon this testimony the learned justice at Special Term granted an order directing the city chamberlain to pay the money in his hands to the sheriff, to be applied upon execution upon the defendant's judgment. It is recited in this order that it was granted "after hearing Samuel Meyers, Esq., in support of the claim of said attorneys to an alleged lien for services rendered, * * * based upon a written agreement, and having duly determined that the said attorneys were and are not entitled to any such claim or lien."

[1] It is not disputed, however, that no notice of motion to determine the lien of the appellants upon the fund in question was given, and Samuel Meyers, Esq., was only present in court upon the day of the examination and order in question because the defendant's attorney notified him by telephone on the morning of the hearing to come to the court, without telling him what the nature of the hearing was to be. Furthermore, it is not disputed that the appellant objected to a summary adjudication of his lien without notice. The order appealed from was not, therefore, an order granted upon notice in a contested motion to determine an attorney's lien, but merely a summary order in supplementary proceedings pursuant to section 2447 of the Code of Civil Procedure. It is well settled that:

"Such an order can be made, however, only when the judgment debtor's right to the possession of the money or property is not substantially disputed. If there is a real controversy in this respect, it cannot be settled in supplementary proceedings, but must await determination in an appropriate action." Kenney v. South Shore Natural Gas & F. Co., 201 N. Y. 89, at page 92, 94 N. E. 606, at page 607.

[2] The right of the debtor to the money in the hands of the city chamberlain was disputed by his attorneys, who claimed a lien thereon for the amount of their services. As soon as the money was paid into court by the defendant, it became the property of the plaintiff irrevocably, regardless of what the final outcome of the action might be.

The plaintiff could have drawn it out at any time, and, had it been lost or stolen, the loss would have fallen upon him, and not upon the defendant. Taylor v. B. E. R. R. Co., 119 N. Y. 561, 23 N. E. 1106; Mann v. Sprout, 185 N. Y. 109, 77 N. E. 1018, 5 L. R. A. (N. S.) 561, 7 Ann. Cas. 95. In the latter case it is said at page 111 of 185 N. Y., at page 1018 of 77 N. E. (5 L. R. A. [N. S.] 561, 7 Ann. Cas. 95):

"Not only does the party paying it into court lose all right to it, but the court itself has no power to make an order in the same action which, in effect, retransfers the title."

The lien of the appellants as attorneys for the plaintiff attached to the money as soon as it was paid into court, and this lien was not disturbed by the subsequent judgment for costs.

The order appealed from was accordingly improperly granted, and must be reversed, with $10 costs and disbursements. All concur.

(82 Misc. Rep. 408)

NEAL v. NEW YORK CITY POLICE ENDOWMENT FUND.

(Supreme Court, Appellate Term, First Department. October 8, 1913.)

PLEADING (§ 343*)—NECESSITY OF PROOF—CONTROVERTED ALLEGATIONS.

In an action against a benefit society composed of members of a police department, the complaint alleged that under the by-laws, as amended, plaintiff was entitled, upon death, dismissal, retirement, or resignation, if a member in good standing for over 18 months, to $200, and that she had resigned. The answer alleged an amendment of the by-laws, so as to provide that any member in good standing for five consecutive years, who might resign, should receive not less than $500, and that this amendment was in lieu of the provision relied upon by plaintiff. Both sides rested on the pleadings, without introducing evidence. *Held*, that the rights of the parties could only be determined upon the presentation of proof in support of the allegations of the complaint put in issue by the answer, and hence a judgment for plaintiff could not be sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048–1051; Dec. Dig. § 343.*]

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Mary M. Neal against the New York City Police Endowment Fund. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued June term, 1913, before SEABURY, PAGE, and BIJUR, JJ.

Grant & Rouss, of New York City (Jacob Rouss, of New York City, of counsel), for appellant.

William E. Murphy, of New York City, for respondent.

SEABURY, J. The defendant is a membership corporation composed of members of the police department of the city of New York. The plaintiff was a matron in the police department, and became a member of the defendant organization on October 1, 1909. This action is brought to recover $200 alleged by the plaintiff to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

due her from the defendant under her certificate of membership in the defendant organization. The complaint alleged that, under the by-laws existing at the time the plaintiff became a member, she was entitled, in case of death, dismissal, or retirement, to $200, provided she was a member in good standing for over 18 months and less than 3 years, and that, subsequently, the by-laws were so amended as to provide for the payment of this sum upon the "resignation" of a member. It is further alleged that on February 26, 1912, the plaintiff resigned her position as matron in the police department. The answer by the defendant alleges that the by-laws were, subsequent to plaintiff's original membership, amended so as to provide that:

"Any member in good standing five consecutive years, who may resign from the police department of the city of New York, shall receive a sum of not less than $500."

The answer further alleged that this amendment was adopted in lieu of the provision, which provided for the payment of $200, upon which the plaintiff bases her claim. The defendant contended that, because the plaintiff had not been a member of the defendant organization for five years, she was not entitled to recover. No evidence was introduced upon the trial. Both sides moved for judgment on the pleadings. This motion was originally denied by the court, and then both sides announced that they "rested on the pleadings." The court reserved decision, and subsequently granted judgment in favor of the plaintiff. From that judgment the defendant appeals to this court.

The pleadings put in issue the facts upon which the plaintiff predicated her claim for judgment. Under these circumstances, the pleadings were not in such a condition that the court could render judgment upon them. No determination of the rights of the parties could be had upon the conflicting contentions presented by the pleadings. The rights of the parties could only be determined upon the presentation of proof, unless the parties admitted the facts. The controverted allegations of the complaint afford no basis for the award of judgment for the plaintiff. The allegations of the complaint being put in issue by the answer, the plaintiff was not entitled to judgment, unless she proved the controverted allegations.

It follows that the judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

HASLINGHUIS et al. v. HENCKEN, HAAREN & CO.

(Supreme Court, Appellate Term, First Department. July 7, 1913.)

1. TRADE-MARKS AND TRADE-NAMES (§ 50*)—CONSTRUCTION OF STATUTE.
General Business Law (Consol. Laws 1909, c. 20) § 367, imposing a penalty in favor of the proprietor of a trade-mark upon any person who uses a bottle, etc., with another's trade-mark stamped thereon, is penal, and must be strictly construed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 58; Dec. Dig. § 50.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. TRADE-MARKS AND TRADE-NAMES (§ 44*)—PROCEEDINGS FOR ACQUISITION—PUBLICATION.

Under General Business Law (Consol. Laws 1909, c. 20) § 367, providing that any person filing a description of a trade-mark shall in New York and Kings counties publish the same once a week for three weeks in two daily newspapers, but may publish it once a week for three weeks successively in a newspaper published in the other counties, the publication must be daily in two newspapers in New York and Kings counties.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 50–52; Dec. Dig. § 44.*]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Jacobus J. Haslinghuis and others against Hencken, Haaren & Co. From a judgment for plaintiffs, defendants appeal. Reversed, and new trial granted.

Argued June term, 1913, before SEABURY, PAGE, and BIJUR, JJ.

Sayers Bros., of New York City (H. Schieffelin Sayers, of New York City, of counsel), for appellants.

George W. Tucker, Jr., of New York City, for respondents.

PAGE, J. This action was brought to recover the penalty prescribed for a violation of section 367 of the General Business Law, in refilling a bottle upon which was an alleged filed trade-mark. The plaintiffs proved that the trade-mark was filed in the office of the Secretary of State and in the office of the clerk of New York county, and the publication thereof in the New York Law Journal for the required period.

[1, 2] Section 367, however, provides that in New York and Kings counties the publication shall be "daily in two newspapers." This, being a penal statute, must be strictly construed, and plaintiff must show that he has complied with each and every requirement thereof in order to claim its protection and enable him to recover the penalty therein provided. This case is distinguishable from the case of Mackie & Coy, Distillers, Limited, v. Hencken, Haaren & Co., Inc., decided at this term (no opinion filed). In that case the trade-mark was filed in the Queens county clerk's office, in which county the statute requires the publication in one newspaper.

Judgment reversed, and new trial granted, with costs to appellants to abide the event. All concur.

(82 Misc. Rep. 438)

MALONE v. BOCKER.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. JUDGMENT (§ 818*)—ACTION ON FOREIGN JUDGMENT—DEFENSES.

A defendant, sued on a foreign judgment, may show that the court in which the judgment was rendered was without jurisdiction over his person, in that he was not served and did not appear, and that the attorney who appeared for him did so without authority.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458–1481; Dec. Dig. § 818.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. JUDGMENT (§ 818*)—COLLATERAL ATTACK—FOREIGN JUDGMENT.
The rule that a judgment based on an unauthorized appearance cannot be attacked collaterally does not apply to foreign judgments.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458–1481; Dec. Dig. § 818.*]

3. JUDGMENT (§ 820*)—FOREIGN JUDGMENT—FRAUD.
Notwithstanding a provision of a lease by which defendant constituted a person named, or any attorney of any court of record in Illinois, as his attorney, with power to appear in any action brought against defendant and confess judgment, defendant may show, to relieve himself from a judgment so obtained against him, that he was induced to sign the lease by false representations that it did not contain such a provision.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1486, 1487; Dec. Dig. § 820.*]

Appeal from City Court of New York, Trial Term.

Action by Joseph Malone against Ernst Bocker. From judgments for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Cornelius Huth, of New York City (Isidor M. Katz, of New York City, of counsel), for appellant.

Hirsch, Scheuerman & Limburg, of New York City (Morris J. Hirsch and Mortimer H. Hess, both of New York City, of counsel), for respondent.

SEABURY, J. Appeals from two judgments have been taken which involve substantially the same question. The plaintiff sues in two actions as assignee of two judgments recovered against the defendant in the state of Illinois. These judgments were recovered in actions for rent upon a written lease. The lease contained a clause in which the defendant constituted one Mayer, "or any attorney of any court of record in the state of Illinois," as his attorney, with power to appear in any action brought against him and to confess judgment.

The answer alleges that the defendant was induced to sign the lease as the result of false and fraudulent representations that the lease was merely a lease and did not contain a power of attorney. The answer further alleges that the attorney of record in the Illinois actions appeared without authority from the defendant and confessed judgment. Upon the trial, the defendant attempted to produce evidence in support of these allegations, but was not permitted to do so. At the time the actions in Illinois were brought, this defendant was, and ever since has been, a resident of the state of New York. The evidence which the defendant offered should have been received.

[1] It is competent for such a defendant to show that the foreign court in which the judgments were recovered was without jurisdiction over the defendant, that he was not served and did not appear, and that the attorney who appeared for him in such actions was not authorized so to do. Vilas v. P. & M. R. R. Co., 123 N. Y. 440, 25 N. E. 941, 9 L. R. A. 844, 20 Am. St. Rep. 771; Woodward v. Mutual

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Reserve Life Insurance Co., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519. In Vilas v. P. & M. R. R. Co., supra, the court said:

"It is well settled that, in an action brought in our courts on a judgment of a court of a sister state, the jurisdiction of the court to render the judgment may be assailed by proof that the defendant was not served and did not appear in the action, or, where an appearance was entered by an attorney, that the appearance was unauthorized, and this even where the proof directly contradicts the record."

[2] The rule that a judgment founded on an unauthorized appearance cannot be attacked collaterally has no application to foreign judgments, but applies only to judgments rendered in the courts of our own state. White v. Glover, 138 App. Div. 797, 123 N. Y. Supp. 482.

[3] It is claimed that the defendant is in no position to attack the judgments sued upon, because he is conclusively bound by the provision of the lease constituting any attorney of any court of record in Illinois as his attorney, with power to confess judgment on his behalf. Comprehensive as this clause is, it does not prevent the defendant from showing, if he can, that he was induced to sign the lease by false and fraudulent representations, and that he signed the lease because he was induced by such representations to believe that it did not contain such a clause. Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720. Whether or not the evidence presented on these trials was sufficient to establish that the lease was procured by fraud, or to establish the fact that the appearance for the defendant in the Illinois court was unauthorized, cannot now be determined. These issues of fact should have been submitted to the jury for their determination.

Judgments reversed, and new trials ordered, with costs to the appellant to abide the event. All concur.

(82 Misc. Rep. 454)

SIMON v. CITY OF NEW YORK.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

MUNICIPAL CORPORATIONS (§ 827*)—BURSTING OF WATER MAIN—LIABILITY OF CITY.

A city is not an insurer of its water system, but is required only to use reasonable care in establishing and maintaining it, and hence was not liable for the flooding of a cellar through the bursting of a water pipe, in the absence of any negligence in its construction or operation, or in the repair thereof after notice of the break, or actual notice by like prior occurrences that the pipe was defectively constructed or maintained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1772–1776; Dec. Dig. § 827.*]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Edward Simon against the City of New York. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Clarence L. Barber, of New York City, for appellant.
Albert J. Rifkind, of New York City, for respondent.

GUY, J. This action was brought to recover damages for the flooding of the cellars occupied by plaintiff's assignor at Nos. 1171–1175 Second avenue, by reason of the bursting of a main pipe of the water supply system. The defense was a general denial.

Plaintiff's assignor was a furniture dealer on the corner of Sixty-Second street and Second avenue. He had been there three years. On January 17, 1912, he found his cellar flooded with six feet of water. At the same time he saw in the middle of Second avenue workmen repairing a broken water pipe, which had flooded the street. Plaintiff saw the water running out, but could not see the pipe. There was some proof of the damage claimed. There was no dampness in the cellar before the flood. The water ran out of the cellar through the cellar drain. It did not have to be bailed or pumped.

In all the sewer or water main cases cited by the plaintiff, in which the city was held liable, there was either evidence of actual neglect in the construction or operation of the water main or sewer, or notice to the city authorities of the break or overflow, accompanied by neglect on their part to repair promptly, or actual notice, by reason of like prior occurrences, that the sewer or pipe were defectively constructed or maintained. Messersmith v. City of Buffalo, 138 App. Div. 427, 122 N. Y. Supp. 918; Talcott v. City of New York, 58 App. Div. 514, 69 N. Y. Supp. 360; Ettlinger v. City of New York, 58 Misc. Rep. 229, 109 N. Y. Supp. 44; Silverberg v. City of New York, 59 Misc. Rep. 492, 110 N. Y. Supp. 992. There is an entire absence of such evidence in the case at bar. A municipality is not an insurer of its water or sewer system, any more than of its streets. It is required only to use reasonable care in establishing and maintaining such a system. Jenney v. City of Brooklyn, 120 N. Y. 164, 167, 168, 24 N. E. 274.

Judgment reversed, and new trial granted, with costs to the appellant to abide the event. All concur.

MANDEL et al. v. STEINHARDT et al.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

SALES (§ 418*)—REFUSAL TO DELIVER—MEASURE OF DAMAGES.

The measure of damages for refusal to deliver an article of merchandise sold is the difference between the contract price and the market value of the article at the time and place where it should have been delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1201; Dec. Dig. § 418.*]

Appeal from Municipal Court, Borough of Manhattan, Second District.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Max Mandel and Charles Leef, copartners doing business under the style of Mandel & Leef, against Joseph H. Steinhardt and Richard F. Kelly, Jr., copartners doing business as Steinhardt & Kelly. From a judgment for plaintiffs, defendants appeal. Reversed, and new trial ordered.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Frank H. Reuman, of New York City, for appellants.

Charles Tolleris, of New York City, for respondents.

SEABURY, J. The plaintiffs sued to recover damages for a breach of contract, which breach consisted in the failure of defendants to deliver to plaintiffs a car of 600 boxes of apples. The only proof of damage which the plaintiffs offered was to the effect that they had purchased the apples from the defendants for $1 per box, "and had resold the apples" to other persons for $1.25 a box. This was not the correct rule of damage. It is elementary that the rule of damages, where a vendor refuses to deliver an article of merchandise which he has agreed to sell, is the difference between the contract price and the market value of the article at the time and place where it should have been delivered.

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

KLEIN v. UTZ.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

ATTORNEY AND CLIENT (§ 166*)—ACTIONS FOR COMPENSATION—EVIDENCE.

In an attorney's action against his client, where he relied on the client's written agreement to pay $300 as a retainer, while she was permitted to orally testify that she only agreed to pay that amount in case she was successful in an action brought by the attorney for her, a verdict for the client was so contrary to the evidence as to lead to the conclusion that it was induced by prejudice, or some consideration other than the evidence.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368–372; Dec. Dig. § 166.*]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Peter Klein against Emma Utz. From a judgment on a verdict for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Peter Klein, of New York City, in pro. per.

Bernhard Bloch, of Brooklyn, for respondent.

SEABURY, J. The plaintiff, an attorney at law, sues to recover $250, the balance remaining unpaid under a written contract. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

written contract provided that the defendant should pay the plaintiff "the sum of $300 in cash as a retainer," and in addition thereto a percentage of the amount recovered. The defendant paid the plaintiff $50 in cash, instead of $300 agreed upon.

Upon the trial the plaintiff was permitted to testify that the agreement between them was that she would pay plaintiff $300 in the event that she recovered the money for which she engaged the plaintiff to recover in an action. Thus the written agreement was regarded as amounting to nothing, and the case was submitted to the jury to determine whether the agreement was that the plaintiff should have $300 in cash, or whether that sum should be contingent upon the success of a suit which he was employed to bring. The matter having been left to the jury, they also disregarded the written contract, and rendered judgment for the defendant. The verdict of the jury was so clearly contrary to the evidence as to lead to the conclusion that it must have been induced by prejudice, or some consideration other than the evidence.

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

MARTINDALE v. B. F. CUMMINS CO.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. MASTER AND SERVANT (§ 40*)—WRONGFUL DISCHARGE—ACTIONS—ADMISSION OF EVIDENCE.

In an action for wrongful discharge from defendant's employment, defendant in justification offered in evidence letters written by plaintiff to his superior officer, relating to defendant's business, which charged the recipient with repudiating obligations, stating that he made such charge deliberately, and also referred to one of such officer's letters as "glaringly inconsistent" and insolent, and stating that plaintiff was astonished that he should use the threat of the loss of plaintiff's position to enforce compliance with his demands. *Held*, that the evidence was admissible on the question whether plaintiff's discharge was justified.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 47–49; Dec. Dig. § 40.*]

2. MASTER AND SERVANT (§ 43*) — WRONGFUL DISCHARGE — ACTIONS — JURY QUESTION.

In an action for the wrongful discharge of an employé, whether the discharge was justified by plaintiff's conduct toward a superior officer in writing offensive letters, etc., *held* a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 57, 58; Dec. Dig. § 43.*]

3. MASTER AND SERVANT (§ 40*)—WRONGFUL DISCHARGE—ADMISSION OF EVIDENCE.

In an action for an employé's wrongful discharge, evidence that at the time of his discharge plaintiff had stated to another that he had already secured another position was admissible, as tending to show that plaintiff left defendant's employment, instead of being discharged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 47–49; Dec. Dig. § 40.*]

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from City Court of New York, Trial Term.

Action by Roy W. Martindale against the B. F. Cummins Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Ingram, Root, Massey, Clark & Lowe, of New York City (Walter D. Clark, of New York City, of counsel), for appellant.

William Wallace Young, of New York City (James A. Hughes, of New York City, of counsel), for respondent.

BIJUR, J. This action was brought for wrongful discharge of an employé.

[1] Among other defenses, defendant claims justification for the discharge, in that plaintiff, during the term of his employment, had written insolent and offensive letters to his immediate superior officer, and that their relations became so strained that plaintiff's usefulness to the defendant ceased. The learned court below excluded the correspondence in which the alleged offensive expressions of the plaintiff had been used. Such exclusion constitutes reversible error. Although the entire correspondence is not produced, enough appears to indicate that the controversy related to the business of the defendant, and that plaintiff charged his immediate superior officer with repudiating obligations, which language, he says, in a subsequent letter, he used deliberately. He speaks of one of this officer's letters as "glaringly inconsistent," writes that part of it is insolent, and says:

"I am astonished that you use the threat of the loss of my position to try to force me to accede to your demands."

[2] This correspondence certainly presented an issue which should have been submitted to the jury.

[3] It should also be noted that the learned court erroneously excluded the testimony of a person to whom it is claimed that plaintiff, at the very time of his discharge, said that he had already secured another position. This testimony was competent, as being that of an admission of the plaintiff against interest, and it was relevant, in that, if established to the extent claimed by the defendant in its answer, it might have shown that the plaintiff left the defendant's employ, rather than that he was discharged.

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

GUY, J., concurs. SEABURY, J., taking no part.

(159 App. Div. 886)

In re LICHTENBERG.

(Supreme Court, Appellate Division, First Department. November 14, 1913.)

ATTORNEY AND CLIENT (§ 53*)—DISBARMENT—PROCEEDINGS.

Where respondent, on the report of a special master appointed to take testimony, was suspended from practice by the U. S. District Court for professional misconduct in a bankruptcy proceeding therein, and the bar

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

association presented the charges to the state court, the facts of the misconduct charged must be investigated by the state court, unless the respondent consents to a submission on the testimony taken before and the finding made by the special master.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

In the matter of the application to discipline Louis Lichtenberg, an attorney, for professional misconduct. Respondent given leave to answer.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Einar Chrystie, of New York City, for petitioner.

George Landon, of New York City, for respondent.

PER CURIAM. The respondent was charged, together with one Nathan Kopf, with professional misconduct by the United States District Attorney, which charges were brought on before the United States District Court for the Southern District of New York, which appointed a special master to take the testimony and report. The charges related to the respondent's misconduct in certain bankruptcy proceedings before the United States District Court, which upon that report has convicted the respondent, and ordered him suspended from practice for one year.

The Association of the Bar of the City of New York has brought the matter to this court upon the testimony and report of the special master. The respondent has submitted an answer.

We think the charges are sufficiently serious to require an investigation. If the respondent is willing to submit the charges to this court upon the testimony taken by the special master and his findings, they can be so submitted, and the court will determine what, if any, discipline should be imposed. If, however, the respondent wishes to have another investigation of the charges, the matter will be referred to an official referee.

(159 App. Div. 887)

In re KOPF.

(Supreme Court, Appellate Division, First Department. November 14, 1913.)

ATTORNEY AND CLIENT (§ 53*)—DISBARMENT—PROCEEDINGS.

Where respondent was, on the report of a special master appointed to take testimony, suspended from practice by the United States District Court for professional misconduct in a bankruptcy proceeding therein, and the bar association presented the charges to the state court, the facts of the misconduct charged must be investigated by the state court, unless the respondent consents to a submission on the testimony taken before and the finding made by the special master.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

In the matter of the application to discipline Nathan Kopf, an attorney, for professional misconduct. Respondent given leave to answer.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Einar Chrystie, of New York City, for petitioner.
Nathaniel Kopf, of New York City, in pro. per.

PER CURIAM. The respondent was charged, together with one Louis Lichtenberg, with professional misconduct by the United States District Attorney, in relation to bankruptcy proceedings before the United States District Court for the Southern District of New York. The matter was brought on before the District Court and referred to a special master, who took the testimony of the parties and presented his report to the court, whereupon the court found the respondent guilty of professional misconduct, and suspended him from practice for one year.

Thereupon the Association of the Bar of the City of New York presented the testimony taken before the special master and his report to this court, charging the respondent with professional misconduct. There is no answer by the respondent; but a letter is submitted in explanation of his conduct.

We think the charges are sufficiently serious to require an investigation. If the respondent is willing to submit the case upon the testimony and findings of the special master, they will be considered as a submission upon that record. However, if the respondent wishes to have another investigation, the matter will be referred to the official referee.

GENS v. REIBSTEIN et al.

(Supreme Court, Appellate Term, First Department. November 13, 1913.)

1. WITNESSES (§ 350*)—IMPEACHMENT—CROSS-EXAMINATION.

In an action for money loaned, defended on the ground of usury, defendant's son testified that plaintiff brought him a check for the amount of the loan, made payable to one of the indorsers of the note given for it, and told the witness to indorse the payee's name on the check, which he did, and then he used the check. *Held*, that the indorsement was not a vicious or criminal act, which would warrant cross-examination as to his similar indorsement of another check on another occasion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140–1149; Dec. Dig. § 350.*]

2. TRIAL (§ 133*)—ARGUMENT OF COUNSEL—COMMENT ON WITNESS—ACTION OF COURT.

Characterizing such act as a forgery by counsel in his argument was wholly improper, and the refusal of the court to rebuke counsel and properly instruct the jury lent the weight of the court's support to the assertion, and was error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

Appeal from City Court of New York, Trial Term.

Action by Frank Gens against Emil Reibstein and others. From a judgment for plaintiff, entered upon the verdict of a jury, and also

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from an order denying defendants' motion for a new trial, defendants appeal. Reversed, and new trial granted.

Argued October term, 1913, before SEABURY, GUY, and BIJUR, JJ.

Manheim & Manheim, of New York City (Jacob Manheim, of New York City, of counsel), for appellants.

I. Gainsburg, of New York City (Jos. P. Segal, of New York City, of counsel), for respondent.

BIJUR, J. Plaintiff sued for money loaned. The defense was usury. The chief witness as to the alleged giving of the usury was Leonard Reibstein, the son of the defendant Emil Reibstein. He testified that he received the whole or the principal part of the loan from the plaintiff personally, who brought him a check made payable to the order of one of the indorsers of the note which was given for the loan, and that plaintiff told the witness to indorse the payee's name on the check because "it is according to a form," and that then he used the check. After this testimony, to which no objection was made, plaintiff's counsel pursued the subject whether the indorser of the note—the payee of the check—had given the witness authority to indorse his name on the back of the check. To this objection was taken, and the court remarked: "I will allow it as affecting his credibility." It is at least doubtful whether the prior testimony, to which no objection had been taken, did not justify the further inquiry. But thereafter counsel for the plaintiff, over the same objection, namely, that it was incompetent, irrelevant, and immaterial, and foreign to any issue involved in this case, was permitted to interrogate the witness as to his similar indorsement on another check on another occasion. Again this was allowed "on the question of the credibility of the witness." Following this, on the summing up, plaintiff's counsel said: "Young Reibstein even goes on the stand and says that he forged other people's names." He also made other statements to that effect, and when objection was taken thereto the court overruled the objection.

[1, 2] In the first place, it is, to say the least, extremely doubtful whether these transactions as disclosed by the examination of the witness were not perfectly innocent. While the witness may have been indiscreet to indorse another's name on a check, the check was brought to him by the maker, no title had passed to the payee, and for the purposes of that transaction the payee's name was a pure fiction, in indorsing to which the witness was merely carrying out the maker's direction to receive the money himself. It therefore was "neither a vicious nor criminal act of his life" which would justify the inquiry on cross-examination, under the rule laid down in People v. Webster, 139 N. Y. 73, 84, 34 N. E. 730. But, at all events, plaintiff's counsel had no right to characterize the act as a forgery, and the refusal of the court to reprove him therefor and properly instruct the jury necessarily lent the weight of the court's indorsement to that characterization, and probably destroyed thereby all the value of the witness' testimony.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

MEMORANDUM DECISIONS

ALESSI et al. v. BOTTINI. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Charles Alessi and others against Providina Bottini. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

ALJNUICK, Appellant, v. AMERICAN MFG. CO., Respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Alexander Aljnuick against the American Manufacturing Company. No opinion. Order unanimously affirmed, with costs.

ALTHAUSE v. TRIMBLE. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Walter Althause against Richard Trimble. No opinion. Application granted. Order signed. See, also, 143 N. Y. Supp. 1105.

ALTHAUSE v. TRIMBLE. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Walter Althause against Richard Trimble. With this case has been consolidated in this court cases bearing titles as follows: Walter Althause v. U. S. Steel Corporation; William Thiele v. U. S. Steel Corporation; Same v. Richard Trimble. No opinions. Orders for stay granted. Orders filed. See, also, 143 N. Y. Supp. 1105.

ALTHAUSE v. UNITED STATES STEEL CORPORATION. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Walter Althause against the United States Steel Corporation. No opinion. Application granted. Order signed.

AMERICAN TAXIMETER CO., Appellant, v. CITY OF NEW YORK et al., Respondents. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the American Taximeter Company against the City of New York and others. C. Andrade, of New York City, for appellant. T. Farley, of New York City, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

ANDERSON v. ILLINOIS SURETY CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by William B. Anderson against the Illinois Surety Company. No opinion. Motion denied, with $10 costs. Order filed. See, also, 157 App. Div. 691, 142 N. Y. Supp. 719.

ANGEVINE, Respondent, v. ROSENWALD, Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Roth Angevine against Max Rosenwald. No opinion. Order reversed, without costs, and default opened, on payment of $50.

ARMSTRONG, Respondent, v. MINETTO-MERIDEN CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. September 24, 1913.) Action by James D. Armstrong against the Minetto-Meriden Company. No opinion. Motion to amend order of reversal (157 App. Div. 943, 142 N. Y. Supp. 1106), so as to state that the reversal was made upon questions of law only, and that facts had been examined and no error found therein, denied, without costs.

ARNOLD v. SPRING et al. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by George S. Arnold against Rex Spring and others.

PER CURIAM. Judgment (135 N. Y. Supp. 314) reversed, and new trial granted, without costs of this appeal to either party. *Held*, that the judgment appealed from is erroneous in the following particulars: First, plaintiff is not entitled to a lien for the value of the undelivered stove wood; second, plaintiff's lien attaches to all the wood and logs remaining upon the plaintiff's lands, and is not limited to an undivided one-half thereof; third, plaintiff's lien is limited in amount to the value of said wood and logs, less the expense incurred by defendants in cutting and piling the same.

In re ASHLEY. (Supreme Court, Appellate Division, First Department. October 31, 1913.) In the matter of Sarah D. Ashley. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

ATHERAS v. KEHAYA. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Aristo Atheras against Fry Kehaya. No opinion. Motion granted, with $10 costs. Order filed.

In re ATKINS. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) In the matter of John H. Atkins, an attorney. No opinion. Motion to conform report of referee granted, and respondent disbarred. See, also, 156 App. Div. 890, 141 N. Y. Supp. 1108.

ATWELL, Respondent, v. RABINOFF, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.)

Action by Ben H. Atwell against Max Rabinoff. N. G. Goldberger, of New York City, for appellant. E. Sondheim, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion granted, with $10 costs, with leave to plaintiff to renew motion upon proper papers. Order filed. See, also, 142 N. Y. Supp. 1107.

AUGINS, Respondent, v. ROSS, Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Simon Augins against Benjamin M. Ross. No opinion. Judgment and order affirmed, with costs.

BANDEMER, Appellant, v. CALVIN RITTER PROTESTANT BENEFICIAL SOCIETY, Respondent. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Frederick L. Bandemer against the Calvin Ritter Protestant Beneficial Society. No opinion. Judgment affirmed, with costs.

BANKERS' TRUST CO. v. R. E. DIETZ CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Bankers' Trust Company against the R. E. Dietz Company and others. No opinion. Motion granted, on conditions stated in opinion. Opinion per curiam. Settle order on notice. See, also, 151 App. Div. 939, 135 N. Y. Supp. 1099.

BARD, Respondent, v. JOHN SINGLE PAPER CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Jennie L. Bard, as administratrix, etc., against the John Single Paper Company. No opinion. Judgment and order affirmed, with costs.

BARDIN, Appellant, v. SALISBURY et al., Respondents. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Della Bardin against Martha Annie Salisbury and others.

PER CURIAM. Judgment unanimously affirmed, with costs to defendants Johnston.

HOWARD, J., not sitting.

BARNES et al., Respondents, v. MIDLAND RAILROAD TERMINAL CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Sarah H. Barnes and others against the Midland Railroad Terminal Company. No opinion. Order affirmed, without costs. See, also, 157 App. Div. 937, 142 N. Y. Supp. 1107.

BARRY, Appellant, v. SOLVAY PROCESS CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. September 24, 1913.) Action by Patrick M. Barry, as administrator, etc., against the Solvay Process Company. No opinion. Motion for reargument (of 157 App. Div. 941, 142 N. Y. Supp. 1107) denied, with $10 costs. Motion for leave to appeal to Court of Appeals denied.

BARTON et al., Appellants, v. REYNOLDS et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Emma L. Barton and others against Jennie B. Reynolds and another, as administrators, etc.

PER CURIAM. Interlocutory judgment (81 Misc. Rep. 15, 142 N. Y. Supp. 895) modified, by striking out the words "upon the merits," and, as so modified, affirmed, with costs, with leave to the plaintiff to amend within 20 days, upon payment of the costs of the demurrer and of this appeal.

FOOTE and MERRELL, JJ., dissent.

In re BECKER. (Supreme Court, Appellate Division, First Department. October 17, 1913.) In the matter of John Becker, deceased. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

BEEBE, Respondent, v. BEEBE, Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Mary E. Beebe against Silas P. Beebe. No opinion. Order modified, by providing that the date from which alimony shall be payable shall be June 10, 1913 (Thrall v. Thrall, 83 Hun, 188, 31 N. Y. Supp. 591), and, as thus modified, affirmed, without costs.

BERKOWITZ v. BAUMAN et al. (Supreme Court, Appellate Term, First Department. November 10, 1913.) Appeal from City Court of New York, Special Term. Action by Wolf Berkowitz against Joseph Bauman and Samuel Bauman, doing business as J. Bauman & Bro. and J. & S. Bauman, Incorporated. From an order vacating an order for the examination of plaintiff before trial, defendants appeal. Order reversed. Nadal, Jones & Mowton, of New York City (Bernard G. Barton, of New York City, of counsel), for appellants. Lester M. Friedman, of New York City, for respondent.

PER CURIAM. We think that, under a fair construction of the stipulation entered into between the parties, the plaintiff waived the right to move to vacate the order for his examination. Schweinburg v. Altman, 131 App. Div. 795, 116 N. Y. Supp. 318. The order is therefore reversed, with $10 costs and disbursements, and motion denied.

BERLIN CONST. CO., Respondent, v. EXETER MACH. WORKS, Appellant. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by the Berlin Construction Company against the Exeter Machine Works. L. D. Ball, of New York City, for appellant. S. A. Lowenstein, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

BETTINGER et al., Respondents, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Albert A. Bettinger and another against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment of Special Term and judgment of Buffalo City Court reversed, and a new trial granted in Buffalo City Court, to be held on the 22d day of October, 1913, at 10 a. m., with costs in all courts to appellant to abide the event. *Held*, that the driver of the wagon was guilty of contributory negligence as matter of law, and that his negligence is imputable to the plaintiffs.

B. F. STURTEVANT CO., Respondent, v. FIREPROOF FILM CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by the B. F. Sturtevant Company against the Fireproof Film Company.

PER CURIAM. Judgment and order affirmed, with costs.

ROBSON, J., dissents.

BLUM, Respondent, v. SCOTTISH UNION & NAT. INS. CO. OF EDINBURGH, Appellant. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Max D. Blum against the Scottish Union & National Insurance Company of Edinburgh. L. Levy, of New York City, for appellant. D. Slade, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 142 N. Y. Supp. 1109; 143 N. Y. Supp. 1107.

BLUM v. SCOTTISH UNION & NAT. INS. CO. OF EDINBURGH. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Max D. Blum against the Scottish Union & National Insurance Company of Edinburgh. No opinion. Motion to dismiss appeal denied. Order filed. See, also, 143 N. Y. Supp. 1107.

In re BOARD OF RAPID TRANSIT R. COM'RS. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) In the matter of the application of the Board of Rapid Transit Railroad Commissioners, etc., for the appointment of three commissioners, etc., Brooklyn and Manhattan Loop Lines, Brooklyn sections.

PER CURIAM. Motion denied, with $10 costs. See, also, 147 App. Div. 913, 132 N. Y. Supp. 1122.

CARR, J., taking no part.

BOLTON, Respondent, v. BUTTS, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Glenn Bolton against George Butts. No opinion. Judgment affirmed, with costs.

BOND & MORTGAGE GUARANTEE CO. v. CAPPADONA et al. (Supreme Court, Appellate Division, Second Department. September 23, 1913.) Action by the Bond & Mortgage Guarantee Company against Antonio Cappadona and others.

PER CURIAM. Judgment of the County Court of Kings County affirmed, with costs.

CARR, J., not voting.

BOOTH, Appellant, v. CLEWS, Respondent. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Henry F. Booth against James B. Clews. No opinion. As the record does not show that the trial of this action will require the examination of a long account on either side, the order of reference is reversed, with $10 costs and disbursements, and motion denied, with $10 costs.

BOOTH et al., Respondents, v. SLEE, Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Samuel H. Booth and others against J. Noah H. Slee. No opinion. Judgment affirmed, with costs.

BOVAR, Respondent, v. MECHANICVILLE ELECTRIC LIGHT & GAS CO., Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Mary Bovar, as administratrix, etc., of Frank J. Malbeauf, deceased, against the Mechanicville Electric Light & Gas Company. No opinion. Motion denied. See, also, 142 N. Y. Supp. 1109.

In re BRAKER. (Supreme Court, Appellate Division, First Department. October 17, 1913.) In the matter of Conrad Braker, deceased. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

In re BRAKER. (Supreme Court, Appellate Division, First Department. October 17, 1913.) In the matter of Conrad Braker, Jr., deceased. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

BRILL, Appellant, v. HODGENS, Respondent. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Raphael Brill against Thomas M. Hodgens. A. Benedict, of New York City, for appellant. A. B. King, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion to vacate order for examination denied, with $10 costs, the date for the examination of defendant to be fixed on settlement of order. Settle order on notice.

BROOKLYN HEIGHTS R. CO., Appellant, v. STEERS et al., Respondents. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by the Brooklyn

Heights Railroad Company against Alfred E. Steers, individually and as President of the Borough of Brooklyn and another. No opinion. Judgment affirmed, with costs. See, also, 151 App. Div. 888, 135 N. Y. Supp. 1102.

BROWN v. FAULKNER et al. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Harry K. Brown against Eliza Faulkner and others. No opinion. Motion for reargument (of 141 N. Y. Supp. 1111) denied, with $10 costs. Motion for leave to appeal to Court of Appeals denied.

BRUNO v. ROGERS et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Vittorio Bruno against James H. Rogers and others. No opinion. Motion to dismiss appeal granted, with $10 costs, unless appellant comply with terms stated in order. Order filed.

BRYDGES, Respondent, v. SANITARY CAN CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by John Brydges against the Sanitary Can Company. No opinion. Motion for reargument (of 142 N. Y. Supp. 1110) denied, with $10 costs.

BUFFALO POULTRY, PIGEON & PET STOCK ASS'N v. INTERNATIONAL POULTRY ASS'N. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by the Buffalo Poultry, Pigeon & Pet Stock Association against the International Poultry Association. No opinion. Plaintiff's motion for stay pending appeal denied, with $10 costs.

BUFFALO SAVINGS BANK, Respondent, v. POLISH ROMAN CATHOLIC CHURCH OF THE HOLY MOTHER OF THE ROSARY OF BUFFALO et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by the Buffalo Savings Bank against the Polish Roman Catholic Church of the Holy Mother of the Rosary of Buffalo, N. Y., and others.

PER CURIAM. Order reversed, without costs, and the sale vacated and set aside, and the premises ordered resold under the judgment herein, upon condition, first, that the defendant mortgagor pay to the referee within five days, the referee's fees and expenses of the sale and the interest upon the amount paid by the purchaser from the time of the payment thereof, which, together with the principal sum paid, is to be returned by the referee to the purchaser; and, second, that the defendant mortgagor, within five days, execute and deliver an undertaking to the plaintiff, with sufficient sureties, to the effect that if upon such resale the premises shall sell for less than $80,000, they will pay the difference between that sum and the amount for which they are sold, said undertaking as to form and sufficiency of sureties to be approved by the county judge of Erie county. If such conditions are not complied with, the application to vacate the sale stands denied, and the order appealed from is affirmed, with $10 costs and disbursements.

BURDI, Respondent, v. GIORDANO, Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Saverio Burdi against Angelo Giordano.

PER CURIAM. Order reversed, with $10 costs and disbursements, upon the ground that it fails to recite the grounds for the injunction (Code Civ. Proc. § 610; Meyer v. Moress, 106 App. Div. 556, 94 N. Y. Supp. 771; Brockway v. Miller, 144 App. Div. 239, 128 N. Y. Supp. 1079), and proceedings remitted to the Special Term for further action upon the motion for an injunction, on the same papers, or such additional papers as may be submitted on notice.

In re BURKE. MEYER v. SCHULTE. (Supreme Court, Appellate Division, First Department. November 14, 1913.) In the matter of Mary E. D. Burke. Action by Anton H. Meyer against David H. Schulte. No opinions. Motions for preference granted.

BURKE, Respondent, v. BURKE, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by John F. Burke against William H. Burke.

PER CURIAM. Order overruling demurrer and order continuing injunction affirmed, with $10 costs and disbursements, with leave to the defendant to plead over within 20 days, upon payment of the costs in this court and the court below.

ROBSON and LAMBERT, JJ., dissent, upon the ground that this case does not present such exceptional features as to justify the intervention of a court of equity, under the rule laid down in Bomeister v. Forster, 154 N. Y. 229, 48 N. E. 534, 39 L. R. A. 240.

BURKE, Respondent, v. LINCH, Appellant. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Michael Burke, an infant, etc., against George W. Linch, as receiver, etc. C. E. Chalmers, of New York City, for appellant. A. L. Davis, of New York City, for respondent. No opinion. Judgment and order reversed, and new trial ordered, with costs to appellant to abide event, on the ground that the finding that the defendant was guilty of negligence and the person injured was free from contributory negligence was against the weight of evidence. Settle order on notice.

BURMASTER, Respondent, v. PENNSYLVANIA R. CO. et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Martha Burmaster

against the Pennsylvania Railroad Company and another.

PER CURIAM. Judgment and order affirmed, with costs.

LAMBERT, J., not sitting.

BURREICI v. PELHAM OPERATING CO. et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Josephine Burreici, as administratrix, against the Pelham Operating Company and others. No opinion. Motion denied, with $10 costs. Order filed. See, also, 142 N. Y. Supp. 1110, 157 App. Div. 912.

BUSHBY v. BERKELEY (two cases). (Supreme Court, Appellate Division, First Department. October 31, 1913.) Actions by James C. Bushby against Lancelot M. Berkeley. No opinion. Motions to dismiss appeals granted, with $10 costs, unless appellant comply with terms stated in order. Order filed. See, also, 143 N. Y. Supp. 1109.

BUSHBY v. BERKELEY (two cases). (Supreme Court, Appellate Division, First Department. October 17, 1913.) Actions by James C. Bushby against Lancelot M. Berkeley. No opinion. Motions to dismiss appeals denied. Order filed. See, also, 153 App. Div. 742, 138 N. Y. Supp. 831; 143 N. Y. Supp. 1109.

In re BUTLER et al., Grade Crossing Com'rs. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) In the matter of the application of E. H. Butler and others, as Grade Crossing Commissioners of the City of Buffalo, for a peremptory writ of mandamus against J. H. Bradley and others, as aldermen, etc. No opinion. Order affirmed, without costs. *Held*, that the grade crossing commissioners are not parties in interest, and therefore have no standing to maintain this action.

BUTTERLY, Appellant, v. DEERING, Respondent. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Action by James N. Butterly against James A. Deering. No opinion. Motion to resettle order granted. Settle order before the Presiding Justice. See, also, 143 N. Y. Supp. 1109.

BUTTERLY, Appellant, v. DEERING, Respondent. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Action by James N. Butterly against James A. Deering. No opinion. Motion for leave to appeal to the Court of Appeals (from 158 App. Div. 181, 142 N. Y. Supp. 1050) granted. Settle order before the Presiding Justice. See, also, 143 N. Y. Supp. 1109.

CADY, Respondent, v. HOLMES, Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Edward E. Cady against Jeanette Holmes.

PER CURIAM. Order modified, to the extent of allowing defendant 20 days from the service of the order of this court in which to pay the terms imposed by the order appealed from, and that, on making said payment as aforesaid, the cause be set down for trial at the next term of the Supreme Court in Orange County, and, as so modified, said order is affirmed, with $10 costs and disbursements. See, also, 156 App. Div. 911, 141 N. Y. Supp. 1112.

CAMPBELL, Respondent, v. BOSSON, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Jeremiah Campbell against George C. Bosson, Jr. No opinion. Order affirmed, with $10 costs and disbursements.

CARBONE v. ELLISON CONST. CO. et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Raphael Carbone against the Ellison Construction Company and others. C. L. Hoffman, of New York City, for appellants. S. Wechsler, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

CARLIN, Appellant, v. CITY OF NEW YORK, Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Patrick J. Carlin, as receiver, against the City of New York. C. A. Winter, of New York City, for appellant. T. Farley, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

CARNEVALE, Appellant, v. INTERNATIONAL RY. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Michele Carnevale, as administrator, etc., against the International Railway Company. No opinion. Judgment affirmed, with costs.

In re CARPENTER. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) In the matter of Austin W. Carpenter, attorney and counselor at law.

PER CURIAM. Issues raised by the petition and answer thereto referred to Arthur R. Moore, an attorney residing at Fredonia, N. Y., to take the proofs thereon and return same to this court, together with his opinion thereon, and the district attorney of Chautauqua county is hereby designated to prosecute the matter.

CARR, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Bernard J. Carr against the New York Central & Hudson River Railroad Company. No opinion. Motion for leave to appeal to Court of Appeals (from 142 N. Y. Supp. 1111) denied, with $10 costs.

CARTWRIGHT, Respondent, v. McKINNON, Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Robert Cartwright against Frank H. McKinnon, as administrator, etc., of James R. Baumes, deceased. No opinion. Judgment modified, by striking therefrom recovery of costs, as not authorized by sections 1835 and 1836 of the Code of Civil Procedure, and, as so modified, affirmed, without costs.

CASE v. WALTER et al. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Appeal from Special Term, New York County. Action by Frank M. Case, Jr., against Eugene Walter and another. From an order directing that the issues raised by the separate defense and counterclaim be tried at Special Term, and the remaining issues at Trial Term, and granting a stay pending trial of issues at Special Term, plaintiff appeals. Modified and affirmed. David Gerber, of New York City, for appellant. Samuel W. Tannebaum, of New York City, for respondents.

PER CURIAM. The order appealed from should be modified by providing that the issues raised by the counterclaim in the amended answer of the defendant Walter be tried at Special Term after the issue raised by the allegations of the answer as a defense to the plaintiff's cause of action is tried at Trial Term, and that the trial at Special Term be stayed until the determination of the trial at Trial Term. As so modified, the order is affirmed, with $10 costs and disbursements to the appellant.

CASPER v. NAEF. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Louis Casper against Albert Naef. No opinion. Application denied, with $10 costs. Order signed. See, also, 80 Misc. Rep. 492, 141 N. Y. Supp. 568.

CASSIN, Respondent, v. YONKERS R. CO., Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Edward D. Cassin against the Yonkers Railroad Company. L. F. Crumb, of Yonkers, for appellant. No opinion. Order reversed, with $10 costs and disbursements, and motion granted. Order filed.

CHAMBERLAIN, Appellant, v. GRAVES et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Charles Chamberlain against Sarah Graves and others. No opinion. Motion granted, and decision heretofore and on the 11th day of June, 1913 (142 N. Y. Supp. 1112), made herein, modified, so as to allow to the guardian ad litem the sum of $30 for his costs and disbursements on the appeal.

CIOCARONE v. CHARLES L. DORAN CONTRACTING CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Adamo Ciocarone against the Charles L. Doran Contracting Company. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

In re CITY OF NEW YORK. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) In the matter of the application of the City of New York to acquire certain real estate at Wantagh, etc., for the purposes of water supply. No opinion. Motion for reargument denied, with $10 costs.

CLARK, Respondent, v. CLARK, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Leonidas F. Clark against James A. Clark. No opinion. Motion granted, and appeal dismissed, with costs.

CLARK, Respondent, v. NEW YORK, S. & W. R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by George W. Clark against the New York, Susquehanna & Western Railroad Company. No opinion. Judgment of the County Court of Orange County unanimously affirmed, with costs.

CLARKE et al. v. NICHOLS. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by James J. Clarke and others against Elizabeth M. Nichols. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

CLEARY v. DYKEMAN et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Joseph W. Cleary against Conrad V. Dykeman, impleaded with others. No opinion. Motion to dismiss appeal denied. Order filed. Memorandum per curiam.

In re COFFIN. (Supreme Court, Appellate Division, First Department. November 14, 1913.) In the matter of Harriet E. Coffin. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

COLEMAN & KRAUSE v. CITY OF NEW YORK et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Coleman & Krause against the City of New York and others. F. R. Ryan, of New York City, for appellants. W. McConihe, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion denied, with $10 costs. Order filed.

COLUMBIA-KNICKERBOCKER TRUST CO., Respondent, v. NEW YORK, A. & L. R. CO. et al., Appellants. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by the Columbia-Knickerbocker Trust Company, as trustee, against

the New York, Auburn & Lansing Railroad Company and others. No opinion. Orders affirmed, with $10 costs and disbursements.

CONDESSO, Respondent, v. LANZETTA, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Lizzie Condesso against James Lanzetta. No opinion. Judgment and order affirmed, with costs.

CONDRAN, Respondent, v. PARK & TILFORD, Appellants. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Mary E. Condran, as administratrix, against Park & Tilford. F. V. Johnson, of New York City, for appellants. J. E. Ruston, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

INGRAHAM, P. J., dissents.

CONDREN, Respondent, v. PARK & TILFORD, Appellants. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Ellen Condren, as administratrix, against Park & Tilford. F. V. Johnson, of New York City, for appellant. H. E. Herman, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

INGRAHAM, P. J., dissents.

CONSOLIDATED RY. & LIGHT CO., Appellant, v. ELECTRIC BOND & SHARE CO. et al., Respondents. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by the Consolidated Railway & Light Company against the Electric Bond & Share Company and others. A. C. Cass, of New York City, for appellant. G. Sumner, of New York City, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

CONWAY, Respondent v. NORCROSS BROS. CO., Appellant. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Mary Conway, as administratrix., against the Norcross Bros. Company. W. D. Reed, of New York City, for appellant. R. Gillette, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

COOK, Appellant, v. CONNORS, Respondent. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Margaret E. Cook against William J. Connors. No opinion. Motion for leave to appeal to Court of Appeals (from 157 App. Div. 832, 143 N. Y. Supp. 230) granted.

(159 App. Div. 901)

COON, Appellant, v. MILLER, Respondent. (Supreme Court, Appellate Divsion, First Department. November 7, 1913.) Action by Frederick W. Coon against James A. Miller, Jr. G. H. Taylor, of Mt. Vernon, for appellant. E. Goldmark, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See former opinion in Coon v. Miller, 151 App. Div. 631, 136 N. Y. Supp. 226.

CORCORAN, Appellant, v. EMIGRANT INDUSTRIAL SAVINGS BANK, Respondent. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Jennie M. Corcoran against the Emigrant Industrial Savings Bank. T. W. Churchill, of New York City, for appellant. R. O'Gorman, of Larchmont, for respondent. No opinion. Order affirmed, with 10 costs and disbursements. Order filed.

COUDERSPORT MANGLE ROLLER MFG. CO., Appellant, v. ELLIOTT, Respondent. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by the Coudersport Mangle Roller Manufacturing Company against Clayton H. Elliott. No opinion. Order reversed, with $10 costs and disbursements, and motion denied, with $10 costs.

COYLE, Respondent, v. LUCEY, Appellant. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Albina Coyle against Jeremiah Lucey, as administrator. A. V. Norton, of New York City, for appellant. P. J. O'Brien, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

In re CRAGG. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) In the matter of Walter H. Cragg, an attorney. No opinion. Motion to confirm report of referee granted, and respondent disbarred. See, also, 157 App. Div. 927, 142 N. Y. Supp. 1114.

In re CRERAND'S ESTATE. (Supreme Court, Appellate Division, First Department. October 31, 1913.) In the matter of William F. Crerand, deceased. No opinion. Order modified, by requiring the executor to pay the legacy, with the deduction of 1 per cent. transfer tax, and with such interest as the money on deposit in the bank has earned, if any, and, as so modified, affirmed, with $10 costs and disbursements to the appellant. Settle order on notice.

CRISCUOLI, Respondent, v. CRISCUOLI, Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Luigi Criscuoli against Flora Criscuoli. No opinion. Order affirmed, without costs. See, also, 157 App. Div. 895, 142 N. Y. Supp. 1114.

CROSS & BROWN CO., Appellant, v. HEGEMAN & CO. OF NEW YORK, Respondent. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by the

Cross & Brown Company against Hegeman & Co. of New York. S. Graham, of New York City, for appellant. S. P. Anderton, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

In re CROUSE-HINDS CO. (Supreme Court, Appellate Division, First Department. October 31, 1913.) In the matter of the Crouse-Hinds Company. No opinion. Order reversed, with $10 costs and disbursements, and motion to change place of trial to Onondaga county granted. Order filed.

In re CRUGER AVE. (Supreme Court, Appellate Division, First Department. October 31, 1913.) In the matter of Cruger Avenue, etc. No opinion. Motion denied, with $10 costs. Order filed.

In re CUNNINGHAM. (Supreme Court, Appellate Division, First Department. November 14, 1913.) In the matter of Daniel Cunningham. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed. See, also, 76 Misc. Rep. 120, 136 N. Y. Supp. 922.

In re CUVILLIER (three cases). (Supreme Court, Appellate Division, First Department. October 24, 1913.) In the matter of Louis A. Cuvillier. No opinion. Orders affirmed. Orders filed.

CYPRESS v. UNITED STORES REALTY CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Herman Cypress against the United Stores Realty Company. No opinion. Motion to dismiss appeal denied. Order filed. See, also, 143 N. Y. Supp. 1112.

CYPRESS, Appellant, v. UNITED STORES REALTY CO. et el., Respondents. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Herman Cypress against the United Stores Realty Company and others. M. H. Hochdorf, of New York City, for appellant. C. Levy and A. Furber, both of New York City, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 143 N. Y. Supp. 1112.

In re DAGGETT et al. (Supreme Court, Appellate Division, Third Department. September 10, 1913.) In the matter of the application of W. C. Daggett and others to lay out a highway in the town of Southport, N. Y., and assess the damages therefor.

PER CURIAM. Final order affirmed, with costs.

SMITH, P. J. not voting.

DALY, Respondent, v. OTIS ELEVATOR CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Joseph P. Daly against the Otis Elevator Company, a corporation. No opinion. Order affirmed, with $10 costs and disbursements.

DAVIS v. LONG ISLAND R. CO. (Supreme Court, Appellate Term, First Department. November 13, 1913.) Appeal from Municipal Court, Borough of Manhattan, Second District. Action by Sadie Davis against the Long Island Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and complaint dismissed. Joseph F. Keany, of New York City (Edward Kelly, of New York City, of counsel), for appellant. Charles S. Rosenthal, of New York City, for respondent.

SEABURY, J. Plaintiff sued to recover damages for personal injuries sustained by her while a passenger upon one of the trains of the defendant. While plaintiff was seated in the car, a person not shown to be an employé of the defendant entered the car and dropped a board which he was carrying, upon the plaintiff's foot. It is for the injury thus caused that the plaintiff has recovered judgment. There is no evidence to show that the person who dropped the board was an employé of the defendant, and no evidence to show that the servants of the defendant in charge of the car were guilty of any act of negligence. It follows that the judgment must be reversed, with costs, and the complaint dismissed, with costs, without prejudice. All concur.

In re DAY. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) In the matter of Moses T. Day, an attorney and counselor at law. No opinion. Petition granted, and order entered disbarring the said Moses T. Day, and removing him from his office as attorney and counselor at law, and forbidding his practice as such.

DE BRUYN, Appellant, v. HILFIKER et al. Respondents. (Supreme Court, Appellate Division, Fourth Department. January, 1913.) Action by Cornelius A. De Bruyn against Louis W. Hilfiker and others. No opinion. Judgment reversed, and new trial granted, with costs to appellant to abide event. Opinion by FOOTE, J., withheld from publication by direction of the court. All concurred.

DEC, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Brunislaw Dec against the Brooklyn Heights Railroad Company.

PER CURIAM. Judgment and order of the County Court of Queens County reversed, and a new trial ordered, costs to abide the event, inasmuch as the plaintiff did not sustain the burden of establishing negligence of the defendant. Evidence of loss of profits on a contract was not admissible as damages for personal injuries, unless plaintiff also gave proof that such injuries prevented performance of the contract, or receipt of profits thereof, or diminished them.

DECKER, Respondent, v. DECKER, Appellant. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Kathryne B. Decker against Henry E. Decker. N. McGovern, of New York City, for appellant. E. S. Booth, of New York City, for respondent. No opinion. Order modified as stated in order, and, as modified, affirmed, without costs. Order filed.

DE FRISCO, Appellant, v. GOODMAN. Respondent. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Dominio De Frisco against Patrick Goodman. M. J. Joyce, of New York City, for appellant. J. B. Henney, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

DEICHES v. WESTERN DEVELOPMENT CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Maurice Deiches, as receiver, etc., against the Western Development Company. No opinion. Motion for stay denied, with $10 costs. Order filed. See, also, 157 App. Div. 674, 142 N. Y. Supp. 932; 143 N. Y. Supp. 1113.

DEICHES v. WESTERN DEVELOPMENT CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Maurice Deiches, as receiver, etc., against the Western Development Company. No opinion. Motion denied, with $10 costs. Order filed. See, also, 143 N. Y. Supp. 1113.

DELABARRE v. SEES et al. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Frances Freeland Delabarre against Anna S. Sees, individually, and as executrix, etc., and Maria L. Delabarre.

PER CURIAM. Judgment and order reversed, and new trial granted, costs to abide the final award of costs, on the ground that the proofs fall short of showing any undue influence by the appellant. Surmise and conjecture as to how the deceased came so violently to disagree with his brother do not sustain a verdict. A possibility that undue influence may have been used cannot justify setting aside a will upon that ground.

DE NYIRI, Respondent, v. WICKWIRE STEEL CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by John De Nyiri, as administrator, etc., against the Wickwire Steel Company. No opinion. Judgment and order affirmed, with costs.

DERBYSHIRE, Respondent, v. KEYSTONE VARNISH CO., Appellant. (Supreme Court, Appellate Division, Second Department. September 23, 1913.) Action by John Derbyshire against the Keystone Varnish Company. No opinion. Judgment and order unanimously affirmed, with costs. Appeal to Court of Appeals denied. 143 N. Y. Supp. 1113.

DERBYSHIRE, Respondent, v. KEYSTONE VARNISH CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by John Derbyshire against the Keystone Varnish Company. No opinion. On a careful re-examination of the record on appeal, we see no reason for a reargument, and the motion is therefore denied, without costs. Motion for leave to appeal to the Court of Appeals (from 143 N. Y. Supp. 1113) denied, without costs.

DICK, Appellant, v. INTERBORO RAPID TRANSIT CO., Respondent. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Jessie S. Dick against the Interboro Rapid Transit Company. W. C. Abercrombie, of New York City, for appellant. B. H. Ames, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

DICKEY, Plaintiff, v. GORTNER, Defendant. (Supreme Court, Appellate Division, Second Department. October, 1913.) Action by Paul Dickey against Christopher A. Gortner.

PER CURIAM. Motion for leave to appeal to the Court of Appeals denied. The time to appeal has long since expired, and granting of leave would not extend the time. The granting of leave in a case of this character is not necessary in any event. See, also, 152 App. Div. 937, 137 N. Y. Supp. 1117.

CARR, J., taking no part.

DIEGL v. MERCANTILE WAREHOUSE CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Emma S. Diegl against the Mercantile Warehouse Company. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

DI MARCO, Respondent, v. BUFFALO & FT. E. FERRY & RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Sarah Di Marco against the Buffalo & Ft. Erie Ferry & Railway Company. No opinion. Motion for leave to appeal to Court of Appeals (from 156 App. Div. 924, 141 N. Y. Supp. 1116) denied, with $10 costs.

DI MARTINO, Respondent, v. WEISBECKER et al., Appellants. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Michele Di Martino, an infant, etc., against Francis A. Weisbecker, Sr., and others. No opinion. Judgment and order of the County Court of Kings County unanimously affirmed, with costs.

DOBEK v. AUSTRO-AMERICANA S. S. CO., Limited. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Ferdinand Dobek against the Austro-Americana Steamship Company, Limited. No

opinion. Motion to dismiss appeal denied. Order filed. See, also, 153 App. Div. 887, 138 N. Y. Supp. 1114.

DOELLINGER, Respondent, v. NEW YORK EVENING JOURNAL PUB. CO., Appellant. SAME v. STAR CO. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Actions by Alice Doellinger against the New York Evening Journal Publishing Company and against the Star Company. C. J. Shearn, of New York City, for appellants. R. Maggio, of New York City, for respondent. No opinion. Orders affirmed, with $10 costs and disbursements. Orders filed.

DRDA, Respondent, v. KOMANCEK et al., Appellants. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Antoinette Drda against Joseph Komancek and other. No opinion. Order affirmed, with $10 costs and disbursements.

DREYER, Respondent, v. McCORMACK REAL ESTATE CO., Appellant. (Supreme Court, Appellate Division, Second Department. July 25, 1913.) Action by William F. Dreyer against the McCormack Real Estate Company.

PER CURIAM. Order affirmed, with costs. Appeal to Court of Appeals denied. 143 N. Y. Supp. 1114.

THOMAS, J., dissents, on authority of O'Beirne v. Lloyd, 43 N. Y. 248.

DREYER, Respondent, v. McCORMACK REAL ESTATE Co., Appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Action by William F. Dreyer against the McCormack Real Estate Company. No opinion. Motion for leave to appeal to the Court of Appeals (from 143 N. Y. Supp. 1114) denied, without costs, on the ground that the Court of Appeals can only hear such an appeal on a stipulation for judgment absolute.

DRISCOLL, Respondent, v. CADILLAC HOTEL CO., Appellant. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Cornelius Driscoll against the Cadillac Hotel Company. G. M. Pinney, of New York City, for appellant. H. C. Smyth, of New York City, for respondent.

PER CURIAM. Exceptions overruled, and judgment ordered on verdict. Settle order on notice.

INGRAHAM, P. J., and CLARKE, J., dissent.

DRUMMOND, Respondent, v. DI PAOLO, Appellant. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Michael J. Drummond, as commissioner, against Frank Di Paolo. M. Wechsler, of New York City, for appellant. T. Farley, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

DRUMMOND v. KUNSTLER. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Appeal from Special Term, New York County. Action by Michael J. Drummond, commissioner, etc., on complaint of Freda Friedman against Isidor Kunstler. From an order of filiation, defendant appeals. Reversed and dismissed. Julius Offenbach, of New York City, for appellant. Terence Farley, of New York City, for respondent.

PER CURIAM. We think the finding of the court below was against the weight of evidence. The judgment is therefore reversed and the proceeding dismissed.

LAUGHLIN and DOWLING, JJ., dissent, and vote for affirmance.

DUCAS v. LOONEN. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Appeal from Trial Term, New York County. Action by Benjamin P. Ducas against Robert Loonen. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered. Walter N. Seligsberg, of New York City, for appellant. Harrie C. Manheim, of New York City, for respondent.

PER CURIAM. We think that the evidence adduced by the plaintiff established a prima facie case, and it was error to dismiss the complaint. The letter of the attorney for the plaintiff, written after the commencement of the action, was incompetent to destroy the cause of action, and was improperly admitted, unless set up by way of supplemental pleading. Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

DOWLING, J., dissents.

DUCHARDT et al., Respondents, v. HUXLEY et al., Appellants. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Kate Duchardt and others against Kate Huxley and others. T. F. Kennedy, of New York City, for appellants. L. L. Kellogg, of New York City, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

DUCKETT v. HOFFERBERTH. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Alfred W. Duckett against Charles F. Hofferberth. No opinion. Motion to dismiss appeal granted, with $10 costs, unless appellant comply with terms stated in order. Order filed.

DUKE v. AMERICAN MUSEUM OF NATURAL HISTORY. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Frank Duke against the American Museum of Natural History. No opinion. Motion denied, with $10 costs. Order filed. See, also, 157 App. Div. 637, 142 N. Y. Supp. 804.

DUMAS, Respondent, v. AUBURNDALE REALTY CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Alexander Dumas, Jr., against the Auburndale Realty Company.

PER CURIAM. Judgment and order affirmed, with costs.

BURR and THOMAS, JJ., dissent.

DUNHAM, Respondent, v. SYLVIEUS et al., Appellants. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Erwin A. Dunham, as executor, etc., of Mary E. Dunham, deceased, against Frank A. Sylvieus and another.

PER CURIAM. Motion granted, with costs, unless within 20 days the appellant serves upon the respondent printed papers on appeal, which he may do upon payment of $10 costs of this motion, in which case motion is denied, without costs.

DURYEE v. REES & REES. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by John K. Duryee against Rees & Rees. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

DUSTIN, Respondent, v. CROWLEY, Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Bentley Dustin against Michael J. Crowley. No opinion. Order affirmed, with $10 costs and disbursements.

DYKEMAN et al., Appellants, v. CARDONE, Respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Oliver J. Dykeman and another against Domenice B. Cardone. No opinion. Order affirmed, with $10 costs and disbursements.

EBLING, Respondent, v. BUFFALO LODGE, NO. 8, LOYAL ORDER OF MOOSE, Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Sophia Ebling, as administratrix, etc., against Buffalo Lodge, No. 8, Loyal Order of Moose. No opinion. Judgment affirmed, with costs.

ECKERT, Respondent, v. TRUMAN, Appellant, et al. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Claudine Eckert against Clara M. Truman and another.

PER CURIAM. After entry of judgment, the judgment debtor may appeal by another attorney, without any substitution (Lusk v. Hastings, 1 Hill, 656; Cruikshank v. Goodwin, 66 Hun, 626, 20 N. Y. Supp. 757; Davis v. Solomon, 25 Misc. Rep. 695, 56 N. Y. Supp. 80). Mr. White's authority to represent Mrs. Truman in these proceedings had since the judgment stands undisputed by Mr. Davenport, the former attorney of record. Plaintiff's motion to dismiss the appeal and to set aside the other proceedings taken in behalf of the appellant is denied, but without costs. See, also, 143 N. Y. Supp. 1115.

ECKERT, Appellant, v. TRUMAN, Respondent, et al. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Action by Claudine Eckert against Clara M. Truman and George D. Nowland.

PER CURIAM. Order affirmed, with $10 costs and disbursements. See, also, 143 N. Y. Supp. 1115.

RICH, J., not voting.

E. C. PALMER & CO., Limited, Appellant, v. ERIE R. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by E. C. Palmer & Co., Limited, against the Erie Railroad Company. No opinion. Judgment and order affirmed, with costs.

In re EDICK'S ESTATE. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) In the matter of the estate of Jacob Henry Edick, deceased. No opinion. Motion granted, and appeal dismissed, with costs.

EDISON ELECTRIC ILLUMINATING CO. OF BROOKLYN v. HORACE E. FRICK CO. et al. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by the Edison Electric Illuminating Company of Brooklyn against the Horace E. Frick Company and others. No opinion. Judgment modified, so as to charge the lienors found to be entitled to the fund with only one half of the expenses of the reference, and judgment directed against the National Bank of Lebanon for the other half, and, as so modified, affirmed, without costs against the bank, but with one bill of costs and disbursements, except for printing the record, in favor of the Ajax Lead Coating Company, M. Goodwin & Co., Audley Clark Company, and Neal & Brinker Company against John V. Lindberg and the National Bridge Works, and without costs against the N. Ryan Company. Settle order before Mr. Justice THOMAS. See, also, 146 App. Div. 605, 131 N. Y. Supp. 125.

EISENSTAT v. MAHER. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Selig Eisenstat against Edward Maher. No opinion. Motion denied, with $10 costs. Order filed. See, also, 143 N. Y. Supp. 1115.

EISENSTAT v. MAHER. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Selig Eisenstat against Edward Maher. No opinion. Application denied, with 10 costs. Order signed. See, also, 143 N. Y. Supp. 1115.

EISERT v. BOWEN et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Alwin Eisert against Abner T. Bowen, impleaded with others. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

ELK REALTY CO. v. ONDERDONK. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the Elk Realty Company against Antoinette Onderdonk. No opinion. Application denied, with $10 costs. Order signed. See, also, 142 N. Y. Supp. 289.

ELMOHAR CO., Appellant, v. PEOPLE'S SURETY CO. OF NEW YORK, Respondent. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by the Elmohar Company against the People's Surety Company of New York. A. C. Cass, of New York City, for appellant. E. M. Grout, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

EMPIRE ENGINEERING CORPORATION v. MACK et al. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by the Empire Engineering Corporation against Cornelius J. Mack and others. No opinion. Judgment affirmed with costs.

(158 App. Div. 913)

ENGINEER CO. v. HERRING-HALL-MARVIN CO. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Appeal from Trial Term, New York County. Action by the Engineer Company against the Herring-Hall-Marvin Company. From a judgment for plaintiff, and denial of new trial, defendant appeals. Affirmed. Harry W. Forbes, of New York City, for appellant. James W. Monk, of New York City, for respondent.

PER CURIAM. This court on the former appeal (154 App. Div. 123, 138 N. Y. Supp. 881) held that there was a question for the jury. The case now having been submitted to the jury, who have found a verdict for the plaintiff, which is supported by the evidence, the judgment is therefore affirmed. Judgment and order affirmed, with costs.

ENOCH MORGAN'S SONS CO., Respondent, v. INMAN et al., Appellants. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by the Enoch Morgan's Sons Company against Horace Inman and another. H. V. Borst, of Amsterdam, for appellants. R. F. Clarke, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

EPSTEIN, Appellant, v. DIMON, Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Hyman Epstein against Anton D. Dimon. A. S. Aronstamm, of New York City, for appellant. L. Burgess, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

ETTLINGER, Respondent, v. KRUGER, Appellant. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Louis Ettlinger against Theodore Kruger. H. L. Scheuerman, of New York City, for appellant. W. W. Pellet, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

FABBRI v. MEYER et al. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Appeal from Special Term, New York County. Action by Edith Fabbri against Anna C. Meyer and another. From an order denying a motion for leave to serve an amended complaint, and giving leave to discontinue, plaintiff appeals. Reversed, and motion granted. Rumsey, Sheppard & Ingalls, of New York City, for appellant. Hatch & Sheehan, of New York City, for respondent Meyer. Dexter, Osborn & Fleming, of New York City, for respondent Taylor.

PER CURIAM. The order appealed from should be reversed, with $10 costs and disbursements to the appellant, and the motion granted, to provide, first, that the motion for leave to serve an amended complaint be granted on the payment of full costs and disbursements to be taxed, unless the plaintiff elects to discontinue the action on the payment of costs and disbursements, in which case the action is discontinued.

FAMOBROSIS SOCIETY, Appellant, v. ROYAL BEN. SOCIETY, Respondent. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by the Famobrosis Society against the Royal Benefit Society. W. H. Van Steenbergh, of New York City, for appellant. J. A. Carney, of New York City, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 152 App. Div. 946, 137 N. Y. Supp. 1119.

FARGO v. ARNDTSTEIN. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Bessie V. Fargo against Moses Arndtstein. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

FARNHAM, Appellant, v. LEBOLT & CO., Respondent. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by George A. Farnham against Lebolt & Co. No opinion. Judgment modified, by striking therefrom the allowance of $50 costs, and, as so modified, unanimously affirmed, without costs. See, also, 136 App. Div. 934, 120 N. Y. Supp. 1123.

FAY, Respondent, v. CITY OF GLOVERSVILLE, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Francis Fay against the City of Gloversville. No opinion. Appeal dismissed, with $10 costs.

FEAREY, Respondent, v. NEW YORK TELEPHONE CO., Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by George A. Fearey against the New York Telephone Company. No opinion. Judgment and order unanimously affirmed, with costs.

FEE SIMPLE REALTY CO., Respondent, v. MIDDLETOWN REALTY CO. et al., Appellants. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Fee Simple Realty Company against the Middletown Realty Company and others. J. D. Connolly, of New York City, for appellants. J. L. Prager, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

In re FEINBLATT. (Supreme Court, Appellate Division, First Department. October 31, 1913.) In the matter of Sigmund Feinblatt, an attorney. No opinion. Referred to official referee. Settle order on notice.

FERRERRA v. CONSOLIDATED TELEGRAPH & ELECTRICAL SUBWAY CO. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Ciro Ferrerra against the Consolidated Telegraph & Electrical Subway Company. No opinion. Motion granted, with $10 costs. Order filed.

FIRESTONE TIRE & RUBBER CO. OF NEW YORK, Respondent, v. DIXON MOTOR CAR CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by the Firestone Tire & Rubber Company of New York against the Dixon Motor Car Company. No opinion. Interlocutory judgment affirmed, with costs.

FISH, Appellant, v. DELAWARE, L. & W. R. CO., Respondent. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by George D. Fish against the Delaware, Lackawanna & Western Railroad Company. No opinion. Motion granted, the court certifying that there are questions of law involved therein which ought to be reviewed by the Court of Appeals. See, also, 143 N. Y. Supp. 365.

FLETCHER et al. v. 416 WEST THIRTY-THIRD ST. REALTY CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Austin B. Fletcher and others, as trustees, etc., against the 416 West Thirty-Third Street Realty Company and others. F. Hulse, of New York City, for appellants. B. H. Arnold and D. Bernstein, both of New York City, for respondents. No opinion. Order affirmed, with $10 costs and disbursements to respondent H. G. Vogel Co. Order filed. See, also, 152 App. Div. 943, 137 N. Y. Supp. 1120.

FOLSOM, Appellant, v. COLLINS, Respondent. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Chester J. Folsom, Jr., against Eva E. Collins, as executrix, etc. No opinion. Judgment affirmed, with costs.

FOLZ, Respondent, v. FOLZ, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Viola Folz against William H. Folz. B. F. Gerding, of New York City, for appellant. H. Wintner, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 146 App. Div. 942, 131 N. Y. Supp. 1115.

FOSTER, Appellant, v. THOUSAND ISLAND PARK ASS'N, Respondent. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Silas W. Foster against the Thousand Island Park Association. No opinion. Motion for leave to appeal to Court of Appeals (from 156 App. Div. 925, 141 N. Y. Supp. 1119) denied, with $10 costs.

FOSTER v. WAIT. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by George H. D. Foster against John C. Wait. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed. See, also, 151 App. Div. 933, 136 N. Y. Supp. 209.

FOURTH NAT. REALTY CO., Respondent, v. GOODALE et al., Appellants. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by the Fourth National Realty Company against Josiah H. Goodale and others. No opinion. Order affirmed, with $10 costs and disbursements. See, also, 157 App. Div. 936, 142 N. Y. Supp. 1118.

In re FOWLER'S WILL. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) In the matter of proving the will of Elizabeth H. Fowler, deceased.

PER CURIAM. Decree affirmed, with costs.

ROBSON, J., not sitting.

FOWLSTON, Respondent, v. HATHAWAY, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Stanley J. Fowlston against Azariah J. Hathaway.

PER CURIAM. Motion denied. See, also, 157 App. Div. 883, 141 N. Y. Supp. 1119.

LYON, J., not sitting.

FOX et al. v. PROCTOR. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Hugh L. Fox and others against Frederick F. Proctor. No opinion. Application granted. Order signed.

FREET v. STANDARD SCALE & SUPPLY CO. (Supreme Court, Appellate Division, First

Department. October 17, 1913.) Action by Charles E. Freet against the Standard Scale & Supply Company. No opinion. Motion to dismiss appeal denied. Order filed. See, also, 143 N. Y. Supp. 1118.

FREET, Respondent, v. STANDARD SCALE & SUPPLY CO., Appellant. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Charles E. Freet against the Standard Scale & Supply Company. M. Mackenzie, of New York City, for appellant. W. R. Page, of New York City, for respondent. No opinion. Orders affirmed, with $10 costs and disbursements. Order filed. See, also, 143 N. Y. Supp. 1117.

FRICK, Respondent, v. BURNETT et al., Appellants. (Supreme Court. Appellate Division, Fourth Department. October 15, 1913.) Action by Belle Frick against Augustus E. Burnett, as executor, etc., and another.

PER CURIAM. Judgment reversed upon questions of law and fact, and judgment directed in favor of the defendants dismissing the complaint, with costs, including costs of this appeal. *Held*, that the motion for the dismissal of the complaint should have been granted. The finding that the plaintiff entered into a contract with defendant's testator to board and care for him, as found by the referee, is disapproved, and this court finds and decides that the evidence is insufficient to warrant any such finding, or that there is anything due or unpaid under any contract, express or implied, for the board of defendant.

FRIEDLANDER v. JOHN E. SULLIVAN CO. et al. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Action by Herman Friedlander against the John E. Sullivan Company and others.

PER CURIAM. Order of the County Court of Kings County affirmed, with $10 costs and disbursements.

RICH, J., not voting.

GEISENER, Appellant, v. McDONOUGH, Respondent. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by William Geisener against John F. McDonough as treasurer. J. Hillquit, of New York City, for appellant. J. J. Coughlan, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 156 App. Div. 942, 141 N. Y. Supp. 1120.

GERMAN SAVINGS BANK v. WAGNER. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the German Savings Bank against Phillip Wagner, as committee, etc. No opinion. Motion to dismiss appeal denied, with $10 costs. Order filed. See, also, 157 App. Div. 921, 142 N. Y. Supp. 1119; 143 N. Y. Supp. 1118.

GERMAN SAVINGS BANK IN CITY OF NEW YORK, Respondent, v. WAGNER, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the German Savings Bank in the City of New York against Phillip Wagner, as committee, etc. T. O'Callaghan, of New York City, for appellant. P. S. Dean, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 143 N. Y. Supp. 1118.

GIBBS, Respondent, v. LUTHER et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Arthur Gibbs, a taxpayer of the city of Olean, against George H. Luther and others, as Commissioners of Public Works, etc., and others. No opinion. Order (81 Misc. Rep. 611, 143 N. Y. Supp. 90) affirmed, with $10 costs and disbursements. Held, that the proceeding to pave the street and charge the expense to the adjoining owners is unauthorized, without the petition required by the city charter.

In re GLASBERG. (Supreme Court, Appellate Division, First Department. November 14, 1913.) In the matter of Otto A. Glasberg. No opinion. Referred to official referee. Settle order on notice.

GOEWEY, Appellant, v. LONG, Respondent. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Alfred R. Goewey, an infant, etc., against David D. Long. No opinion. Judgment and order affirmed, with costs.

GOLDBERG v. PEOPLE'S SURETY CO. OF NEW YORK. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Benjamin Goldberg against the People's Surety Company of New York. No opinion. Motion denied, with $10 costs. Order filed.

In re GOODRICH. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) In the matter of the examination of George G. Goodrich, judgment debtor, in proceedings supplementary to execution, upon the application of Nash Rockwood, a judgment creditor under a judgment recovered in an action entitled George G. Goodrich v. Nash Rockwood. No opinion. Order affirmed, with $10 costs and disbursements.

GORDON v. HARSTN & CO. et al. (three cases). (Supreme Court, Appellate Division, First Department. October 17, 1913.) Actions by Milton J. Gordon against Harstn & Co. and others. No opinions. Motions to dismiss appeals granted, with $10 costs. Orders filed.

GOROVOY v. WEST SIDE MASON CONTRACTING CO. (Supreme Court, Appellate Division, First Department. October 31, 1913.)

Action by Celia Gorovoy, as administratrix, against the West Side Mason Contracting Company. No opinion. Motion to dismiss appeal granted, with $10 costs, unless appellant comply with terms stated in order. Order filed.

In re GRADE CROSSING COM'RS OF CITY OF BUFFALO. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) In the matter of the application of the Grade Crossing Commissioners of the City of Buffalo for the appointment of commissioners to ascertain the compensation to be paid to the owners of and parties interested in, etc., lands claimed to be owned by Mary Nowak and others. Proceeding No. 93. No opinion. Upon stipulation filed, appeals dismissed, without costs, and order confirming award as to parcel No. 1 vacated, and report and proceedings sent back to same commissioners for new appraisal and report.

In re GRADE CROSSING COM'RS OF CITY OF BUFFALO. (Supreme Court, Appellate Division, Fourth Department. September 24, 1913.) In the matter of the application of the Grade Crossing Commissioners of the City of Buffalo, as to change of grade of East Genesee street. In re lands owned by Christian Flierl and others. No opinion. Appeal taken by Christian Flierl dismissed, without costs, upon stipulation filed.

GRADY, Respondent, v. NATIONAL CONDUIT & CABLE CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by John Grady against the National Conduit & Cable Company. No opinion. Judgment and order unanimously affirmed, with costs. See, also, 153 App. Div. 401, 138 N. Y. Supp. 549.

GRATTON, Respondent, v. DOHERTY, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by George Gratton against Thomas F. Doherty. No opinion. Judgment unanimously affirmed, with costs. See, also, 157 App. Div. 883, 141 N. Y. Supp. 1121.

GRAY v. HOADLEY. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Gerald H. Gray, as receiver, etc., against Joseph H. Hoadley. R. P. Buell, of New York City, for appellant. C. C. Sanders, of New York City, for respondent. No opinion. Order affirmed, without costs. Order filed. See, also, 138 App. Div. 898, 123 N. Y. Supp. 48.

GRAY v. NEW YORK CENT. & H. R. R. CO. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Charles P. Gray against the New York Central & Hudson River Railroad Company. No opinion. Application granted. Order signed.

GREEN, Appellant, v. SUPREME COUNCIL OF ROYAL ARCANUM et al., Respondents. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Samuel Green against the Supreme Council of the Royal Arcanum and others. No opinion. Order affirmed, with $10 costs and disbursements. See, also, 144 App. Div. 761, 129 N. Y. Supp. 791.

GREISSER, Respondent, v. LOWE, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Wilhelm Greisser against William Lowe. S. Wallach, of New York City, for appellant. J. Marx, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

GRIDLEY, Appellant, v. STODDARD, Respondent. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Lewis G. Gridley against Charles S. Stoddard. No opinion. Judgment and order reversed, and new trial granted, with costs to appellant to abide event. Held: (1) That defendant failed to make out a defense; (2) that the court erred in receiving in evidence copies of the examiner's reports.

GUERNSEY v. BUTTERICK PUB. CO. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Florence Guernsey against the Butterick Publishing Company. No opinion. Application denied, with $10 costs. Order signed.

HAINES v. LEVY et al. (Supreme Court, Appellate Term, First Department. November 13, 1913.) Appeal from City Court of New York, Trial Term. Action by Edwin H. Haines against Abraham Levy and another. From a judgment dismissing the complaint at the close of plaintiff's case, he appeals. Reversed, and new trial ordered. Paul N. Turner, of New York City, for appellant. Albert T. Scharps, of New York City (Oswald N. Jacoby, of New York City, of counsel), for respondents.

BIJUR, J. Plaintiff sues for damages resulting from false representations, the allegation being that defendants misrepresented the character of a life insurance policy which plaintiff purchased and paid for. It does not appear from the record what the ground of dismissal may have been, but apparently, as respondents' brief indicates, it was because the instruments whereby defendants transferred the title to the policy were made to the names of some one other than the plaintiff as assignee. This consideration has no bearing on the case whatsoever. Plaintiff testified that he purchased the policy on the representations of defendants, and proved a prima facie case, including all the other elements entitling him to recover. It is quite indifferent whether the article sold was delivered to the plaintiff or to any one else with his consent or at his request. It may be remarked in passing that the record in respect of exhibits is quite unintelligible. As no ground

was disclosed for holding Annie R. Levy, who seems to have taken part in the transaction only to the extent of releasing her possible interest in the policy, the judgment dismissing the complaint should be affirmed, with costs, as to her, and reversed, and a new trial ordered, as to the other defendant, with costs to appellant to abide the event. All concur.

(158 App. Div. 908)

HALEY, Appellant, v. VILLAGE OF WHITE PLAINS, Respondent. (Supreme Court, Appellate Division, Second Department. July 25, 1913.) Action by John Haley against the Village of White Plains.

PER CURIAM. Interlocutory judgment of the County Court of Westchester County reversed, with $10 costs, and demurrer overruled, with $30 costs, with leave to defendant to serve an answer within 20 days on payment of the costs aforesaid, on authority of Allen v. City of New York, 120 App. Div. 539, 104 N. Y. Supp. 919, and Cantwell v. City of New York, 75 Misc. Rep. 335, 135 N. Y. Supp. 285. Affirmed on opinion below 152 App. Div. 906, 137 N. Y. Supp. 1113.

HAMILTON COUNTY, Appellant, v. RYAN et al., Respondents. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by the County of Hamilton, by Frank E. Tiffany and others, constituting its Board of Supervisors, against Peter Ryan and another. No opinion. Order unanimously affirmed, with costs.

HANEY, Respondent, v. LEHIGH VALLEY STRUCTURAL STEEL CO., Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Andrew M. Haney against the Lehigh Valley Structural Steel Company. L. D. Ball, of New York City, for appellant. L. Schuldenfrei, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion to preclude defendant from giving testimony denied. Order filed.

HANNAN v. REARDON et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Appeal from Special Term, New York County. Action by David P. Hannan against James S. Reardon and others. From an order vacating a judgment for plaintiff and granting defendant's motion for judgment, plaintiff appeals. Modified, and judgment directed for plaintiff. James A. Donegan, of New York City, for appellant. Max Sheinart, of New York City, for respondents.

PER CURIAM. The order appealed from should be modified, so as to vacate both judgments and direct the clerk to enter a judgment in plaintiff's favor for $250, with costs as heretofore taxed, and, as so modified, affirmed, without costs.

HARBOR & SUBURBAN BUILDING & SAVINGS ASS'N, Respondent, v. EMPLOYERS' LIABILITY INS. CORPORATION, LIMITED OF LONDON, ENGLAND, Appellant. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by the Harbor & Suburban Building & Savings Association against the Employers' Liability Insurance Corporation, Limited, of London, England. B. L. Pettigrew, of New York City, for appellant. R. H. Grimes, of New York City, for respondent.

PER CURIAM. Judgment (79 Misc. Rep. 150, 140 N. Y. Supp. 717) affirmed, with costs. Order filed.

SCOTT and DOWLING, JJ., dissent.

HARDEN, Respondent, v. HOOPS, Appellant. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Percival L. Harden against William T. Hoops. E. Hymes, of New York City, for appellant. I. N. Jacobson, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed. See, also, 149 App. Div. 916, 133 N. Y. Supp. 1125.

INGRAHAM, P. J., dissents.

HARDENBERGH v. EMPLOYERS' LIABILITY ASS'N CO. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by William P. Hardenbergh against the Employers' Liability Association Company. No opinion. Application denied, with $10 costs. Order signed. See, also, 80 Misc. Rep. 522, 141 N. Y. Supp. 502.

HARDY v. TURNER et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by William Hardy against Oscar A. Turner, impleaded with others. No opinion. Application denied, with $10 costs. Order signed.

HARGRAVE, Respondent, v. M. GROH'S SONS, Appellant (two cases). (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Arthur Hargrave, an infant, against M. Groh's Sons. G. C. Fox, of New York City, for appellant. L. Cohn, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

In re HARTRIDGE. (Supreme Court, Appellate Division, First Department. October 17, 1913.) In the matter of Clifford W. Hartridge. No opinion. Charges amended, and referred back to official referee to take further testimony. Opinion per curiam. Settle order on notice. See, also, 150 App. Div. 923, 135 N. Y. Supp. 1116; 143 N. Y. Supp. 1120.

In re HARTRIDGE. (Supreme Court, Appellate Division, First Department. November 14, 1913.) In the matter of Clifford W. Hartridge. No opinion. Application denied. Settle order on notice. See, also, 143 N. Y. Supp. 1120.

HASBROUCK v. GALLAGHER. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Louis B. Hasbrouck against Patrick Gallagher. No opinion. Motion denied, with $10 costs. Order filed. See, also, 142 N. Y. Supp. 1121.

HARVEY, Respondent, v. PROCTOR, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by John L. Harvey against Frederick F. Proctor. No opinion. Motion denied. See, also, 142 N. Y. Supp. 769.

HASBERG, Appellant, v. PICKER BROS., Respondent. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Nathan Hasberg against Picker Bros. M. L. Malevinsky, of New York City, for appellant. W. A. Jones, Jr., of New York City, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed.

HAUSER, Appellant, v. HAUSER, Respondent. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Bertie Hauser against William J. Hauser. G. W. Glaze, of New York City, for appellant. S. D. Lasky, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 157 App. Div. 919, 142 N. Y. Supp. 1122; 143 N. Y. Supp. 1121.

HAUSER, Respondent, v. HAUSER, Appellant. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Bertie Hauser against William J. Hauser. S. D. Lasky, of New York City, for appellant. G. W. Glaze, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 143 N. Y. Supp. 1121.

HAYES, Respondent, v. SYRACUSE, B. & N. Y. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Lewis S. Hayes against the Syracuse, Binghamton & New York Railroad Company. No opinion. Judgment and order unanimously affirmed, with costs.

HAZER, Respondent, v. WILLIS, Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Nettie G. Hazer, now Nettie G. Sheldon, against Thomas Willis. No opinion. Judgment and order unanimously affirmed, with costs.

HEALY, Respondent, v. HEALY et al., Appellants. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Anna M. Healy against William J. Healy and another, as executors, etc., of Dennis A. Healy, deceased. No opinion. Judgment unanimously affirmed, with costs.

HEARN et al., Appellants, v. SCHUCHMAN, Respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by George A. Hearn and others against George Schuchman. No opinion. Motion for leave to appeal to the Court of Appeals (from 157 App. Div. 926, 142 N. Y. Supp. 573) granted, and the following question certified: Does the complaint herein state a cause of action against the defendant?

HEIDELBERG TOWER ELECTRIC ADVERTISING CO. v. NO. 1465 BROADWAY CO. et al. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by the Heidelberg Tower Electric Advertising Company against the No. 1465 Broadway Company and others. J. H. Jones, of New York City, for respondent. Rockwood & Haldane, of New York City, for defendants.

PER CURIAM. Judgment affirmed, with costs. Order filed.

INGRAHAM, P. J., dissents.

In re HEINSHEIMER. MEYER v. SCHULTE et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) In the matter of Norbert Heinsheimer. Action by Anton H. Meyer, as assignee, against David A. Schulte and others. A. Gordon, of New York City, for appellant. J. Eisner, of New York City, for respondents Schulte and others. H. K. Heyman, of New York City, for respondent Heinsheimer. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 148 App. Div. 892, 132 N. Y. Supp. 1138.

HEMSTREET, Respondent, v. CHILDS, Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Ralph E. Hemstreet against Gertrude E. Childs. No opinion. Order affirmed, with $10 costs and disbursements.

HERMANN, Respondent, v. WOLFF et al., Appellants. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Harry W. Hermann against William E. Wolff and others. L. Marshall, of New York City, for appellants. G. D. Lamb, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

HERZ, Appellant, v. ROYAL ANTISEPTIC TOOTHPICK CO., Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Alexander Herz against the Royal Antiseptic Toothpick Company. L. E. Varney, of New York City, for appellant. A. Brekstone, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

HEUSY, Respondent, v. J. H. SHIPWAY & BRO., Appellants. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Christian Heusy against J. H. Shipway & Bro. H. S. Hertwig, of New York City, for appellants. T. L. A. Britt, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

HILDEBRANDT, Respondent, v. LEHIGH VALLEY R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. September 24, 1913.) Action by Jennie A. Hildebrandt, as executrix, etc., against the Lehigh Valley Railroad Company. No opinion. Motion for leave to appeal to Court of Appeals (from 157 App. Div. 828, 143 N. Y. Supp. 247) denied, with $10 costs.

HIRSCHFIELD, Appellant, v. KEITH & PROCTOR AMUSEMENT CO., Respondent. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Annie Hirschfield against the Keith & Proctor Amusement Company. D. J. Miller, of New York City, for appellant. L. F. Fish, of New York City, for respondent. No opinion. Order reversed, motion granted, and complaint dismissed, unless plaintiff pays the costs of the former action within 30 days from the date of service of the order of this court on her, in which case the motion will be denied, with $10 costs. No costs of this appeal. Settle order on notice.

HOCHSTIM v. SONNTAG. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Max Hochstim against John A. Sonntag. No opinion. Motion to dismiss appeal granted. Order filed. See, also, 157 App. Div. 920, 142 N. Y. Supp. 1122.

HOFFMAN, Respondent, v. STATE, Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Norbert L. Hoffman against the State of New York. No opinion. Determination unanimously confirmed, with costs.

HOLLAND, Respondent, v. RICKETTS, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by John G. Holland against Charles Ricketts. No opinion. Motion granted, and question certified as follows: Does the complaint state facts sufficient to constitute a cause of action? See, also, 157 App. Div. 885, 141 N. Y. Supp. 1123.

(158 App. Div. 931)

HOLMES v. BELL et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Artemas H. Holmes against Helen V. Bell and others. F. E. Mygatt, of New York City, for appellants. L. C. Lewis, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion granted, with $10 costs, upon the authority of Holmes v. Bell, 139 App. Div. 455, 124 N. Y. Supp. 301, affirmed 200 N. Y. 586, 94 N. E. 1094. Order filed. See, also, 140 App. Div. 907, 125 N. Y. Supp. 1124.

In re HOLYWELL. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) In the matter of Effingham L. Holywell, as attorney.

PER CURIAM. The motion of the Bar Association to confirm the report of the referee herein is granted, and Mr. Holywell is directed to appear at the bar of this court on Monday, November 10, 1913, at 1 o'clock p. m.

JENKS, P. J., not voting. See, also, 149 App. Div. 960, 134 N. Y. Supp. 1135.

HOOKER et al., Respondents, v. CITY OF AUBURN, Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Horace B. Hooker and another against the City of Auburn. No opinion. Motion for leave to appeal to Court of Appeals (from 156 App. Div. 924, 141 N. Y. Supp. 1124) denied, with $10 costs.

HOREY, Respondent, v. INTERNATIONAL RY. CO. et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Anthony Horey against the International Railway Company, and another. No opinion. Judgment and order affirmed, with costs.

HOWE et al., Appellants, v. PLYMOUTH RUBBER CO., Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Solomon H. Howe and others against the Plymouth Rubber Company. D. W. Richards, of New York City, for appellants. Myers & Goldsmith, of New York City, for respondent. No opinion. Order, so far as appealed from, reversed, with $10 costs and disbursements, and motion for bill of particulars granted. Order filed.

HOYT & DE MALLIE CO., Inc., v. NEW YORK RYS. CO. (Supreme Court, Appellate Term, First Department. November 13, 1913.) Appeal from Municipal Court, Borough of Manhattan, Fifth District. Action by the Hoyt & De Mallie Company, Incorporated, against the New York Railways Company. From a judgment dismissing the complaint at the close of plaintiff's case, it appeals. Reversed, and new trial ordered. Thompson & Ballantine, of New York City (John F. O'Neil, of New York City, of counsel), for appellant. James L. Quackenbush, of New York City (B. F. Record, of New York City, of counsel), for respondent.

PER CURIAM. An examination of the record satisfies us that the plaintiff established a prima facie case. No useful purpose would be served by detailing the facts. Judgment reversed, and new trial ordered, with costs to the appellant to abide the event.

In re HUBBELL. (Supreme Court, Appellate Division, First Department. October 24, 1913.) In the matter of Charles L. Hubbell. No opinion. Proceeding dismissed. Settle order on notice.

HUDLER, Appellant, v. HUDLER, Respondent. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Dora Gulnack Hudler against Davis Winne Hudler. No opinion. Order unanimously affirmed, with costs.

HUDSON MORTGAGE CO. v. JOHN E. OLSON CONST. CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Hudson Mortgage Company against the John E. Olson Construction Company and others. No opinion. Motion to dismiss appeal granted. Order filed.

HUDSON NAVIGATION CO., Appellant, v. OLCOTT, Respondent. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by the Hudson Navigation Company against Eben E. Olcott. A. B. Siegel, of New York City, for appellant. W. M. K. Olcott, of New York City, for respondent.

PER CURIAM. Order (81 Misc. Rep. 464, 142 N. Y. Supp. 613) affirmed, with $10 costs and disbursements, on the ground that a temporary injunction at this time is not necessary; the question as to the right of the defendant to the exclusive use of the pier to be reserved until the trial. Order filed.

HUGHES, Appellant, v. STOUTENBRUGH et al., Respondents. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by John H. Hughes against John H. Stoutenbrugh, as trustee, etc., and others. W. E. Godfrey, of New York City, for appellant. E. H. Daly, M. J. Driscoll, and J. E. Donnelly, all of New York City, for respondents. No opinion. Order reversed, and motion granted, upon payment by plaintiff of $10 costs to each of the defendants who appeared separately in the court below and opposed the motion. Settle order on notice.

HURD, Appellant, v. BALDWIN, Respondent. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Reverdy L. Hurd, as trustee, etc., against Anah A. Baldwin. No opinion. Judgment affirmed, with costs.

HURD, Appellant, v. BALDWIN et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Reverdy L. Hurd, as trustee, etc., against Anah A. Baldwin and another. No opinion. Judgment affirmed, with costs.

HYAMS, Appellant, v. HYAMS, Respondent. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Beatrice Hyams against Joseph N. Hyams. C. J. Lane, of New York City, for appellant. A. G. Meyer, of New York City, for respondent. No opinion. Motion to dismiss appeal granted, without costs. Order filed. See, also, 143 N. Y. Supp. 1123.

HYAMS, Appellant, v. HYAMS, Respondent. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Beatrice Hyams against Joseph N. Hyams. No opinion. Order modified, as directed in opinion, and, as modified, affirmed, with $10 costs and disbursements to the appellant. Opinion per curiam. Settle order on notice. See, also, 143 N. Y. Supp. 1123.

INNOVATION INGENUITIES, Inc., Appellant, v. NEW YORK TIMES CO., Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the Innovation Ingenuities, Incorporated, against the New York Times Company. A. K. Stricker, of New York City, for appellant. H. Nathan, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements, with leave to plaintiff to serve amended complaint, on payment of costs in this court and in the court below. Order filed.

ISRAEL, Respondent, v. ISRAEL, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Kate Israel against David Israel. A. S. Gilbert, of New York City, for appellant. J. J. Corn, of New York City, for respondent. No opinion. Order modified, by reducing alimony to $75 per week and counsel fee to $250, and, as modified, affirmed, without costs. Order filed.

JAMES, Respondent, v. McMAHON, Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Frank H. James against John J. McMahon. No opinion. Order reversed, with $10 costs and disbursements, and motion for receiver denied, without costs, upon the ground that the appointment should not be made upon the facts shown.

JAMES, Respondent, v. THOMAS CRIMMINS CONTRACTING CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) Action by George James, as administrator, etc., against the Thomas Crimmins Contracting Company. No opinion. Judgment and order affirmed, with costs.

JAROS, Respondent, v. NEW YORK MILLS, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Michael Jaros against the New York Mills. No opinion. Judgment and order affirmed, with costs.

In re JOHNSON. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.)

In the matter of the examination of Frederick H. Johnson in proceedings supplementary to execution, etc. No opinion. Order affirmed, with $10 costs and disbursements.

In re JONES. (Supreme Court, Appellate Division, First Department. October 17, 1913.) In the matter of Holmes Jones. No opinion. Referred to the official referee. Settle order on notice. See, also, 143 N. Y. Supp. 1124.

In re JONES. (Supreme Court, Appellate Division, First Department. October 17, 1913.) In the matter of Holmes Jones. No opinion. Motion to strike out denied. Settle order on notice. See, also, 143 N. Y. Supp. 1124.

JORDAN v. FAETH et al. (Supreme Court, Appellate Term, First Department. November 13, 1913.) Appeal from City Court of New York, Trial Term. Action by Peter P. Jordan against Charles F. Faeth and another. From a judgment for plaintiff on the pleadings, defendants appeal. Modified. Neier, Hance & Van Derveer, of New York City (Thomas Abbott McKennell and Charles Everett Neier, both of New York City, of counsel), for appellants. Feltenstein & Rosenstein, of New York City (Moses Feltenstein, of New York City, of counsel), for respondent.

PER CURIAM. Judgment modified, by granting leave to the defendants to plead anew within six days after service of a copy of the order entered herewith, with notice of entry of the same in the City Court, upon payment of $10 costs, and, as modified, affirmed, without costs of this appeal to either party.

JOSEPH BECK & SONS, Appellants, v. TYNBERG, Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Joseph Beck & Sons against Sigmund Tynberg. M. D. Steuer, of New York City, for appellants. E. L. Mooney, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 153 App. Div. 881, 137 N. Y. Supp. 1073.

J. P. DUFFY CO. v. TODEBUSH. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the J. P. Duffy Company against August Todebush. No opinion. Motion for leave to appeal to the Court of Appeals (from 157 App. Div. 688, 142 N. Y. Supp. 790) granted. Order filed.

JULIAN, Respondent, v. NEW YORK TIMES CO., Appellant. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Louis E. Julian against the New York Times Company. H. Nathan, of New York City, for appellant. A. E. Woodruff, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

KEITH, Respondent, v. PAYNE, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Ervin A. Keith against Daniel F. Payne. No opinion. Order so far as appealed from affirmed, with $10 costs and disbursements.

KELLER, Appellant, v. CROMBIE, Respondent. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Augustus R. Keller against Amvernette M. Crombie. N. Vidaver, of New York City, for appellant. G. J. Sproull, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

KELLER, Respondent, v. HACKETT, Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Agnes Keller against Elizabeth Hackett. No opinion. Judgment affirmed, with costs.

KELLY, Respondent, v. PENNSYLVANIA TUNNEL & TERMINAL R. CO., Appellant, et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Mary F. Kelly, as administratrix, etc., against the Pennsylvania Tunnel & Terminal Railroad Company, impleaded with others. W. L. O'Brion, of New York City, for appellant. E. A. Martin, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

KENDRICK, Respondent, v. JOSEPH L. SIGRETTO & CO., Appellants. (Supreme Court, Appellate Division, Second Department. September 23, 1913.) Action by William Kendrick against Joseph L. Sigretto & Co. No opinion. Judgment and order unanimously affirmed, with costs.

KENT, Appellant, v. ERIE R. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) Action by Floyd Kent against the Erie Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs.

KRUSE, P. J., dissents, upon the ground that the exception to the charge respecting plaintiff's right to board the train was well taken.

KENT, Respondent, v. YONKERS R. CO., Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Ethel O. Kent against the Yonkers Railroad Company. L. F. Crumb, of Yonkers, for appellant. No opinion. Order reversed, with $10 costs and disbursements, and motion granted. Order filed.

KENYON, Respondent, v. BOWES, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Charles Kenyon against Edward J. Bowes. G. B. Rosenheim, of New York City, for appellant.

I. M. Dittenhoefer, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

KERBEL v. WASSERMAN. (Supreme Court, Appellate Term, First Department. November 13, 1913.) Appeal from Municipal Court, Borough of The Bronx, Second District. Action by Ida G. Kerbel against Joseph Wasserman. From a Municipal Court judgment in favor of plaintiff, defendant appeals. Modified and affirmed. Edward D. Loughman, of New York City, for appellant. Louis Gould, for respondent.

BIJUR, J. This action was brought to recover for work, labor, and services performed at defendant's request. Owing to the fact that this suit was not brought until some 10 months after the work was done, and that plaintiff kept no books of account, the trial involved passing upon a great number of items and much detail. It cannot be said that plaintiff did not sustain the burden of proof; but it seems that the learned judge overlooked an item of $30, which the testimony of the defendant, accompanied by a check in evidence, showed plainly had been paid, and concerning which plaintiff's testimony is substantially an admission of such payment. His alleged explanation, which succeeded such admission, is unintelligible. This item should therefore be deducted, and the amount of the judgment reduced to $54.55, with appropriate costs, and, as thus modified, the judgment is affirmed, with $10 costs to the appellant, to be set off against the judgment. All concur.

KERBEYEKIAN v. RAFFY et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Sarkis G. Kerbeyekian against Lazar Raffy and others. F. H. Van Houten, of New York City, for appellants. A. Blumenstiel, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

KEVE v. COLUMBIA KID HAIR CURLERS MFG. CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Max Keve against the Columbia Kid Hair Curlers Manufacturing Company. No opinion. Motion for stay denied, with $10 costs. Order filed. See, also, 142 N. Y. Supp. 1125; 143 N. Y. Supp. 1125.

KEVE v. COLUMBIA KID HAIR CURLERS MFG. CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Max Keve against the Columbia Kid Hair Curlers Manufacturing Company. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed. See, also, 143 N. Y. Supp. 1125.

KEVE v. COLUMBIA KID HAIR CURLERS MFG. CO. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Max Keve against the Columbia Kid Hair Curlers Manufacturing Company. No opinion. Motion granted on terms stated in memorandum per curiam. Settle order on notice. See, also, 143 N. Y. Supp. 1125.

KEVE, Respondent, v. COLUMBIA KID HAIR CURLERS MFG. CO., Appellant. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Max Keve against the Columbia Kid Hair Curlers Manufacturing Company. M. D. Siegel, of New York City, for appellant. H. Stackell, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 143 N. Y. Supp. 1125.

KILSHEIMER v. KENDAL et al. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by James B. Kilsheimer, Jr., against Louis Kendal and others.

PER CURIAM. Motion denied, without costs, with leave to renew, if the appeal is not diligently prosecuted.

JENKS, P. J., not voting.

KINGMAN v. BOARD OF EDUCATION. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Samuel E. Kingman against the Board of Education. E. J. Parsons, of New York City, for appellant. C. McIntyre, of New York City, for respondent. No opinion. Judgment modified, by reducing interest on plaintiff's claim, so that it will be estimated only from the date of demand, and also by allowing plaintiff his taxable costs, and, as so modified, affirmed, without costs to either party in this court. Settle order on notice.

KINNEY, Respondent, v. RYAN, Appellant. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by John C. Kinney against Patrick Ryan. C. A. Winter, of New York City, for appellant. G. Lange, Jr., of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

KISSLEY, Respondent, v. ULSTER & D. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Julius M. Kissley against the Ulster & Delaware Railroad Company. No opinion. Judgment and order unanimously affirmed, without costs.

KISSLEY, Respondent, v. ULSTER & D. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Irene Kissley against the Ulster & Delaware Railroad Company. No opinion. Judgment and order unanimously affirmed, with costs.

KLANG, Respondent, v. PRESSER et al., Appellants. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Philip Klang, against Isaac Presser and another. I. Schmal, of New York City, for

appellants. H. Pearlman, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

KLEE, Respondent, v. CITY OF TROY, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Joseph W. Klee against the City of Troy. No opinion. Motion denied. See, also, 142 N. Y. Supp. 1126.

KNABE, Appellant, v. DORLAND, Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by William Knabe against Mabelle H. Dorland. H. T. Andrews, of New York City, for appellant. W. L. Snyder, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 146 App. Div. 937, 131 N. Y. Supp. 1123.

KNISKERN, Respondent, v. CITY OF GLOVERSVILLE, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Amelia Kniskern against the City of Gloversville. No opinion. Appeal dismissed, with $10 costs.

KNISKERN v. SINGER SEWING MACH. CO. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Harriet Kniskern against the Singer Sewing Machine Company. No opinion. Application denied, with $10 costs. Order signed.

KOLBRENNER, Appellant, v. BOB et al., Respondents. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Peter Kolbrenner against Herman D. Bob and another. W. S. Evans, of New York City, for appellant. J. J. Mahoney, of New York City, for respondents. No opinion. Order affirmed, with costs. Order filed.

In re KOPOZYNSKI. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) In the matter of the application of Josephine Kopozynski for the removal of Albert Kusper from certain premises in the city of Elmira. No opinion. Motion denied.

KRAMPFF, Respondent, v. WOMANADA LAND ASS'N et al., Appellants. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Ernest E. Krampff against the Womanada Land Association and others. L. J. Wolff, of Brooklyn, for appellants. J. Friedman, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

In re KRAUSE. (Supreme Court, Appellate Division, First Department. October 24, 1913.) In the matter of Richard Krause. No opinion. Referred to official referee. Settle order on notice.

KRAVETZKY v. SCHUSTER et al. (two cases). (Supreme Court, Appellate Division, First Department. October 17, 1913.) Actions by David Kravetzky against Jacob Schuster and others. No opinion. Motions to dismiss appeals granted, with $10 costs. Order filed.

KRIDEL et al., Respondents, v. DAVID et al., Appellants. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Samuel Kridel and others against Esther C. H. David and others. A. G. Meyer, of New York City, for appellants. E. J. Bernheimer, of New York City, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

KUCZCK, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Mary Kuczck, as administratrix, etc., against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to the appellant to abide event, unless the plaintiff shall, within 20 days, stipulate to reduce the verdict to the sum of $5,000, as of the date of the rendition thereof, in which event the judgment is modified accordingly, and, as so modified, is, together with the order, affirmed, without costs of this appeal to either party.

LAMBERT, J., not sitting.

LAKE SHORE & M. S. RY. CO., Appellant, v. MAHLE et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by the Lake Shore & Michigan Southern Railway Company against Jeremiah Mahle and another. No opinion. Order reversed, with $10 costs and disbursements, and matter remitted to the Special Term for the appointment of a new commissioner. See, also, 72 Misc. Rep. 129, 129 N. Y. Supp. 288.

LAMBERTI v. SPADARO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Annie Lamberti against Joseph Spadaro. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

LAWRENCE, Respondent, v. COWPERTHWAIT et al., Appellants. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by William B. Lawrence against Montgomery B. Cowperthwait and another. R. L. Redfield, of New York City, for appellants. H. R. Guggenheimer, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

LEISE, Respondent, v. ROCHESTER, S. & E. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Florence Leise, as administratrix, etc., against the Rochester, Syracuse &

Eastern Railroad Company. No opinion. Judgment and order affirmed, with costs.

LENAHAN v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Anna Lenahan, an infant, etc., against the City of New York. No opinion. Motion denied, with $10 costs. Order filed. See, also, 157 App. Div. 907, 142 N. Y. Supp. 1127.

LEUTKE v. FEDERAL BRASS & BRONZE Co. (Supreme Court, Appellate Term, First Department. November 13, 1913.) Appeal from Municipal Court, Borough of Manhattan, Fifth District. Action by Annie M. Leutke against the Federal Brass & Bronze Company. From a judgment for plaintiff, rendered by a judge without a jury, defendant appeals. Reversed, and new trial ordered. Walter L. Bunnell, of New York City, for appellant. Maurice Hyman, of New York City, for respondent.

BIJUR, J. Plaintiff sues for certain work done under a contract, to be found in three letters exchanged between the parties. These letters required the work to be "bronze electroplated to match sample." Plaintiff's bill of particulars says: "The rail (namely, the work contracted for) was completed by the plaintiff." Although the plaintiff thus plainly sued as upon full performance, he seeks to sustain the judgment on the theory of excuse for nonperformance which was not pleaded. He admitted that the work was not electro-plated. The issue of excusable nonperformance was not presented by the pleadings, and was injected only incidentally and accidentally into the trial. If it can be said to have been litigated, the burden was certainly not sustained by the plaintiff. Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

In re LEVIEN. (Supreme Court, Appellate Division, First Department. October 31, 1913.) In the matter of Douglas Levien, an attorney. No opinion. Referred to official referee. Settle order on notice.

LEVITZKY v. BROWN et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Isaac Levitzky against Samuel Brown, impleaded with others. No opinion. Motion to dismiss appeal denied, with leave to renew after determination of motion for resettlement of order. Order filed. See, also, 143 N. Y. Supp. 1127.

LEVITSKY v. BROWN. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Isaac Levitsky against Samuel Brown. No opinion. Motion to dismiss appeal granted, with $10 costs, unless appellant comply with terms stated in order. Order filed. See, also, 143 N. Y. Supp. 1127.

In re LEVOR. (Supreme Court, Appellate Division, First Department. October 24, 1913.) In the matter of Harry Levor. No opinion. Referred to official referee. Settle order on notice.

LEVY, Respondent, v. GUARDIAN TRUST CO., Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Charles E. Levy against the Guardian Trust Company. M. S. Borland, of New York City, for appellant. C. E. Lydecker, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

LEVY et al. v. WHITING. (Supreme Court, Appellate Term, First Department. November 13, 1913.) Appeal from Municipal Court Borough of Manhattan, Seventh District. Action by Jacob L. Levy and another, copartners doing business as Levy Bros., against Jesse E. Whiting, doing business under the firm name of Veribest Lithograph Company. From a judgment for plaintiffs, defendant appeals. Affirmed, as modified. Lewis Schuldenfrei, of New York City (Emanuel Tepper, of New York City, of counsel), for appellant. Emanuel J. Livingston, of New York City, for respondents.

PER CURIAM. The judgment herein includes an item of $3.50, of which there was no proof given. It must therefore be reduced by that amount. Judgment reduced to the sum of $97.50 and appropriate costs in the court below. and, as reduced, affirmed, with costs.

LIGHT, Respondent, v. PENNSYLVANIA R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Augusta J. Light against the Pennsylvania Railroad Company. No opinion. Judgment and order affirmed, with costs.

LINDE et al., Respondents, v. SECOR, Appellant, et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Ada V. Linde and others against George F. Secor, impleaded with others. S. Bacon, of New York City, for appellant. L. J. Morrison, of New York City, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

LINDEN v. LIPPER et al. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Augustus Linden against Arthur Lipper and others. No opinion. Application denied, with $10 costs. Order signed.

LIPSCHITZ, Respondent, v. BERKOWITZ, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Samuel Lipschitz against Herman Berkowitz. D. Steckler, of New York City, for appellant. A. Thain, of New York City, for respondent. No opinion. Order reversed, and judgment modified, by allowing interest on the balance from November 17, 1911, instead of

from the commencement of the action, with $10 costs and disbursements to the appellant. Settle order on notice. See, also, 149 App. Div. 949, 134 N. Y. Supp. 1137, 143 N. Y. Supp. 1128.

LIPSCHITZ v. BOSKOWITZ. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Samuel Lipschitz against Herman Boskowitz. No opinion. Motion to amend record denied. Settle order on notice. See, also, 143 N. Y. Supp. 1128.

In re LOBSITZ. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) In the matter of the application of Maurice Lobsitz, for an order permitting the removal of the body of Lena Lobsitz. No opinion. Order affirmed, without costs.

LONGWORTH, Respondent, v. LONGWORTH et al., Appellants. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Hannah S. Longworth against William H. Longworth and another. No opinion. Motion denied, without costs, with leave to plaintiff to apply for a reargument, if so advised. See, also, 157 App. Div. 377, 142 N. Y. Supp. 71.

LORD & TAYLOR, Respondent, v. HATCH, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Lord & Taylor against Edward Hatch. H. G. Gray, of New York City, for appellant. J. C. Grier, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion denied. Order filed. See, also, 149 App. Div. 603, 133 N. Y. Supp. 1068.

LOTOS ADVERTISING CO. v. MAGISTRAL CHEMICAL CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Lotos Advertising Company against the Magistral Chemical Company. G. B. Plante, of New York City, for appellant. N. S. Goetz, of New York City, for respondent. No opinion. Order affirmed, without costs. Order filed.

LOWDEN, Appellant, v. PAMLICO REALTY CO., Respondent. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Fannie C. Lowden, as committee of Mary L. Thayer, an incompetent person, against the Pamlico Realty Company.

PER CURIAM. Judgment affirmed, with costs.

CARR, J., dissents.

LUCAS, Respondent, v. DODGE, Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by William Lucas against Benjamin D. Dodge. No opinion. Judgment and order affirmed, with costs.

In re LYMAN. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) In the matter of the application for the appointment of a committee of the person and property of Katherine K. C. Lyman, an alleged incompetent person. No opinion. Order affirmed, with $10 costs and disbursements.

LYNCH, Respondent, v. KIRBY et al., Appellants. (Supreme Court, Appellant Division, First Department. November 14, 1913.) Action by James M. Lynch against John Kirby, Jr., and others. A. P. Nevin, of New York City, for appellants. A. J. Talley, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 74 Misc. Rep. 266, 131 N. Y. Supp. 680.

In re McALEESE, City Judge. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) In the matter of the application for the removal from office of Bernard J. McAleese, City Judge of the City of Lackawanna.

PER CURIAM. Order entered removing the said Bernard J. McAleese from office as city judge of the city of Lackawanna. *Held*, on the uncontradicted evidence it appears that the defendant did for many months fail to pay over the fines collected by him to the city treasurer as required by the charter. His failure so to do constituted a violation of his duty as a public officer, and, being wholly unexplained or excused, justifies and requires his removal from office. See, also, 151 App. Div. 897, 899, 135 N. Y. Supp. 1125.

McCALLUM v. BARBER (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Lee McCallum against George S. Barber. No opinion. Application denied, with $10 costs. Order signed.

McCANN v. COLONIAL LIFE INS. CO. OF AMERICA. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Nellie A. McCann against the Colonial Life Insurance Company of America. No opinion. Motion for stay denied, with $10 costs. Order filed. See, also, 143 N. Y. Supp. 1128.

McCANN v. COLONIAL LIFE INS. CO. OF AMERICA. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Nellie A. McCann against the Colonial Life Insurance Company of America. No opinion. Application denied, with $10 costs. Order signed. See, also, 143 N. Y. Supp. 1128.

McCLOREY, Appellant, v. CITY OF NEW YORK, Respondent. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Mary McClorey against the City of New York. No opinion. Judgment unanimously affirmed, with costs.

McCORMACK, Respondent, v. McCORMACK, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Margaret M. McCormack against George McCormack. S. B. Stiles, of New York City, for appellant. W. F. Byrne, of New York City, for respondent. No opinion. Order reversed, and motion for alimony and counsel fee denied. Order filed.

McCORMICK, Respondent, v. NEW YORK LIFE INS. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Mary E. McCormick against the New York Life Insurance Company.

PER CURIAM. Motion granted, and decision heretofore and on the 30th day of April, 1913 (156 App. Div. 406, 141 N. Y. Supp. 993), made herein, is amended by striking out the words, "and judgment directed for the defendant dismissing the complaint upon the merits, with costs, including costs of this appeal," and inserting in lieu thereof the words, "and a new trial granted, with costs to appellant to abide event."

McDERMOTT DAIRY CO. v. NIMMCKE. (Supreme Court, Appellate Term, First Department. October 23, 1913.) Appeal from City Court of New York, Special Term. Action by the McDermott Dairy Company against Ernest R. Nimmcke. From an order of the City Court adjudging defendant, as a judgment debtor, guilty of contempt, he appeals. Order reversed. Grossfield Bros., of New York City, for appellant. Yankauer & Davidson (Jacob M. Cohen, of New York City, of counsel), for respondent.

PER CURIAM. The examination of the judgment debtor disclosed that the money in the bank was that of his wife, and upon the motion made to punish him for contempt the wife came into court and showed that she was the owner of the fund, and this was undisputed. The judgment creditor's right to reach this money is at least so questionable that it should not be enforced by contempt proceedings. Order reversed, with $10 costs and disbursements, the amount, when taxed, to be credited upon the judgment.

McELROY v. GOLDSTEIN. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Robert L. McElroy against Albert Goldstein. No opinion. Motion to dismiss appeal granted, with $10 costs, unless appellant comply with terms stated in order. Order filed. See, also, 153 App. Div. 900, 138 N. Y. Supp. 1127.

McHUGH, Appellant, v. McHUGH, Respondent. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Emeline W. McHugh against Joseph F. McHugh. No opinion. Order modified, by providing that defendant pay $50 alimony within 10 days after order herein, and $50 additional before trial, and that in default of either payment he be fined the sum of $100, and be committed until such sum be paid, and, as so modified, affirmed, without costs.

In re McLAUGHLIN. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) In the matter of the petition of John McLaughlin for an inspection of the books, etc., of the Glenside Woolen Mills. No opinion. Order affirmed, with costs.

In re McLAUGHLIN. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) In the matter of the petition of James McLaughlin, Jr., for an inspection of the books, etc., of the Glenside Woolen Mills. No opinion. Order affirmed, with costs.

McLEER ELECTRIC & MFG. CO., Respondent, v. PALMER & SINGER MFG. CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Action by the McLeer Electric & Manufacturing Company against the Palmer & Singer Manufacturing Company.

PER CURIAM. Order modified, by granting, without condition, defendant's motion for a substitution and a delivery of the papers in this action, and by reducing to the sum of $15,000 the amount of the bond to secure the payment of any judgment which may be recovered in the action, as a condition of opening the defendant's default, and, as so modified, affirmed, without costs. Settle order before Mr. Justice STAPLETON. See, also, 157 App. Div. 896, 142 N. Y. Supp. 1129.

McNAUGHTON v. BUFFALO, R. & P. R. CO. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Clarence E. McNaughton against the Buffalo, Rochester & Pittsburg Railroad Company. No opinion. Plaintiff's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the defendant upon the nonsuit, with costs.

McNELUS et al., Respondents, v. STILLMAN et al., Appellants. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by James A. McNelus and another against Edwin A. Stillman and others. A. P. Nevin, of New York City, for appellants. W. G. Merritt, of New York City, for respondents. No opinion. Order affirmed, with $10 costs and disbursements, with leave to defendants to answer on payment of costs. Order filed.

MABIE v. SEYMOUR et al. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Cornelia M. Mabie against Edmund Seymour and others. No opinion. Interlocutory judgment (80 Misc. Rep. 280, 140 N. Y. Supp. 1097) affirmed, with costs, with leave to appellants to plead over within 20 days, upon payment of the costs of the demurrer and of this appeal.

In re MAGED. (Supreme Court, Appellate Division, First Department. October 31, 1913.) In the matter of Benjamin F. Maged, an attorney. No opinion. Referred to official referee. Settle order on notice.

MALLOUK v. AMERICAN EXCH. NAT. BANK et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Ellias N. Mallouk against the American Exchange National Bank, impleaded with others. No opinion. Motion denied, with $10 costs. Order filed. See, also, 157 App. Div. 711, 142 N. Y. Supp. 724.

MARINARO v. MULTI-SPEED SHUTTER CO. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Appeal from Trial Term, New York County. Action by Francesco Marinaro, an infant, by Guiseppe Marinaro, his guardian ad litem, against the Multi-Speed Shutter Company, to recover damages for injuries suffered in defendant's employ. From a judgment for plaintiff in the sum of $2,144.75, defendant appeals. Reversed, and new trial ordered. Sheffield, Bentley & Betts, of New York City (James R. Sheffield, of New York City, of counsel, and James J. Cosgrove, of New York City, on the brief), for appellant. Rosario Maggio, of New York City, for respondent.

PER CURIAM. Upon careful consideration of this record, we are satisfied that the verdict is against the weight of evidence. The plaintiff failed to establish that there was any defect in the machine, that he was not properly instructed, and that the accident was caused by any actionable negligence upon the part of the defendant. Upon the evidence it would appear that it was physically impossible for the upper die to fall as claimed by him, leaving it fairly inferable that he himself caused it to descend by pressure upon the treadle. The judgment and order appealed from are therefore reversed, and a new trial ordered, with costs to the appellant to abide the event.

MARTIN, Respondent, v. CRUMB, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Ignatz Martin against Leverett F. Crumb. No opinion. Motion for reargument (of 158 App. Div. 228, 142 N. Y. Supp. 1096) denied, without costs. Motion for leave to appeal to the Court of Appeals denied, upon the ground that leave to appeal is unnecessary.

MAY, Appellant, v. E. MAY, Inc., Respondent, et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Solomon May against E. May, Incorporated, impleaded with others. J. H. Reagan, for appellant. W. C. Prime, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion to vacate order for examination of plaintiff granted, without costs, to the extent only of striking from said order the requirement that he produce books and records. Order filed.

In re MARKS. (Supreme Court, Appellate Division, First Department. November 14, 1913.) In the matter of Alexander Marks. No opinion. Referred to Hon. Roger A. Pryor, official referee. Settle order on notice.

MECHANICS' BANK v. SPRINGER et al. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Action by the Mechanics' Bank against J. Harwood Springer and another. No opinion. Order affirmed, with $10 costs and disbursements. See, also, 154 App. Div. 906, 138 N. Y. Supp. 1130.

(158 App. Div. 941)

MEIGEL, Appellant, v. E. V. CRANDALL OIL & PUTTY CO., Respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by George Meigel against the E. V. Crandall Oil & Putty Company. No opinion. Judgment unanimously affirmed, with costs, upon the authority of Meigel v. Crandall Oil & Putty Co., 141 App. Div. 828, 126 N. Y. Supp. 720.

MELLON, Appellant, v. BOARD OF EDUCATION, Respondent. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Peter F. Mellon against the Board of Education. F. Gilbert, of New York City, for appellant. W. E. C. Mayer, of New York City, for respondent. No opinion. Order affirmed, with costs and disbursements. Order filed.

MELTON et al. v. FULLERTON WEAVER REALTY CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Samuel Melton and others against the Fullerton Weaver Realty Company. No opinion. Motion for leave to appeal to the Court of Appeals (157 App. Div. 525, 142 N. Y. Supp. 852) granted. Order filed.

MENG, Respondent, v. FISCHER, Appellant. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by James S. Meng, as receiver, etc., against Frederick Fischer. M. F. Conry, of Washington, D. C., for appellant. A. P. Massey, of New York City, for respondent. No opinion. Determination affirmed, with costs and disbursements. Order filed. See, also, 155 App. Div. 936, 140 N. Y. Supp. 1131.

MERCHANT, Respondent, v. RYALL, Appellant, et al. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Metta F. Merchant, as administratrix, etc., against George M. Ryall and others.

PER CURIAM. Motion to dismiss appeal from judgment denied, on condition that appellant perfect his appeal from order, place the case on the present calendar, and be ready for argument when reached; otherwise, motion granted, without costs. Motion to dismiss appeal, on the ground that defendant Ryall has accepted a benefit under the judgment, denied, without costs. See, also, 142 App. Div. 949, 127 N. Y. Supp. 1132.

MERRIAM, Respondent, v. MOYER et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Delia B. Merriam against John W. Moyer and another. No opinion. Judgment affirmed, with costs.

MESSIMER, Appellant, v. NEW YORK DOCK CO., Respondent. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Onslow W. Messimer against the New York Dock Company. J. K. M. Ewing, of White Plains, for appellant. E. J. Mastaglio, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

MEYER, Appellant, v. BATTLE et al., Respondents. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Anna Meyer, as administratrix, etc., against George Gordon Battle and others. J. T. Canavan, of New York City, for appellant. H. C. Smyth, of New York City, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

MIDTOWN CONTRACTING CO. v. GOLDSTICKER et al. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Appeal from Special Term, New York County. Action by the Midtown Contracting Company against Louis Goldsticker and others. From an order denying a motion to compel defendants to serve a bill of particulars of their claims, plaintiff appeals. Reversed, and motion granted in part. George Hahn, of New York City, for appellant. William Goldsticker, of New York City, for respondents.

PER CURIAM. The order appealed from is reversed, and the motion for a bill of particulars granted, to the extent of requiring defendant to furnish particulars of the amounts claimed to have been paid to or on behalf of plaintiff over and above the amounts admitted by plaintiff as alleged in paragraph 10 of the complaint, and also of the sums claimed to have been paid by defendant to complete the work left uncompleted by plaintiff, without costs to either party in this court or at Special Term. Settle order on notice.

MILLS et al., Respondents, v. CITY OF GLOVERSVILLE, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Alexander H. Mills and others against the City of Gloversville. No opinion. Appeal dismissed, with $10 costs.

MIODOWNICK v. HOROWITZ. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Morris Miodownick against Jacob Horowitz. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

MISHKIN, Respondent, v. WEISBERGER et al., Appellants. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Natty Mishkin against Moritz Weisberger and others. M. A. Elias, of New York City, for appellants. W. Frank, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

In re MITCHELL. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) In the matter of the application of Julius L. Mitchell, an attorney and counselor of Rhode Island, for permission to practice law in the state of New York. No opinion. Application granted.

MORLEY, Respondent, v. LEMKAU, Appellant. (Supreme Court, Appellate Division, Fourth Department. September 24, 1913.) Action by William Morley against August J. Lemkau. No opinion. Appeal dismissed, without costs, upon stipulation filed.

In re MORRIS & CUMINGS DREDGING CO. In re LEARY. (Supreme Court, Appellate Division, First Department. October 17, 1913.) In the matter of the Morris & Cumings Dredging Company. In the matter of James D. Leary, deceased. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

MORSE & ROGERS v. MERETZKY. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Morse & Rogers against Morris Meretzky. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

MOSES v. KELLY. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by G. Arnold Moses against William J. Kelly. No opinion. Motion granted, with $10 costs. Order filed.

MOSSON, Respondent, v. HAFF, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Maximilian Mosson against Raymond C. Haff. R. C. Haff, of Amityville, pro se. E. M. Otterbourg, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion granted. Order filed.

MOTOR FINANCE CO., Appellant, v. CASUALTY CO. OF AMERICA, Respondent. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by the Motor Finance Company against the Casualty Company of America. H. S. Mansfield, of New York City, for appellant. M. D. Steuer, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

LAUGHLIN, J., dissents.

MOWBRAY v. DE FOREST. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by William E. Mowbray against Harriet De Forest. No opinion. Motion denied, without costs. Order filed. See memorandum. See, also, 142 N. Y. Supp. 1131, 157 App. Div. 920.

MULLEN, Appellant, v. SCHENECTADY RY. CO., Respondent. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by John E. Mullen, as administrator, etc., of Bartley J. E. Mullen, late of the city of Albany, deceased, against the Schenectady Railway Company. No opinion. Judgment unanimously affirmed, with costs.

MULLER v. SNYDER. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Joseph H. S. Muller against George F. Snyder. No opinion. Motion granted, with $10 costs. Order filed.

In re MUMFORD. (Supreme Court, Appellate Division, Fourth Department. September 24, 1913.) In the matter of the application of John F. Mumford for the removal from office of John Fields as Supervisor of the Town of Fairfield, Herkimer County, N. Y. No opinion. Issues raised by the petition and answer referred to Hon. Pardon C. Williams, of Watertown, to take the proofs thereon and return the same to this court, together with his opinion thereon.

MURPHY, Appellant, v. VILLAGE OF FT. EDWARD, Respondent. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Celia Murphy, an infant, by Mary Ann Murphy, her guardian ad litem, against the Village of Ft. Edward. No opinion. Reargument (of 143 N. Y. Supp. 378) ordered. Case set down for Wednesday, November 12th.

NAPIECEK, Respondent, v. CROSSTOWN ST. RY. CO. OF BUFFALO, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Julia Napiecek, as administratrix, etc., against the Crosstown Street Railway Company of Buffalo.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event, unless the plaintiff shall, within 20 days, stipulate to reduce the verdict to the sum of $3,000, as of the date of the rendition thereof, in which event the judgment is modified accordingly, and, as so modified, is, together with the order, affirmed, without costs of this appeal to either party. Held, that the verdict is excessive, and that improper and inflammatory remarks were made by plaintiff's counsel.

NELLIS, Appellant, v. GOURLAY, Respondent. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Elizabeth Nellis against Mary A. Gourlay. No opinion. Motion granted, and appeal dismissed, with costs.

NEUBERGER, Appellant, v. GOWEN, Respondent. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Louis Neuberger against Albert Y. Gowen. R. Wolf, of New York City, for appellant. A. C. Intemann, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion for a commission to examine the witnesses named in the motion papers on oral questions granted. Order filed.

NEUSTAEDTER, Respondent, v. KAPLAN, Appellant. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Mania Neustaedter against John Kaplan. N. D. Shapiro, of Brooklyn, for appellant. M. D. Siegel, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion granted, with $10 costs; referee to be named on settlement of order. Settle order on notice.

NEWMAN v. JOHN J. MITCHELL CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Arthur L. Newman against the John J. Mitchell Company, impleaded with others. No opinion. Motion to dismiss appeal granted, with $10 costs, unless appellant comply with terms stated in order. Order filed.

NEWMAN v. WATERMAN BLDG. CO. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Dora Newman against the Waterman Building Company. No opinion. Application denied, with $10 costs. Order signed.

NEW YORK BELTING & PACKING CO. v. FOX. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the New York Belting & Packing Company against Susan Fox. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

NIEMEYER, Respondent, v. O'CONNOR, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Anna Niemeyer, an infant, etc., against J. Francis O'Connor. No opinion. Motion to dismiss appeal denied, with $10 costs.

NOLAN, Respondent, v. MAGEE et al., Appellants. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by John L. Nolan against J. Vedder Magee and others. No opinion. Judgment unanimously affirmed, with costs.

NORMENT v. WHITMAN. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by James W. Norment against Eleanor O. Whitman, as administratrix, etc. No opinion. Motion denied, with $10 costs. Order filed. See, also, 157 App. Div. 708, 142 N. Y. Supp. 717.

In re NORRIS. (Supreme Court, Appellate Division, First Department. October 10, 1913.) In the matter of Edward W. Norris. No opinion. Report approved, and proceeding dismissed. Settle order on notice. See, also, 146 App. Div. 938, 131 N. Y. Supp. 1131.

NORTHERN BANK OF NEW YORK v. BINGHAM. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Northern Bank of New York against Richard J. Bingham. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

NORTHERN BANK OF NEW YORK v. MULLIGAN et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Northern Bank of New York against William G. Mulligan and others. No opinion. Motion to dismiss appeal denied. Order filed. See, also, 156 App. Div. 927, 142 N. Y. Supp. 1133; 143 N. Y. Supp. 1133.

NORTHERN BANK OF NEW YORK v. MULLIGAN et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the Northern Bank of New York against William G. Mulligan and others. W. G. Mulligan, of New York City, for appellants. G. W. Morgan, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 143 N. Y. Supp. 1133.

NORTHERN BANK OF NEW YORK v. MULLIGAN et al. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by the Northern Bank of New York against William G. Mulligan and another. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed. See, also, 143 N. Y. Supp. 1133.

NORTHERN BANK OF NEW YORK v. ROBIN. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by the Northern Bank of New York against Joseph G. Robin. No opinion. Motion granted, with $10 costs. Order filed. See, also, 156 App. Div. 941, 141 N. Y. Supp. 1134.

NOWAKOWSKI, Appellant, v. NEW YORK & N. S. TRACTION CO., Respondent. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Stanislaus Nowakowski, an infant, etc., against the New York & North Shore Traction Company. No opinion. Order unanimously affirmed, with costs. See Azzara v. Nassau Electric R. Co., 134 App. Div. 167, 118 N. Y. Supp. 830.

NOWAKOWSKI, Appellant, v. NEW YORK & N. S. TRACTION CO., Respondent. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by John Nowakowski against the New York & North Shore Traction Company. No opinion. Order unanimously affirmed, with costs. See Azzara v. Nassau Electric R. Co., 134 App. Div. 167, 118 N. Y. Supp. 830.

O'BRIEN v. NEW YORK MAIL CO. (Supreme Court, Appellate Term, First Department. November 13, 1913.) Appeal from City Court of New York, Trial Term. Action by Patrick O'Brien against the New York Mail Company. From a judgment dismissing the complaint, plaintiff appeals. Reversed and remanded. Ralph Gillette, of New York City, for appellant. Amos H. Stephens, of New York City (Earle W. Webb, of New York City, of counsel), for respondent.

GUY, J. This action was brought to recover for personal injuries sustained by the driver of a three-horse feed truck, which, while lawfully standing at the sidewalk in East Fifteenth street, between Avenues A and B, was struck with great force in the rear by defendant's automobile, pushed forward two feet, and the plaintiff was thrown off and injured. Plaintiff heard no horn, warning, or sound of any kind given by the chauffeur of the automobile. The plaintiff established lack of contributory negligence, and there was sufficient evidence of defendant's negligence to require the submission of the case to the jury. Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

O'GRADY, Respondent, v. SOLVAY PROCESS CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by John O'Grady against the Solvay Process Company. No opinion. Judgment and order affirmed, with costs.

ORMES, Respondent, v. DANIEL WINENT, Inc., Appellant. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by William H. Ormes against Daniel Winent, Incorporated. C. S. Keyes, of New York City, for appellant. H. A. Blake, of Albion, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

ORSINO, Respondent, v. ORSINO et al., Appellants. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Nunzio Orsino against Grace Orsino and others. No opinion. Judgment affirmed, with costs. See, also, 157 App. Div. 932, 142 N. Y. Supp. 1133.

OSBORNE v. MULLIGAN. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by James W. Osborne against Agnes K. M. Mulligan. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed. See, also, 153 App. Div. 312, 138 N. Y. Supp. 18.

OSSINING NAT. BANK v. BLAKE et al. (Supreme Court, Appellate Division, Second De-

partment. October 31, 1913.) Action by the Ossining National Bank against Michael Blake and others. No opinion. Order reversed, with $10 costs and disbursements, and ordered that plaintiff state and number as separate causes of action the several transfers as in the notice of motion enumerated, save that the fifth and sixth enumerations may be stated and numbered as a single cause of action.

OWENS, Appellant, v. CARNOCHAN, Respondent, et al. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Laura Van Zandt Owens against Gouverneur M. Carnochan, as surviving executor and trustee, etc., of Harriet F. Van Zandt, deceased, impleaded with others. No opinion. Motion denied, with $10 costs. See, also, 156 App. Div. 919, 141 N. Y. Supp. 1135; 143 N. Y. Supp. 1134.

OWENS, Appellant, v. CARNOCHAN, Respondent, et al. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Laura Van Zandt Owens against Gouverneur M. Carnochan, as surviving executor, etc., impleaded with others. No opinion. Motion for reargument denied, without costs. Motion for leave to appeal to the Court of Appeals (from 156 App. Div. 919, 141 N. Y. Supp. 1135) denied. without costs. See, also, 143 N. Y. Supp. 1134.

OWENS, Respondent, v. OWENS, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Louise Burke Owens against Oscar Lee Owens.

PER CURIAM. Motion granted, unless within 30 days the defendant pays $10 costs of this motion, and serves upon the plaintiff a proposed case and exceptions, and uses all efforts to speed the hearing of the appeal, in which case motion is denied.

PARTRIDGE et al., Appellants, v. A. DUTCH & CO., Respondents. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Frank C. Partridge and others against A. Dutch & Co. No opinion. Judgment and order affirmed, with costs.

PASCOCELLO, Appellant, v. NATIONAL CHAIN CO., Respondent. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Anthony J. Pascocello against the National Chain Company. H. J. Goldsmith, of New York City, for appellant. S. F. Hartman, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

PATERSON v. HARRISON. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Chester A. Paterson against Duncan B. Harrison. No opinion. Judgment and order of the City Court of New Rochelle reversed, and new trial ordered, costs to abide the event, on the ground that the judgment is against the weight of evidence as to performance by plaintiff of the contract with defendant.

PEASE OIL CO., Appellant, v. MONROE COUNTY OIL CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by the Pease Oil Company against the Monroe County Oil Company. No opinion. Interlocutory judgment (78 Misc. Rep. 285, 138 N. Y. Supp. 177) affirmed, with costs, with leave to the plaintiff to plead over within 20 days, upon payment of the costs of the demurrer and of this appeal.

PECK BRICK CO., Respondent, v. HAVERSTRAW WATER SUPPLY CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by the Peck Brick Company against the Haverstraw Water Supply Company.

PER CURIAM. Order reversed, with $10 costs and disbursements, and motion granted with $10 costs, on the ground that the complaint sets up facts which constitute apparently three separate causes of action, one cause of action for each distinct parcel which is separately described in the complaint.

BURR, J., dissents, on the ground that it affirmatively appears from the complaint that parcel 2 connects parcels 1 and 3 as therein described, so that there is but a single parcel of land involved in the litigation.

PECZYNSKA, Respondent, v. STATLER'S RESTAURANT, Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Anna Peczynska, an infant, etc., against the Statler's Restaurant. No opinion. Motion for leave to appeal to Court of Appeals (from 156 App. Div. 924, 141 N. Y. Supp. 1135) denied, with $10 costs.

In re PEISER. (Supreme Court, Appellate Division, First Department. October 31, 1913.) In the matter of Isaac Peiser. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

PELZ v. PELZ. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Rose M. Pelz against Samuel Pelz. No opinion. Motion denied, with $10 costs. Order filed. See, also, 156 App. Div. 765, 142 N. Y. Supp. 54.

PEOPLE, Respondent, v. ARCHIMEDE, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against Guiseppe Archimede, alias Guiseppe Militano. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. BERNSTEIN, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against Frank Bernstein. No opinion. Motion to dismiss appeal granted. See, also, 156 App. Div. 908, 141 N. Y. Supp. 1136.

PEOPLE, Respondent, v. BRUNORI, Appellant, et al. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Proceeding by the People of the State of New York against Nicola Brunori, impleaded with others. L. Ullo, of New York City, for appellant. R. S. Johnstone, of New York City, for the People. No opinion. Judgment and order affirmed. Order filed.

PEOPLE, Respondent, v. BUCCUFURRI, Appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Proceeding by the People of the State of New York against Vincenzo Buccufurri. No opinion. Motion to resettle order denied. See, also, 158 App. Div. 186, 143 N. Y. Supp. 62.

PEOPLE, Respondent, v. COHEN, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against Morris Cohen. No opinion. Motion to dismiss appeal granted.

PEOPLE v. CONSIGLIO. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Proceeding by the People of the State of New York against Arturo Consiglio. No opinion. Motion to dismiss appeal granted. Order filed.

PEOPLE, Respondent, v. FITZPATRICK, Appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Proceeding by the People of the State of New York against Robert Fitzpatrick. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. FORCARAZZO, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against Vito Forcarazzo. No opinion. Motion to dismiss appeal granted.

PEOPLE v. FREEMAN. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Proceeding by the People of the State of New York against Henry C. Freeman. No opinion. Motion to dismiss appeal granted, unless appellant comply with terms stated in order. Order filed.

PEOPLE, Respondent, v. FULTZ, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against Mamie Fultz. No opinion. Motion to dismiss appeal granted.

PEOPLE v. FURCOLO. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Proceeding by the People of the State of New York against Ralph Furcolo. No opinion. Time to file and serve papers extended until November 18, 1913. Settle order on notice.

PEOPLE, Respondent, v. GREENBERG, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against Jacob Greenberg. No opinion. Motion to dismiss appeal granted.

PEOPLE v. GRUTZ. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Proceeding by the People of the State of New York against George Grutz. No opinion. Motion to dismiss appeal granted, unless appellant comply with terms stated in order. Order filed.

PEOPLE, Respondent, v. HAWKINS, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against May Hawkins. No opinion. Order of the County Court of Kings County, affirming a judgment of conviction of the City Magistrates' Court, City of New York, Borough of Brooklyn, affirmed. See, also, 157 App. Div. 887, 141 N. Y. Supp. 1137.

PEOPLE v. HINCHEY. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Proceeding by the People of the State of New York against Margaret Hinchey. No opinion. Motion to dismiss appeal granted. Order filed.

PEOPLE v. HORMAN. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Proceeding by the People of the State of New York against William Horman. No opinion. Motion to dismiss appeal granted. Order filed.

PEOPLE v. HUDSON. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Proceeding by the People of the State of New York against William J. Hudson. No opinion. Motion to dismiss appeal granted. Order filed.

PEOPLE, Respondent, v. JACOBS, Appellant. (Supreme Court, Appellate Division, Second Department. May 23, 1913.) Proceeding by the People of the State of New York against Morris Jacobs. No opinion. Motion granted. See, also, 143 N. Y. Supp. 21.

PEOPLE, Respondent, v. KERR, Appellant, et al. (Supreme Court, Appellate Division, Second Department. September 23, 1913.) Proceeding by the People of the State of New York

against Fred W. Kerr, Max Schneider, and Joseph Levin. No opinion. Order of the County Court of Kings County affirmed, with $10 costs and disbursements.

PEOPLE, Respondent, v. MANGHAVITA, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against Giovanni Manghavita. No opinion. Motion denied, upon condition that defendant perfect his appeal, place the case on the calendar for the November term, and be ready for argument when reached; otherwise, motion granted.

(159 App. Div. 929)

PEOPLE v. METROPOLITAN SURETY CO. H. B. SMITH CO. v. YAWGER. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Proceeding by the People of the State of New York against the Metropolitan Surety Company. Claim of the H. B. Smith Company against John F. Yawger, as receiver of the Metropolitan Surety Company. No opinion. Order reversed, with $10 costs and disbursements, and claim dismissed, on the authority of People v. Metropolitan Surety Co., Matter of Baldwin, 150 App. Div. 885, 133 N. Y. Supp. 1055.

PEOPLE, Respondent, v. MILLER, Appellant. (Supreme Court. Appellate Division, Fourth Department. July 8, 1913.) Proceeding by the People of the State of New York against Simon Miller. No opinion. Judgment of conviction and order affirmed.

PEOPLE, Respondent, v. O'CONNOR, Appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Proceeding by the People of the State of New York against Cornelius J. O'Connor. No opinion. Judgment of conviction of the Court of Special Sessions affirmed by default.

PEOPLE, Respondent, v. OGUJENOVICH et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Proceeding by the People of the State of New York against Adam Ogujenovich and another. No opinion. Judgment of conviction and order affirmed.

PEOPLE, Respondent, v. RANDAZZO, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against Salvatore Randazzo. No opinion. Motion denied, upon condition that defendant perfect his appeal, place the case on the calendar for the November term, and be ready for argument when reached; otherwise, motion granted. The appeal may be heard upon the original papers.

PEOPLE, Respondent, v. ROTHENBERG, Appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Proceeding by the People of the State of New York against Rebecca Rothenberg. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. SAGE, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) Proceeding by the People of the State of New York against John W. Sage. No opinion. Judgment of conviction affirmed.

PEOPLE, Respondent, v. SHIPPANI, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against John Shippani. No opinion. Motion denied, on condition that defendant perfect his appeal, place the case on the calendar for the November term, and be ready for argument when reached; otherwise, motion granted. The appeal may be heard upon the original papers.

PEOPLE, Respondent, v. SKEEL, Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Proceeding by the People of the State of New York against Vern Skeel. No opinion. Judgment of conviction unanimously affirmed.

PEOPLE, Respondent, v. SMITH, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against Edward Smith. No opinion. Judgment of conviction of the County Court of Kings County affirmed by default. See, also, 156 App. Div. 910; 141 N. Y. Supp. 1140, 143 N. Y. Supp. 1136.

PEOPLE, Respondent, v. SMITH, Appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Proceeding by the People of the State of New York against May Smith. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. SORRENTINO, Appellant. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York against Tony Sorrentino. No opinion. Motion denied, upon condition that defendant perfect his appeal, place the case on the calendar for the November term, and be ready for argument when reached; otherwise, motion granted.

PEOPLE ex rel. BALDWIN, Appellant, v. PRESCOTT et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Proceeding by the People of the State of New York, on the relation of C. Whitney Baldwin, against Charles B. Prescott and others, as Board of Canvassers of town of Attica, Wyoming County, N. Y., and others. No opinion. Order affirmed, with costs.

PEOPLE ex rel. BROOKLYN, Q. C. & S. R. CO. v. STEERS. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Proceeding by the People of the State of New York, on the relation of the Brooklyn, Queens County & Suburban Railroad Company, against Alfred E. Steers, President of the Borough of Brooklyn. No opinion. Motion to resettle order granted, without costs. See, also, 158 App. Div. 153, 143 N. Y. Supp. 52.

PEOPLE ex rel. BUCKLEY, Appellant, v. CONKLIN, Town Clerk, Respondent. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Proceeding by the People of the State of New York, on the relation of Michael F. Buckley, against Charles M. Conklin, Town Clerk of the town of Milo. No opinion. Order affirmed, with costs.

PEOPLE ex rel. BURKE, v. THOMPSON, Com'r. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Proceeding by the People of the State of New York, on the relation of Chas. F. Burke, against Henry S. Thompson, as Commissioner. J. Rouss, of New York City, for relator. H. Crone, of New York City, for respondent. No opinion. Writ dismissed, and proceedings affirmed with $50 costs and disbursements. Order filed.

PEOPLE ex rel. CASSIDY v. WALDO, Police Com'r. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Proceeding by the People of the State of New York, on the relation of Edward J. Cassidy, against Rhinelander Waldo, as Police Commissioner of the City of New York. No opinion. Determination reversed, with $50 costs and disbursements, on the ground that the charge is not supported by the evidence, and relator reinstated.

PEOPLE ex rel. CENTRAL AUTO SALES CO., Respondent, v. BOARD OF ASSESSORS OF CITY OF UTICA, Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Proceeding by the People of the State of New York, on the relation of the Central Auto Sales Company, against the Board of Assessors of the City of Utica. No opinion. Judgment and order affirmed, with costs.

PEOPLE ex rel. CHAPMAN v. WALDO, Police Com'r. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Proceeding by the People of the State of New York, on the relation of Walter S. Chapman, against Rhinelander Waldo, as Police Commissioner, etc.

PER CURIAM. Determination confirmed, with $50 costs and disbursements.

RICH, J., dissents, on the ground that the relator was entitled to a reasonable adjournment for the attendance of his counsel.

PEOPLE ex rel. CITY OF NEW YORK v. DEYO et al., Board of Assessors. (Supreme Court, Appellate Division, Third Department. September 10, 1913.) Proceeding by the People of the State of New York, on the relation of the City of New York, against Nathaniel Deyo and others as members of and constituting the Board of Assessors of the town of Gardiner, Ulster County, State of New York. No opinion. Order affirmed, with $10 costs and disbursements.

(158 App. Div. 909)

PEOPLE ex rel. CITY OF NEW YORK v. JANSEN et al., Board of Assessors. (Supreme Court, Appellate Division, Third Department. September 10, 1913.) Proceeding by the People of the State of New York, on the relation of the City of New York, against Charles H. Jansen and others, as members of and constituting the Board of Assessors of the Town of Shawangunk, Ulster County, State of New York. No opinion. Order of Special Term (75 Misc. Rep. 139, 134 N. Y. Supp. 897) reversed, and assessment of relator stricken from the roll as illegal, with $10 costs and disbursements to the relator, on opinion in People ex rel. City of New York v. Deyo and Others, Assessors of the town of Gardiner, 143 N. Y. Supp. 334, decided herewith.

PEOPLE ex rel. CITY OF NEW YORK v. JANSEN et al., Board of Assessors. (Supreme Court, Appellate Division, Third Department. September 10, 1913.) Proceeding by the People of the State of New York, on the relation of the City of New York, against Charles H. Jansen and others, as members of and constituting the Board of Assessors of the Town of Shawangunk, Ulster County, State of New York. No opinion. Order affirmed, with $10 costs and disbursements.

PEOPLE ex rel. CONGER et al. v. TOWN BOARD OF TOWN OF SMYRNA. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Proceeding by the People of the State of New York, on the relation of Carl E. Conger and another, against the Town Board of the Town of Smyrna, constituting the Board of Elections. No opinion. Order reversed, with $10 costs and disbursements, and motion denied, without costs.

PEOPLE ex rel. CRAUGH, Appellant, v. CONKLIN, Town Clerk, Respondent. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Proceeding by the People of the State of New York, on the relation of William S. Craugh, against Charles M. Conklin, Town Clerk of the Town of Milo. No opinion. Order affirmed, with costs.

(158 App. Div. 892)

PEOPLE ex rel. CUSICK, Appellant, v. DALY, Sheriff, Respondent. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Proceeding by the People of the State of New York, on the relation of Webster Cusick, against Dennis W. Daly, Sheriff of Niagara

County. No opinion. Order affirmed, upon the opinion of Pound, J., delivered at Special Term. 78 Misc. Rep. 657, 138 N. Y. Supp. 817.

PEOPLE ex rel. GOLDEY, Appellant, v. GRIFFENHAGEN, Respondent. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Proceeding by the People of the State of New York, on the relation of Henry Goldey, against Max S. Griffenhagen. H. Goldey, of New York City, for appellant. T. Farley, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

PEOPLE ex rel. HAYES v. WALDO et al. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Proceeding by the People of the State of New York, on the relation of Cornelius G. Hayes, against Rhinelander Waldo and another. T. D. Thacher, of New York City, for relator. H. Crone, of New York City, for respondents. No opinion. Writ dismissed, and proceedings affirmed, with $50 costs and disbursements. Order filed.

PEOPLE ex rel. IANNARONE v. DOYLE, Sheriff. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Proceeding by the People of the State of New York, on the relation of Angelo Iannarone, against William J. Doyle, Sheriff of Westchester County.

PER CURIAM. Final order, dismissing writ of habeas corpus, affirmed, without costs.

JENKS, P. J., not sitting.

PEOPLE ex rel. KELLY v. WALDO. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Proceeding by the People of the State of New York, on the relation of Andrew F. Kelly, against Rhinelander Waldo, as Commissioner. E. Rosenberg, of New York City, for relator. H. Crone, of New York City, for respondent. No opinion. Writ dismissed, and proceedings affirmed, with $50 costs and disbursements. Order filed.

PEOPLE ex rel. MAUSER MFG. CO. v. PURDY et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Proceeding by the People of the State of New York, on the relation of the Mauser Manufacturing Company, against Lawson Purdy and others. No opinion. Motion to dismiss appeal granted.

PEOPLE ex rel. MORRO v. DOYLE, Sheriff. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Proceeding by the People of the State of New York, on the relation of Rocco Morro, against William J. Doyle, Sheriff of Westchester County.

PER CURIAM. Final order dismissing writ of habeas corpus, affirmed, without costs.

JENKS, P. J., not sitting.

PEOPLE ex rel. NOYES, Respondent, v. SOHMER, State Comptroller, Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.). Proceeding by the People of the State of New York, on the relation of Charles P. Noyes, against William Sohmer, as Comptroller of the State of New York. No opinion. Order (81 Misc. Rep. 522, 143 N. Y. Supp. 475) affirmed, with $10 costs and disbursements to respondent.

PEOPLE ex rel. PELLECCHIO, Sheriff, v. GALLO. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Proceeding by the People of the State of New York, on the relation of Fred Pellecchio, judgment debtor, Sheriff of Kings County, against Saverio Gallo.

PER CURIAM. From the return to the writ of habeas corpus, to which no traverse was filed, it appears that the relator was held by the sheriff of Kings county pursuant to an order of the Special Term of the Supreme Court committing him to his custody for a civil contempt. The court had jurisdiction to make the order, and the provisions thereof were within its power. No other questions can be presented by such a writ. People ex rel. Price v. Hayes, 151 App. Div. 561, 136 N. Y. Supp. 854. The order discharging relator should be reversed, without costs, and he should be remanded to the custody of the sheriff of Kings county.

(158 App. Div. 510)

PEOPLE ex rel. SQUIRES et al., Appellants, v. HAND et al., respondents. (Supreme Court, Appellate Division, Second Department. September 23, 1913.) Proceeding by the People of the State of New York, on the relation of George D. Squires and others, against Alphonso P. Hand and others. No opinion. Judgment (135 N. Y. Supp. 192) affirmed, with costs, upon the opinion of Mr. Justice Putnam at Trial Term.

PEOPLE ex rel. VARLEY v. WALDO. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Proceeding by the People of the State of New York, on the relation of James S. Varley, against Rhinelander Waldo, as Commissioner. J. Rouss, of New York City, for relator. H. Crone, of New York City, for respondent. No opinion. Writ dismissed, and proceedings affirmed, with $50 costs and disbursements. Order filed.

PEOPLE'S SURETY CO., Respondent, v. I. A. HODGE & CO., Appellants. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by the People's Surety Company against I. A. Hodge & Co. F. B. Dow, of New York City, for appellants. A. C. Rowe, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

PETROLINO, Respondent, v. BUFFALO, L. & R. RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Antonio Petrolino against

the Buffalo, Lockport & Rochester Railway Company. No opinion. Motion for leave to appeal to Court of Appeals (from 142 N. Y. Supp. 1140) denied, with $10 costs.

PETTIT, Appellant, v. TRUSTEES OF FREEHOLDERS AND COMMONALTY OF TOWN OF BROOKHAVEN et al., Respondents. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Henry S. Pettit against the Trustees of the Freeholders and Commonalty of the Town of Brookhaven and another. No opinion. Judgment affirmed, with costs.

PHELAN, Respondent, v. NEW YORK, N. H. & H. R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Richard Powers Phelan against the New York, New Haven & Hartford Railroad Company. No opinion. Motion for reargument (of 143 N. Y. Supp. 545) denied, with $10 costs. See, also, 143 N. Y. Supp. 1139.

PHELAN, Respondent, v. NEW YORK, N. H. & H. R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Richard Powers Phelan against the New York, New Haven & Hartford Railroad Company. No opinion. Motion for leave to appeal to the Court of Appeals (from 143 N. Y. Supp. 545) granted. See, also, 143 N. Y. Supp. 1139.

PHILADELPHIA WAREHOUSE CO. v. SEAMAN. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Philadelphia Warehouse Company against Elizabeth C. Seaman. No opinion. Motion to dismiss appeal granted, with $10 costs. See rule 41, General Rules of Practice. Order filed.

PIPER, Respondent, v. CITY OF FULTON, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Jay M. Piper against the City of Fulton. No opinion. Judgment affirmed, with costs.

PLOTKIN v. HEFFNER et al. (Supreme Court, Appellate Term, First Department. November 13, 1913.) Appeal from Municipal Court, Borough of Manhattan, Third District. Action by Abraham Plotkin against Leopold Heffner and another, doing business under the firm name of the Empire City Iron Works. From a judgment for plaintiff, defendants appeal. Reversed, and complaint dismissed. Walter G. Evans, of Rome, for appellants. Charles M. Kiefer, of New York City, for respondent.

SEABURY, J. This is an action to recover damages for personal injuries. Plaintiff was in the employ of defendants. The capacity in which he was employed is a subject of dispute. While acting as driver of defendants' horse, the horse became unmanageable and ran away. After the horse had run a considerable distance, one of the reins broke, and the plaintiff was thrown out of the wagon and injured. No negligence on the part of the defendants was proven. The attempt of the plaintiff to make it appear that the defendants agreed before the accident to be responsible for any accident that might happen was not sustained by credible proof, and in no way alters the case. Judgment reversed, with costs, and complaint dismissed, with costs. All concur.

POEL v. HILLS et al. (three cases). (Supreme Court, Appellate Division, First Department. November 7, 1913.) Appeal from Special Term, New York County. Actions by Frans Poel against William Hills. From an order providing for discovery and inspection of books, etc., of plaintiff, plaintiff appeals. Modified and affirmed. See, also, 155 App. Div. 934, 140 N. Y. Supp. 1140. Pinney, Thayer & Van Slyke, of New York City (Aaron C. Thayer, of New York City, of counsel), for appellants. Griggs, Baldwin & Baldwin, of New York City (Martin Conboy, of New York City, of counsel), for respondents.

PER CURIAM. The orders appealed from should be modified, by striking out the provisions for the discovery and inspection of the books, records, and accounts of Gruner & Co. and Dusendschon, Zarges & Co., both of Brazil, and by limiting the inspection of the books and records of the plaintiffs to the period from February 14, 1910, to July 25, 1910, both dates inclusive, and the time in which such inspection can be had during business hours for a period of two weeks, and, as so modified, affirmed, with $10 costs and disbursements to the appellants.

POPIELASZ, Respondent, v. CHELSEA FIBRE MILLS, Appellant. (Supreme Court, Appellate Division, Second Department. September 23, 1913.) Action by Anna Popielasz, by Michael Popielasz, her guardian ad litem, against the Chelsea Fibre Mills.

PER CURIAM. Judgment and order reversed, and new trial granted, costs to abide the event, unless within 20 days plaintiff stipulate to reduce said judgment to the sum of $7,500, exclusive of the taxed costs and disbursements, in which case the judgment, as so modified, and the order, are unanimously affirmed, without costs of this appeal.

PRATT, Respondent, v. PRENTICE, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) Action by John C. Pratt, as trustee, against William E. Prentice. No opinion. Interlocutory judgment affirmed, without costs, with leave to the defendant to plead over within 20 days.

PRICE v. ALEXANDER et al. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Anna Price against Mary F. Alexander and another. No opinion. Motion granted, without costs. Settle order on notice.

PRZYTULA, Appellant, v. EMPIRE STATE DEGREE OF HONOR, Respondent. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Szczepan Przytula, as executor, etc., against the Empire State Degree of Honor. No opinion. Order affirmed, with $10 costs and disbursements. See, also, 146 App. Div. 899, 133 N. Y. Supp. 1141.

PURITAN PURE FOOD CO. et al. v. STOLLWERCK BROS., Inc., et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the Puritan Pure Food Company and others against Stollwerck Bros., Incorporated, and others. E. H. Wilson, of New York City, for appellants. N. Lyon, of New York City, for respondents Puritan Pure Food Co. and others, and C. A. Baker, of New York City, for respondent Stollwerck. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 156 App. Div. 903, 141 N. Y. Supp. 1143.

QUARANTIELLO, Appellant, v. NEW YORK, L. E. & W. R. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) Action by John Quarantiello against the New York, Lake Erie & Western Railroad Company. No opinion. Order affirmed, with $10 costs and disbursements.

R. A. CORROON & CO., Respondent, v. SAX, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by R. A. Corroon & Co. against Max Sax. J. G. Wells, of New York City, for appellant. L. B. Williams, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

RADLEY, Respondent, v. LERAY PAPER CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Rachel May Radley, as executrix, etc., against the Leray Paper Company.

PER CURIAM. Judgment and order affirmed with costs. See, also, 156 App. Div. 429, 141 N. Y. Supp. 1061.

FOOTE, J., dissents.

RAFTERY, Appellant, v. CARTER et al., Respondents. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by George A. Raftery against John B. Carter and others. H. M. Hitchings, of New York City, for appellant. B. Tolles, of New York City, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

In re RANDALL'S WILL. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) In the matter of the proving of the last will and testament of George Randall, deceased. No opinion. Decree (77 Misc. Rep. 41, 137 N. Y. Supp. 319) affirmed, with costs.

RANGER, Respondent, v. LOCKE, Appellant. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by John H. Ranger against Charles E. Locke. N. Blank, of New York City, for appellant. H. C. Burnstine, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 156 App. Div. 903, 141 N. Y. Supp. 1143.

RANO, Respondent, v. GENERAL ELECTRIC CO., Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Michael Rano against the General Electric Company. No opinion. Judgment and order unanimously affirmed, with costs.

RASHKOFF v. ERIE R. CO. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Hyman Rashkoff against the Erie Railroad Company. No opinion. Motion to dismiss appeal granted, with $10 costs, unless appellant comply with terms stated in order. Order filed. See, also, 142 N. Y. Supp. 1141.

RATH, Respondent, v. McNAUGHT, Appellant, et al. (Supreme Court, Appellate Division, Second Department. July 25, 1913.) Action by Arthur A. Rath against Roy H. McNaught and another.

PER CURIAM. As the affidavits for the remedy by arrest made a prima facie case of actionable fraud, without reference to the proceedings in the suit of Eastmond v. McNaught, the order denying the motion to vacate the order of arrest is affirmed, with $10 costs and disbursements, to abide the event. Reargument denied. 143 N. Y. Supp. 1140.

RATH, Respondent, v. McNAUGHT, Appellant, et al. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Action by Arthur A. Rath against Roy H. McNaught and another. No opinion. Motion for reargument (of 143 N. Y. Supp. 1140) denied, with $10 costs.

RECTOR, WARDENS AND VESTRYMEN OF CHURCH OF MESSIAH, Appellant, v. WASHBURN et al., Respondents. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by the Rector, Wardens, and Vestrymen of the Church of the Messiah against John Washburn and another, as executors, etc., of John W. Stewart, late of the town of Moreau, Saratoga county, N. Y., deceased. No opinion. Order affirmed, with $10 costs and disbursements.

REES et al., Appellants, v. UNITED STATES OXYGEN CO., Respondent, et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by William A. Rees and others against the United

States Oxygen Company, impleaded with others. M. E. Joffe, of New York City, for appellants. A. S. Bacon, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and the collection of the judgment enjoined, as stated in opinion. Opinion per curiam. Settle order on notice.

REID, Respondent, v. PLAUT, Appellant. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Bertha W. Reid against Albert Plaut. E. C. Sherwood, of New York City, for appellant. H. S. Dottenheim, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

REIGLE, Respondent, v. LEHIGH VALLEY R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Foster L. Reigle against the Lehigh Valley Railroad Company. No opinion. Judgment and order affirmed, with costs.

(158 App. Div. 906)

REILLY, Respondent, v. EARLY, Appellant. (Supreme Court, Appellate Division, Second Department. July 25, 1913.) Action by Matthew Reilly against Alice Josephine Early.

PER CURIAM. Judgment and order reversed, and new trial granted, costs to abide the event, on authority of Hayes v. Brooklyn Heights Railroad Co., 200 N. Y. 183, 93 N. E. 469. Reargument denied. 143 N. Y. Supp. 1141.

JENKS, P. J., and STAPLETON, J., dissent.

REILLY, Respondent, v. EARLY, Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Matthew Reilly against Alice Josephine Early. No opinion. Motion for reargument (of 143 N. Y. Supp. 1141) denied, with $10 costs.

REILLY, Appellant, v. FRIAS et al., Respondents. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Hugh J. Reilly against Jose A. Frias and others. W. T. Jerome, of New York City, for appellant. R. Stout, of New York City, for respondents. No opinion. Order reversed, with $10 costs and disbursements, and motion granted. Order filed.

REYNOLDS, Appellant, v. NEW YORK TRANSP. CO., Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Kate Reynolds against the New York Transportation Company. F. X. McDonough, of New York City, for appellant. F. H. Gerrodette, of Brooklyn, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

REYNOLDS, Respondent, v. PENNSYLVANIA R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Elmer Reynolds, as administrator, etc., against the Pennsylvania Railroad Company. No opinion. Judgment and order affirmed, with costs.

RICH, Respondent, v. MEURER, Appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Action by Max Rich against Jacob Meurer, etc.

PER CURIAM. Order affirmed, with $10 costs and disbursements.

RICH, J., not voting.

RICH, Respondent, v. THOMPSON, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Paul J. Rich against Alvina M. Thompson. No opinion. Motion granted and appeal dismissed, with costs.

RICHARDSON, Respondent, v. LAWYERS' TITLE INS. & TRUST CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by John J. Richardson, as administrator, etc., of William Richardson, deceased, against the Lawyers' Title Insurance & Trust Company. No opinion. Judgment and order unanimously affirmed, with costs.

ROHR v. LINCH. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by William H. Rohr against George W. Linch. No opinion. Application denied, with $10 costs. Order signed. See, also, 78 Misc. Rep. 45, 137 N. Y. Supp. 752.

ROSENBLATT v. NEW YORK CENT. & H. R. R. CO. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by William Rosenblatt against the New York Central & Hudson River Railroad Company. No opinion. Application denied, with $10 costs. Order signed.

ROSENFIELD et al., Appellants, v. JOSEPHSON, Respondent. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Harry Rosenfield and others against Charles Josephson. S. J. Loeb, of New York City, for appellants. I. J. Kresel, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

ROSENTHAL v. RUBIN. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Samuel B. Rosenthal against Edward Rubin. No opinion. Motion granted, with $10 costs. Order filed. See, also, 148 App. Div. 44, 132 N. Y. Supp. 1053.

ROWE, Respondent, v. CHARLES H. DITSON CO., Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Mildred Rowe against the Charles H. Ditson Company. No opinion. Order (140 N. Y. Supp. 929) reversed, without costs, and motion granted, with costs to abide event of the action.

RUBBER TRADING CO., Respondent, v. MANHATTAN RUBBER MFG. CO., Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Rubber Trading Company against the Manhattan Rubber Manufacturing Company. L. W. Stotesbury, of New York City, for appellant. H. D. Nims, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

RUBENSTEIN, Appellant, v. MITCHELL, Respondent. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Michael Rubenstein against Alfred A. Mitchell. No opinion. Order affirmed, with $10 costs and disbursements.

RUCCHIO et al. v. RUTH REALTY CO. et al. (Supreme Court, Appellate Division, Second Department. September 23, 1913.) Action by Joseph Rucchio and another against the Ruth Realty Company and others. No opinion. Judgment affirmed, with costs.

RYER, Appellant, v. BILLINGTON, Respondent. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Mabel B. Ryer against Reno R. Billington. G. H. Taylor, of Mt. Vernon, for appellant. J. A. Gray, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

RYON, Respondent, v. GIBSON, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Cora Gaylord Ryon, as administratrix, etc., of Henderson Gaylord, against Hannah P. Gibson, individually and as executrix, etc., of Judson A. Gibson, deceased. No opinion. Motion denied. See, also, 142 N. Y. Supp. 1142.

In re SACHS. (Supreme Court, Appellate Division, First Department. October 24, 1913.) In the matter of Moses A. Sachs. No opinion. Referred to official referee. Settle order on notice.

SADDIER, Respondent, v. HARMONY MILLS, Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Wilfred Saddier, an infant, by Obeline Saddier, his guardian ad litem, against the Harmony Mills. No opinion. Judgment and order unanimously affirmed, with costs.

In re SANBORN. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) In the matter of Addison S. Sanborn, an attorney. No opinion. Matter referred to Hon. William D. Dickey, official referee, with the suggestion that, as the attorney is now under indictment, he exercise his discretion in waiting a reasonable time before proceeding with the reference. See, also, 152 App. Div. 935, 137 N. Y. Supp. 1141.

SANITARY FIREPROOFING & CONTRACTING CO., Appellant, v. ENDSWORTH CONST. CO. et al., Respondents. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by the Sanitary Fireproofing & Contracting Company against the Endsworth Construction Company and another. R. A. McDuffie, of New York City, for appellant. C. Goldzier, of New York City, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

SCHEELER, Appellant, v. CASUALTY CO. OF AMERICA, Respondent. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by John C. Scheeler against the Casualty Company of America.

PER CURIAM. Order (137 N. Y. Supp. 811) affirmed, with costs. Held, that the questions as to whether the policy provides for forfeiture of plaintiff's claim for indemnity for failure to give notice of his disability in proper time (see Carpenter v. German-American Insurance Co., 52 Hun, 249, 4 N. Y. Supp. 925), or if delay in giving the notice prevents recovering for disability prior to the time the notice is given, recovery may, nevertheless, be had for 26 weeks of disability after notice was given (see Whiteside v. North American Accident Ins. Co., 200 N. Y. 320, 93 N. E. 948, 35 L. R. A. [N. S.] 696, dissenting opinion by Haight, J.), not having been argued by counsel are not determined.

SCHERMERHORN, Appellant, v. SCHERMERHORN, Respondent. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Josephine W. Schermerhorn against Nathaniel E. Schermerhorn. J. S. Wise, of New York City, for appellant. No opinion. Order reversed, without costs, and motion for interlocutory judgment granted, with costs. Order filed.

In re SCHMIDT'S ESTATE. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) In the matter of the estate of John D. Schmidt, deceased. No opinion. Order of the Surrogate's Court of Kings county affirmed, with $10 costs and disbursements.

SCHMITT, Appellant, v. SCHMITT et al., Respondents. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Lillian Schmitt against Andrew Schmitt, Jr., and others. No opinion. Judgment affirmed by default, with costs. See, also, 157 App. Div. 928, 142 N. Y. Supp. 1143.

SCHNEIDER v. SCHLANG. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Barnet S. Schnei-

der against Alexander Schlang. No opinion. Motion to dismiss appeal denied, with $10 costs. Order filed.

(158 App. Div. 907)

SCHOENHERR v. VAN METER. (Supreme Court, Appellate Division, Second Department. July 25, 1913.) Action by Henry Schoenherr against W. K. Van Meter, as trustee in bankruptcy of the Brooklyn Consolidated Drug Company, and others. No opinion. Judgment affirmed, with costs, on authority of Matter of Meighan, 106 App. Div. 599, 94 N. Y. Supp. 1153, affirmed 182 N. Y. 558, 75 N. E. 1131.

In re SCHOONMAKER et al. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) In the matter of the application of Adrian O. Schoonmaker and others for payment of award made to unknown owners, etc. No opinion. Motion granted, and matter referred to J. Harry Snook, Esq., to take proof and report, with his opinion.

SCHWARTZ, Appellant, v. WILLIAMS et al., Respondents. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Michel I. Schwartz against Herbert E. Williams and others. Appeal Nos. 1 and 2. No opinion. Orders affirmed, with $10 costs and disbursements. See, also, 153 App. Div. 302, 137 N. Y. Supp. 1048; 153 App. Div. 918, 138 N. Y. Supp. 1141.

SCOTT & FOWLES CO., Appellant, v. WRIGHT, Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the Scott & Fowles Company against Nannie H. Wright. J. W. Prendergast, of New York City, for appellant. J. J. Crawford, of New York City, for respondent. No opinion. Judgment and order reversed, and new trial ordered, with costs to appellant to abide event, upon the ground that the verdict was against the weight of evidence. Settle order on notice.

SEAMAN, Respondent, v. SHELDON, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Elijah H. Seaman, as trustee in bankruptcy, etc., against George R. Sheldon. No opinion. Order affirmed, with $10 costs and disbursements, with leave to the defendant to plead over within 20 days upon payment of the costs of the demurrer and of this appeal.

SEIBERT, Respondent, v. GRIFFITH, Appellant, et al. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Luther B. Seibert against William M. Griffith, impleaded with others. No opinion. Interlocutory judgment affirmed, with costs, with leave to the appellant to plead over within 20 days, upon payment of the costs of the demurrer and of this appeal.

SEIDAK, Respondent, v. FOUNDATION CO., Appellant. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Charles F. Seidak against the Foundation Company. B. C. Loder, of New York City, for appellant. T. H. Beardsley, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

SHALLECK, Respondent, v. MINETTO-MERIDEN CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Stansalaus Shalleck against the Minetto-Meriden Company. No opinion. Appeal dismissed, without costs, upon stipulation filed.

SHAMPINE, Respondent, v. CARDINAL, Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Frederick Shampine against William Cardinal. No opinion. Judgment unanimously affirmed, with costs.

SHAWNEE FIRE INS. CO., Respondent, v. NEWMAN et al., Appellants. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Shawnee Fire Insurance Company against Robert J. Newman and others. C. Goldzier, of New York City, for appellants. C. P. Williamson, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 142 N. Y. Supp. 1144.

SHEEHAN, Appellant, v. KALLE, Respondent. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Sarah Sheehan against Charles F. Kalle. C. J. Earley, of New York City, for appellant. E. D. Worcester, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

In re SHUEFELT. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) In the matter of the application of Margaret M. Shuefelt to compel George W. Donnan and Benjamin Terk, attorneys of the state of New York, to pay over certain moneys. No opinion. Order affirmed, with $10 costs and disbursements.

SIEFTER, Respondent, v. AMERICAN BONDING CO. OF BALTIMORE, Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Frederiek Siefter against the American Bonding Company of Baltimore. No opinion. Order modified, by directing plaintiff to state the number and location of the office where verbal and written communications were given, and, as so modified, affirmed, without costs. See, also, 143 N. Y. Supp. 1144.

SIEFTER, Respondent, v. AMERICAN BONDING CO. OF BALTIMORE, Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Frederick Siefter against the American Bonding Company of Baltimore. No opinion. Motion granted. See, also, 143 N. Y. Supp. 1143.

SKALA, Appellant, v. E. BAILEY & SONS, Respondents. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Mary Skala, as administratrix, etc., of Stephen Skala, deceased, against E. Bailey & Sons. No opinion. Judgment unanimously affirmed, with costs.

In re SMITH. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) In the matter of Whitmel H. Smith, an attorney. No opinion. Matter referred to Hon. Josiah T. Marean, official referee, to take testimony and report, with his opinion.

SMITH, Appellant, v. RUBEL, Respondent. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Robert S. Smith against Max Rubel. H. Nathan, of New York City, for appellant. M. J. O'Brien, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 156 App. Div. 943, 141 N. Y. Supp. 1147.

SMITH, Respondent, v. TARANTO, Appellant. (Supreme Court, Appellate Division, Second Department. September 23, 1913.) Action by Thomas F. Smith against Anthony J. Taranto.

PER CURIAM. Order (140 N. Y. Supp. 794) affirmed, without costs, on plaintiff filing an undertaking in the sum of $250 within 10 days after the service of copy of order to be entered herein, with notice of entry; but, if such undertaking should not be so filed, the order is reversed, with $10 costs and disbursements, and the motion denied, with $10 costs.

SMITH v. WESTERN PAC. RY. CO. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Charles E. W. Smith against the Western Pacific Railway Company. No opinion. Motion granted. No question certified, but certificate made which is provided for by section 191, subd. 2, of the Code of Civil Procedure. Order filed. See, also, 154 App. Div. 130, 139 N. Y. Supp. 129.

SNARE & TRIEST CO., Appellant, v. CITY OF NEW YORK, Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the Snare & Triest Company against the City of New York. H. M. Hitchings, of New York City, for appellant. W. E. C. Mayer, of Brooklyn, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

SQUIBB v. NEUBERGER et al. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Appeal from Special Term, New York County. Action by Charles F. Squibb against David M. Neuberger and others. From an order denying his motion to make the complaint more definite and certain, the defendant named appeals. Reversed. George E. Joseph, of New York City, for appellant. Carl S. Stern, of New York City, for respondent.

PER CURIAM. The order appealed from is reversed, with $10 costs and disbursements, and the plaintiff required to make the fifth, sixth, seventh, and ninth paragraphs of the complaint more definite and certain by stating whether the agreement of trust therein alleged was oral or in writing, the date thereof, and, if in writing, to annex a copy thereof to the complaint, and, if not in writing, to state the substance of the agreement.

STANDING v. BRADY. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Percy D. Standing against William A. Brady. No opinion. Motion denied, with $10 costs. Order filed. See, also, 157 App. Div. 657, 142 N. Y. Supp. 656.

In re STANTON. (Supreme Court, Appellate Division, First Department. November 14, 1913.) In the matter of George P. Stanton. No opinion. Application granted and respondent disbarred. Settle order on notice.

STAR CO., Respondent, v. PRESS PUB. CO. et al., Appellants. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the Star Company against the Press Publishing Company and others. H. Taylor, of New York City, for appellants. S. Untermyer, of New York City, for respondent.

PER CURIAM. Order affirmed, with $10 costs and disbursements. Order filed.

LAUGHLIN and SCOTT, JJ., dissent.

STARK, Respondent, v. ATLANTIC, GULF, & PACIFIC CO., Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Norman Stark against the Atlantic, Gulf & Pacific Company. No opinion. Judgment and order unanimously affirmed, with costs.

In re STATE BANK OF PIKE. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) In the matter of the State Bank of Pike. No opinion. Order affirmed, with $10 costs and disbursements.

STERLING SECURITIES CO., Appellant, v. THAMES LOAN & TRUST CO., Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the Sterling Securities Company against the Thames Loan & Trust Company. J. C. Guggenheimer, of New York City, for appellant. W. H. Ford,

of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion to open default denied, with leave to defendant to renew on presenting to the court verified answer setting up a defense. Order filed.

STERRY, Appellant, v. STERRY, Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Elisabeth S. Sterry against James W. Sterry. I. N. Jacobson, of New York City, for appellant. H. Ringrose, of New York City, for respondent. No opinion. Order affirmed, without costs. Order filed. See, also, 79 Misc. Rep. 355, 140 N. Y. Supp. 716.

STEVENS, Appellant, v. SPURR, Respondent. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Don Stevens against Charles Spurr. No opinion. Order affirmed, with $10 costs and disbursements.

STEVENS, Appellant, v. STANTON CONST. CO., Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Mamie Stevens, as administratrix, against the Stanton Construction Company. A. M. Leslie, of New York City, for appellant. E. F. Lindsay, of New York City, for respondent. No opinion. Order reversed, with costs, motion to set aside verdict and for new trial denied, and verdict reinstated. Settle order on notice. See, also, 153 App. Div. 82, 137 N. Y. Supp. 1024.

STEWART, Respondent, v. UNION BAG & PAPER CO., Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Joseph W. Stewart against the Union Bag & Paper Company.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event, unless plaintiff stipulates to reduce the verdict to $5,000, in which case the judgment is modified, and, as so modified, judgment and order affirmed, without costs.

SMITH, P. J., votes for reversal.

STILLWELL, Appellant, v. BATEMAN et al., Respondents. (Supreme Court, Appellate Division, Second Department. July 25, 1913.) Action by William Stillwell against Caroline V. Bateman and others.

PER CURIAM. Judgment and order reversed, and new trial granted, costs to abide the event. The competency of plaintiff's mother to testify is sustained by Healy v. Healy, 55 App. Div. 315, 66 N. Y. Supp. 927, affirmed 166 N. Y. 624, 60 N. E. 1112. Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916, is distinguishable upon the facts, and does not apply where the child furnished the consideration. At the time of this trial plaintiff's mother had no interest in any judgment the court might render, she had no enforceable claim or right to any portion of any recovery by plaintiff, and she was without any interest or expectancy in the event of plaintiff's death.

STROBRIDGE LITHOGRAPH CO., Respondent, v. BRADY et al., Appellants. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by the Strobridge Lithograph Company against William A. Brady and another. N. Vidaver, of New York City, for appellants. C. P. Rogers, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

STROZIK, Respondent, v. CROSSTOWN ST. RY. CO. OF BUFFALO et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. October 8, 1913.) Action by Stephania Strozik, an infant, etc., against the Crosstown Street Railway Company of Buffalo and the International Railway Company. No opinion. Judgment affirmed, with costs.

In re STROZZI. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) In the matter of the petition of Frederick E. Strozzi to review the action of William J. Boyer and another, as Commissioners of Election, etc., of Erie County, in canvassing, etc., for the primary election, etc., for nomination of alderman of National Progressive party, etc. No opinion. Order affirmed, with $10 costs and disbursements.

SULLIVAN v. WILHELM et al. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by James Sullivan against one Wilhelm and others. No opinion. Application granted. Order signed.

SULLY, Respondent, v. TIFFANY & CO., Appellants. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Emma F. Sully against Tiffany & Co. C. A. Jayne, of New York City, for appellants. J. J. Lordan, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion to strike out parts of answer as irrelevant denied, with $10 costs. Order filed.

SUMNER, Appellant, v. RYAN et al., Respondents. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Perrin H. Sumner against Patrick L. Ryan and others. J. M. Williams, of New York City, for appellant. P. L. Ryan, of New York City, for respondents. No opinion. Judgment affirmed, with costs. Order filed. See, also, 156 App. Div. 946, 142 N. Y. Supp. 1147.

SUSSMAN v. PITTSBURGH LIFE & TRUST CO. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by William S. Sussman against the Pittsburgh Life & Trust Company. No opinion.

Motion denied, with $10 costs. Order filed. See, also, 143 N. Y. Supp. 1146.

SUSSMAN, Respondent, v. PITTSBURGH LIFE & TRUST CO., Appellant. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by William S. Sussman against the Pittsburgh Life & Trust Company. F. E. Montgomery, of New York City, for appellant. H. B. Tibbetts, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion granted as stated in order. Order filed. See, also, 143 N. Y. Supp. 1146.

SYRACUSE MOTOR CAR CO., Respondent, v. PULLMAN MOTOR CAR CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) Action by the Syracuse Motor Car Company against the Pullman Motor Car Company. No opinion. Order affirmed, with $10 costs and disbursements.

SZEL IMPORT & EXPORT CO. et al. v. CORN, et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Szel Import & Export Company and others against Fannie Corn, impleaded with others. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed. See, also, 142 N. Y. Supp. 1147.

TANNER, Respondent, v. CONGER, et al., Appellants. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Lillian M. Tanner against Benn Conger and others. No opinion. Interlocutory judgment affirmed, with costs, with leave to defendants to withdraw demurrer and answer, upon payment of costs in this court and at Special Term. See, also, 151 App. Div. 914, 135 N. Y. Supp. 1146.

TAUSSIG v. CARNEGIE TRUST CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Edward D. Taussig against the Carnegie Trust Company and others. No opinion. Motion denied. See memorandum per curiam. Settle order on notice. See, also, 156 App. Div. 519, 141 N. Y. Supp. 347.

THAYER, Respondent, v. STANDARD OIL CO. OF NEW YORK, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Ida M. Thayer, as administratrix, etc., against the Standard Oil Company of New York. No opinion. Judgment and order affirmed, with costs.

THIELE v. TRIMBLE. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by William Thiele against Richard Trimble. No opinion. Application granted. Order signed.

THEILE v. UNITED STATES STEEL CORPORATION. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by William Theile against the United States Steel Corporation. No opinion. Application granted. Order signed.

In re THORN. (Supreme Court, Appellate Division, First Department. October 31, 1913.) In the matter of Frank Thorn, an attorney. No opinion. Referred to official referee. Settle order on notice.

THURLING, Appellant, v. ORINOCO S. S. CO., Respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by George W. Thurling against the Orinoco Steamship Company. No opinion. Judgment and order unanimously affirmed, with costs. Appeal to Court of Appeals denied. 143 N. Y. Supp. 1146.

THURLING, Appellant, v. ORINOCO S. S. CO., Respondent. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by George W. Thurling against the Orinoco Steamship Company. No opinion. Motion for reargument denied, without costs. Motion for leave to appeal to the Court of Appeals (from 143 N. Y. Supp. 1146) denied, without costs.

TICHENOR, Respondent, v. YUNG, Appellant, et al. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Frank M. Tichenor against Charles Yung, impleaded with others. E. J. McCabe, of New York City, for appellant. G. H. Taylor, of Mt. Vernon, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

TODD et al., Appellants, v. TODD et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) Action by Le Roy D. Todd and another against Rowena Todd and another. No opinion. Judgment and order affirmed, with costs.

TOONE v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by William Toone against the City of New York. No opinion. Motion denied, without costs. Order filed.

TOWNSEND, Appellant, v. PERRY et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Frank B. Townsend against Ezekiel C. Perry and others. No opinion. Judgment affirmed, with costs. See, also, 146 App. Div. 225, 130 N. Y. Supp. 951.

TRACEY v. McCURDY. In re SWANICK. (Supreme Court, Appellate Division, First De-

partment. October 17, 1913.) Action by George W. Tracey against Samuel McCurdy. In the matter of James F. Swanick. B. H. Stern, of New York City, for appellant. J. F. Swanick, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

TROY TRUST CO., Respondent, v. McLEOD, Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by the Troy Trust Company against Sayre McLeod. No opinion. Order affirmed, with $10 costs and disbursements.

TROY WASTE MFG. CO., Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by the Troy Waste Manufacturing Company against the New York Central & Hudson River Railroad Company. No opinion. Motion granted. See, also, 143 N. Y. Supp. 420.

TUCKER, Appellant, v. TUCKER, Respondent. (Supreme Court, Appellate Division, Second Department. October 3, 1913.) Action by Christina A. Tucker against Charles S. Tucker. No opinion. Order affirmed, without costs.

TULLIS, Respondent, v. TULLIS, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Mary M. Tullis against Walter S. Tullis. T. G. Prioleau, of New York City, for appellant. R. Krause, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed. See, also, 143 N. Y. Supp. 1147.

TULLIS v. TULLIS. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Mary M. Tullis against Walter S. Tullis. No opinion. Motion for stay denied, with $10 costs. Order filed. See, also, 143 N. Y. Supp. 1147.

UHREN, Respondent, v. GORDON, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by David Uhren against Amos Gordon. E. W. Lackey, of Tannersville, for appellant. H. W. Merchant, of New York City, for respondent. No opinion. Order reversed, with $10 costs and disbursements, and motion granted. Order filed.

ULSTER & DELAWARE BLUESTONE CO., Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by the Ulster & Delaware Bluestone Company against the City of New York. No opinion. Order affirmed, with $10 costs and disbursements.

UNION TRUST CO. OF ROCHESTER, Respondent, v. ROCHESTER REAL ESTATE & INVESTMENT CO. et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by the Union Trust Company of Rochester against the Rochester Real Estate & Investment Company and others. No opinion. Appeal dismissed, without costs, upon stipulation filed.

UNITED DRESSED BEEF CO. v. DIETRICH et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the United Dressed Beef Company against Eugenie L. Dietrich and others. No opinion. Motion granted. Order filed. See, also, 143 N. Y. Supp. 1147.

UNITED DRESSED BEEF CO. v. E. LE LONG DIETRICH, Inc., et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the United Dressed Beef Company against E. Le Long Dietrich, Incorporated, and others. No opinion. Appeal dismissed, without costs. Order filed. See, also, 143 N. Y. Supp. 1147.

UNITED DRESSED BEEF CO., Respondent, v. E. LE LONG DIETRICH, Inc., et al., Appellants et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by the United Dressed Beef Company against E. Le Long Dietrich, Incorporated, and others. H. L. Loomis, of New York City, for appellants. L. Dashew, of New York City, for respondent. No opinion. Order reversed, without costs, and motion to open default and allow defendant to answer granted, upon payment of costs in the action to date and $10 costs of opposing motion. Order filed. See, also, 143 N. Y. Supp. 1147.

UTZ v. GERLICH. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Emma Utz against Charles J. Gerlich, Jr. B. Bloch, of Brooklyn, for appellant. P. Klein, of New York City, pro se. No opinion. Order reversed, with $10 costs and disbursements, and motion granted, upon condition stated in opinion. Opinion per curiam. Settle order on notice.

VAN BLARICOM, Respondent, v. VAN BLARICOM, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Marjorie Van Blaricom against George H. Van Blaricom. No opinion. Interlocutory judgment affirmed, with costs.

VAN GAASBEEK, Appellant, v. TISDALE LUMBER CO. et al., Respondents. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Richard M. Van Gaasbeek against the Tisdale Lumber Company and others. No opinion. Motion to dismiss appeal granted, without costs, upon the ground that the appeal from the order to resettle the

former order is not appealable. See, also, 149 App. Div. 928, 133 N. Y. Supp. 1148.

VARON, Respondent, v. AMERICAN MFG. CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 10, 1913.) Action by Ovadio Varon against the American Manufacturing Company.

PER CURIAM. Order reversed, with $10 costs and disbursements, and defendant's motion granted, with $10 costs, and the cause removed to New York county, as the county of plaintiff's residence when the action was brought.

RICH, J., not voting.

VASS, Respondent, v. BRITT et al., Appellants. (Supreme Court, Appellate Division, Second Department. October 22, 1913.) Application of Alfred E. Vass against J. Gabriel Britt and others. No opinion. Order affirmed, without costs.

VEEDER, Respondent, v. CITY OF GLOVERSVILLE, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Asenath Veeder against the City of Gloversville. No opinion. Appeal dismissed, with $10 costs.

VINSON, Respondent, v. SEWER, WATER, AND STREET COMMISSION OF SARATOGA SPRINGS, Appellant. (Supreme Court Appellate Division, Third Department. September 26, 1913.) Action by Charles E. Vinson against the Sewer, Water and Street Commission of Saratoga Springs. No opinion. Motion denied. See, also, 142 N. Y. Supp. 598.

VON BACHO, Respondent, v. METROPOLITAN LIFE INS CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Walter Von Bacho against the Metropolitan Life Insurance Company. No opinion. Judgment and order reversed, and new trial granted, costs to abide the event, on the ground of error in charging plaintiff's request as to assumption of risk at folio 153 of the record.

VON HAUS, Respondent, v. SOULE, Appellant. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Wilhelma Von Haus against Ullman B. Soule. J. Fennelly, of New York City, for appellant. C. F. Dos Passos, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 146 App. Div. 731, 131 N. Y. Supp. 512.

WAGNER et al., Appellants, v. SUTTON, Respondent. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Fred Wagner and Marion E. Sutton, an infant, by guardian, etc., against Ernest E. Sutton. No opinion. Order affirmed, with costs.

WALKER, Respondent, v. DRESSLER, Appellant. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by George W. Walker against Anna Dressler. W. B. Dressler, of New York City, for appellant. E. Whitlock, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 157 App. Div. 921, 142 N. Y. Supp. 1149.

WALL, Appellant, v. O'HARE, Respondent. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by Clarence H. Wall against John J. O'Hare. No opinion. Judgment unanimously affirmed, with costs.

(158 App. Div. 273)

WALLACE et al. v. WALLACE et al. (Supreme Court, Appellate Division, Second Department. July 25, 1913.) Action by Jessie Wallace and others against Howard Gurdon Wallace, individually, etc., and others.

PER CURIAM. Judgment affirmed, with costs, on opinion of Mr. Justice MILLS at Special Term (137 N. Y. Supp. 43). See, also, 143 N. Y. Supp. 1148.

HIRSCHBERG, J., not voting.

WALLACE et al., Respondents, v. WALLACE, Appellant et al. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Jessie Wallace and others against Howard G. Wallace and others. No opinion. Order affirmed, without costs. See. also, 143 N. Y. Supp. 1148.

WALZ, Respondent, v. HUMRICH, Appellant. (Supreme Court, Appellate Division, Second Department. October 31, 1913.) Action by Joseph Walz against Magdalena Humrich. No opinion. Judgment affirmed, with costs.

WARE, Respondent, v. CITY OF BUFFALO, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Henry Ware against the City of Buffalo. No opinion. Judgment and order affirmed, with costs.

WARING v. CHILDS CO. (Supreme Court, Appellate Division, First Department. November 14, 1913.) Action by Emma B. P. Waring against the Childs Company. With this case have been considered cases bearing titles as follows: Joseph Dorf v. Robert S. Smith; Francis Griffin v. Adelaide T. Beach; Elizabeth Passut v. Marion M. Heubner; Benjamin Gibbs v. New York Safety Reserve Fund (two cases); Harry Dunn v. New Amsterdam Casualty Company. No opinions. Applications denied, with $10 costs, in each case. Orders signed.

WASKO, Appellant, v. MACKO, Respondent. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Stephen Wasko against John Macko, as President, etc. No opinion. Judgment affirmed, without costs.

WASKOWSKI, Respondent, v. BOCKHAUS, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Florence Waskowski against George Bockhaus. E. R. Koch, of New York City, for appellant. H. Asher, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

WATERBURY, Respondent, v. WATERBURY, Appellant. (Supreme Court, Appellate Division. Fourth Department. July 8, 1913.) Action by John H. Waterbury against Edith A. Waterbury. No opinion. Judgment affirmed, without costs. See, also, 143 N. Y. Supp. 1149.

WATERBURY, Respondent, v. WATERBURY, Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by John H. Waterbury against Edith A. Waterbury. No opinion. Order affirmed, without costs. See, also, 143 N. Y. Supp. 1149.

In re WEBER. (Supreme Court, Appellate Division, First Department, November 14, 1913.) In the matter of Joseph L. Weber. No opinion. Order affirmed. Order filed.

WECHSLER, Respondent, v. RAWAK, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Jacob Wechsler against George Rawak. W. E. Ernst, of New York City, for appellant. A. K. Stricker, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

WEED, Respondent, v. CITY OF AUBURN, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Ethel May Weed against the City of Auburn. No opinion. Judgment and order affirmed, with costs.

WEEKS v. RODISI HOLDING CO. et al. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Florence R. Weeks against the Rodisi Holding Company and others. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed. See, also, 155 App. Div. 937, 140 N. Y. Supp. 1150; 143 N. Y. Supp. 1149.

WEEKS, Appellant, v. RODISI HOLDING CO. et al., Respondents. (Supreme Court, Appellate Division, First Department. November 7, 1913.) Action by Florence R. Weeks against the Rodisi Holding Company and another. W. A. Wight, of New York City, for appellant. M. S. Hirschberg, of New York City, for respondents. No opinion. Judgment affirmed, with costs. Order filed. See, also, 143 N. Y. Supp. 1149.

WEILL, Respondent, v. JOHNSTON, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by Henry Weill against Frank M. Johnston. No opinion. Motion granted, and appeal dismissed, with costs.

WELD et al., Respondents, v. DELAWARE & H. CO., Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Katharine S. Weld and others against the Delaware & Hudson Company. J. P. Cotton, Jr., of New York City, for appellant. C. A. Collin, of New York City, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

WELLS, Respondent, v. HAFF, Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by James Clarence Wells against Alvah W. Haff. (Actions 1 and 2.) No opinion. In action No. 1: Order affirmed, without costs. In action No. 2: Order modified, so that plaintiff's discontinuance shall be on payment of defendant's taxable costs in that action, and, as so modified, affirmed, without costs.

WEMPLE et al., Respondents, v. CITY OF GLOVERSVILLE, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Adam Z. Wemple and another against the City of Gloversville. No opinion. Appeal dismissed, with $10 costs.

WENDLING, Respondent, v. WENDLING, Appellant, et al. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Julia Wendling against William Wendling, impleaded with others. J. Wilson Bryant, of New York City, for appellant. L. Jersawitz, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

WERNER et al., Respondents, v. HEINZE, Appellant, et al. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Ernest Werner and another against Ruth N. Heinze, impleaded with others. F. E. M. Bullowa, of New York City, for appellant. B. G. Paskus, of New York City, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed.

WESTCHESTER TRUST CO. v. CONDON et al. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by the Westchester Trust Company, as executor

and trustee, etc., against Helen W. Condon, as guardian ad litem, etc., and another, appellant. No opinion. Judgment and order affirmed, with costs to plaintiff respondent. See, also, 157 App. Div. 888, 141 N. Y. Supp. 1150.

WESTERN NAT. BANK v. SEAMAN. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by the Western National Bank against Elizabeth C. Seaman. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

WESTERN NEW YORK WATER CO., Respondent, v. CITY OF NIAGARA FALLS et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. October 15, 1913.) Action by the Western New York Water Company against the City of Niagara Falls and others.

PER CURIAM. Order affirmed, with $10 costs and disbursements.

ROBSON and FOOTE, JJ., dissent.

WHITMAN, Respondent, v. O'DONOVAN, Appellant. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Alfred A. Whitman against Alfred J. O'Donovan. H. R. Kohn, of New York City, for appellant. O. C. Sommerich, of New York City, for respondent. No opinion. Order (141 N. Y. Supp. 750) affirmed, with $10 costs and disbursements. Order filed.

(158 App. Div. 947)

WHITMORE, Respondent, v. NEW YORK INTERURBAN WATER CO., Appellant. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by David L. Whitmore against the New York Interurban Water Company. No opinion. Order reversed, with $10 costs and disbursements, on the authority of Wood v. New York Interurban Water Co., 157 App. Div. 407, 142 N. Y. Supp. 626, and motion granted, with $10 costs. See, also, 158 App. Div. 178, 142 N. Y. Supp. 1098.

WILLIAM F. KASTING CO., Respondent, v. NETSCH, Appellant. (Supreme Court, Appellate Division, Fourth Department. October 1, 1913.) Action by William F. Kasting Company against Charles H. Netsch. No opinion. Order affirmed, with $10 costs and disbursements.

WILLIAM H. HENRY & CO., Appellants, v. DEVLIN, Respondent. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by William H. Henry & Co. against Joseph J. Devlin. No opinion. Order affirmed, with $10 costs and disbursements.

WILLIAM H. HENRY & CO., Appellants, v. HOUSTON, Respondent. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by William H. Henry & Co. against George B. Houston. No opinion. Order affirmed, with $10 costs and disbursements.

WILLIAM H. HENRY & CO., Appellants, v. MITCHELL, Respondent. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by William H. Henry & Co. against Alfred A. Mitchell. No opinion. Order affirmed, with $10 costs and disbursements.

WILSON, Respondent, v. CITY OF GLOVERSVILLE, Appellant. (Supreme Court, Appellate Division, Third Department. September 26, 1913.) Action by Jay S. Wilson against the City of Gloversville. No opinion. Appeal dismissed, with $10 costs.

WILSON, Respondent, v. SCOTT, Appellant. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by James A. Wilson against Jesse M. W. Scott. No opinion. Order affirmed, with $10 costs and disbursements.

WISE, Appellant, v. HANNON et al., Respondents. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Eugene A. Wise, Jr., against John J. Hannon and others. T. J. Curran, of New York City, for appellant. J. Stiefel, of New York City, for respondents. No opinion. Order modified, by providing that plaintiff be allowed to discontinue the present action without costs, and, as modified, affirmed, without costs. Order filed.

WITTWER, Respondent, v. HURWITZ et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. July 8, 1913.) Action by Gottfried Wittwer against Louis L. Hurwitz and another.

PER CURIAM. Judgment and order affirmed, with costs.

LAMBERT, J., dissents. MERRELL, J., not sitting.

WOLF, Respondent, v. CARPENTER, Appellant, et al. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Eva Wolf, an infant, etc., against Charles L. Carpenter, impleaded with others. E. A. Jones, of New York City, for appellant. J. Wilkenfeld, of New York City, for respondent.

PER CURIAM. Judgment and order reversed, and new trial ordered, costs to appellant to abide event, on the ground that the evidence does not sustain the finding that the defendant was guilty of negligence. Settle order on notice.

LAUGHLIN, J., dissents.

WOODSTOCK-ON-HUDSON, Respondent, v. CITY OF YONKERS et al., Appellants. (Supreme Court, Appellate Division, Second Department. October 24, 1913.) Action by Woodstock-on-Hudson against the City of Yonkers and another. No opinion. Judgment affirmed, with costs.

WRAY v. MANN. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Albert A. Wray against William D. Mann. Action No. 1. No opinion. Motion to dismiss appeal granted, with $10 costs, unless appellant comply with terms stated in order. Order filed.

WRAY v. MANN. (Supreme Court, Appellate Division, First Department. October 17, 1913.) Action by Albert A. Wray against William D. Mann. Action No. 2. No opinion. Motion to dismiss appeal granted, with $10 costs, unless appellant comply with terms stated in order. Order filed.

WRAY, Appellant, v. MANN, Respondent (three cases). (Supreme Court, Appellate Division, First Department. October 31, 1913.) Actions by Albert A. Wray against William D. Mann. No opinion. Orders affirmed, with $10 costs and disbursements. Orders filed.

WRAY, Appellant, v. MANN, Respondent. (Supreme Court, Appellate Division, First Department. October 31, 1913.) Action by Albert A. Wray against William D. Mann. W. E. Kisselburgh, Jr., of New York City, for appellant. H. C. S. Stimpson, of New York City, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

YOUNGS, Respondent, v. SYRACUSE, B. & N. Y. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. November 12, 1913.) Action by William Youngs against the Syracuse, Binghamton & New York Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs.

SMITH, P. J., not voting.

ZAHN, Respondent, v. SAAL et al., Appellants. (Supreme Court, Appellate Division, First Department. October 24, 1913.) Action by Anthony Zahn, an infant, against Nathan Saal and others. A. E. Brosmith, of New York City, for appellants. A. Ruger, of Brooklyn, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

END OF CASES IN VOL. 143